Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35916
Docket No. MW-35558
02-3-99-3-482

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Santa Fe Railway Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed to allow Mr. C.F. Walton an opportunity to qualify on a Mark IV Tamper and hold an unjust treatment investigation which was timely requested in compliance with Rule 23C (System File B-2460-3/MWC 98-03-09AB BNR).

(2) The Agreement was further violated when Division Superintendent T. Sarret failed to respond to the claim submitted to him by General Chairman E.R. Spears under date of February 9, 1998.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, 'We now request that the unjust treatment stop at once and Mr. Walton be permitted to qualify on the machine, and that he receive any difference in pay.'"

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant C. F. Walton established seniority in the Maintenance of Way and Structures Department. At the time this dispute arose, the Claimant was assigned to Gang TP-11 and was attempting to qualify as a Mark IV Tamper Machine Operator.

On February 9, 1998, the Organization wrote to the Division Superintendent claiming that the Claimant ". . . was unjustly treated on February 6, 1998 when Roadmaster Briscow did not give enough time and opportunity to qualify on Mark IV Tamper. . . ." The Organization requested that the unjust treatment cease, that the Claimant be allowed to qualify on the machine, and receive any difference in pay. The Organization further requested that an Unjust Treatment Hearing be held in accordance with Agreement Rules 23C and 62 of the Agreement between the parties.

In a second letter, dated March 9, the Organization informed the General Director Labor Relations that the Division Superintendent had failed to respond to the February 9, 1998 correspondence. According to the Organization, the Division Superintendent violated the Agreement when he failed to schedule the requested Unjust Treatment Hearing within the time parameters set forth in Rule 62. The Organization requested that the Claimant be "immediately permitted" to qualify on the Mark IV Tamper and be compensated any difference in pay.

The Carrier denied the claim asserting that the February 9, 1998 request for an Unjust Treatment Hearing was not properly submitted to the Claimant's "immediate supervisor."

Agreement Rules 23, 40 and 62, state, in pertinent part:

"Rule 23 FAILURE TO QUALIFY

C. An employee who considers himself unfairly disqualified may request, and shall thereupon be given, an investigation as to such qualifications pursuant to the provisions of Rule 62.

Rule 40 INVESTIGATIONS AND APPEALS

A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held no later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule.

* * *

J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.

Rule 62 UNJUST TREATMENT

An employee who considers himself unjustly treated in matters other than discipline, or in matters other than those arising out of the interpretation and application of the rules of this Agreement, shall have the same right of hearing and appeal as provided in Rule 40, if written request is made to his immediate superior within twenty (20) calendar days after the date of the occurrence of the cause for complaint."

The record evidence demonstrates that on February 6, 1998, the Claimant was disqualified from the Machine Operator position on the Mark IV Tamper. Three days later, on February 9, 1998, the Organization sent the Carrier correspondence in which it requested an Unjust Treatment Hearing. The Carrier did not respond to that request, later asserting that the Division Superintendent was not the Claimant's immediate Supervisor, and therefore, not the proper Supervisor to receive the request.

Notably, the Carrier did not dispute that the Division Superintendent received the Organization's claim and request; nor is it disputed that the Carrier was aware of the Claimant's desire to have an Unjust Treatment Hearing. However, the Carrier made

no attempt to inform the Organization or the Claimant of the apparent error, nor did the Carrier identify the proper Carrier Officer to whom the request could be made. In these circumstances, it is clear that the Carrier's actions or rather lack thereof, deprived the Claimant of a valuable contractual right and violated the intent of the Agreement between the parties.

In accordance with established Third Division precedent and consistent with Decision 16 of the National Disputes Committee, ". . . this claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances." In these circumstances, damages are awarded to the date of the Carrier's belated denial to the Organization's initial claim letter of February 9, 1998. There is no evidence in the record to show that the Claimant had successfully qualified.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of January, 2002.

CARRIER MEMBERS' DISSENT
to Award 35916 (Docket MW-35558)
(Referee Murphy)

The Carrier accepts that this particular claim is settled. However, inasmuch as the Award's rationale runs counter to the plain language of Rule 62 of the Collective Bargaining Agreement, the Carrier feels that a Dissent is necessary.

From this Award, it appears that the Majority of the Board was offended by the failure of the Carrier's local Division Superintendent to extend the courtesy of responding to the Organization's invalidly filed request for an Unjust Treatment Hearing. By the erroneous opinion of the Majority that courtesy rises to the level of contractual obligation. There is no basis for such a conclusion.

It is undisputed that this claim and the request for the Unjust Treatment Hearing was improperly filed with the Superintendent, in contravention of the specific requirement contained in Rule 62 quoted at page 3 of the Award. The Organization never denied that it was in violation of its contractual duty under the plain language of Rule 62 to file with the Claimant's "immediate superior" - not the Division Superintendent, who is several levels above the Claimant's immediate supervisor.

But the Majority nonetheless decided that the Carrier was somehow obligated to help the Organization cure its defect. The opinion, however, runs contrary to the overwhelming number of precedent Awards that hold each party accountable for its own procedural errors in claims handling.

Absent a contractual provision to the contrary, the Carrier was under no contractual obligation to right the Organization's error. The Organization is just as sophisticated as the Carrier in it's knowledge and understanding of the procedural requirements. The deficiency was pointed out to the Organization on the property but was ignored by them until its Submission. Certainly the Organization knew the difference between the Claimant's "immediate supervisor" and the Division Superintendent. Such is not merely a typo!

Under these circumstances, this Award cannot be considered as precedent.

P V Varga
Paul V. Varga

M W Fingerhut
Martin W. Fingerhut

Michael C. Lesnik
Michael C. Lesnik