

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36954
Docket No. MS-36632
04-3-01-3-172**

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

**(Stephen M. Pirillo
PARTIES TO DISPUTE: (
(New Jersey Transit Rail Operations**

STATEMENT OF CLAIM:

“This grievance is for and against the Brotherhood of Maintenance of Way Employees General Chairman Mr. Gregory J. Barbati for violations of the Union’s duty of fair representation. I was told by my local union representative, Mr. Vincent Apadula, to write a letter to Mr. Barbati requesting union dues to be taken out of my paycheck during my initial period of employment as a machinist so that my seniority would be protected. I did, in fact, write a letter of request to Mr. Barbati, which was written, dated and mailed on the night of November 6, 2000. I never received a response from Mr. Barbati regarding my letter. But for the months of November and December 2000 and January 2001, union dues were taken out of my paychecks. I feel that the B.M.W.E. and Mr. Gregory J. Barbati, as agent and representative for the B.M.W.E., have violated their legal duty of fair representation to me in this matter.

I am seeking adjudication that the B.M.W.E. has violated its legal duty of fair representation in this case. I am further seeking to set aside my discharge, and to be reinstated to my position as rail machinist, together with the payment of all lost back salary and employment benefits.”

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.

This case is a companion case to Second Division Docket 13607 which, as of this date, has not been adopted.

The Claimant was employed by New Jersey Transit on January 26, 1998, as a Serviceman in Bus Operations. On August 19, 1998, he requested and was granted a transfer into the New Jersey Transit Rail Operations as a Repairman represented by the Brotherhood of Maintenance of Way Employees (BMWE). At this time, the Claimant acknowledges that he was told that the rail operations was a separate entity despite being under the umbrella of New Jersey Transit. He also understood that he would be subject to a 90-day probationary period under the jurisdiction of the Brotherhood of Maintenance of Way Employees (BMWE) Agreement.

In October 2000, the Claimant transferred of his own volition a second time to a position as a Machinist under the jurisdiction of the International Association of Machinists and Aerospace Workers (IAMAW) Agreement. By letter dated October 16, 2000, he was advised:

“Your hourly rate will be \$15.69 per hour, which is 80% of the full rate for the Machinist B position. Your probationary period is 120 days and you will have to start over again regarding your seniority with International Association of Machinists.” (Emphasis added)

The Claimant accepted the position. Prior to completing his probationary status, he was terminated by letter dated January 30, 2001. The letter stated in part:

“On January 29, 2001, while changing a turbo charger on Locomotive 4142, it was observed that you demonstrated a lack of mechanical ability to perform your job and you also lack the necessary work ethic required to be employed as a Machinist for NJ Transit. As of this notification you are hereby terminated.”

The Claimant insists that he is not a new hire and should have been provided greater assistance from BMW in reversing his termination. He claims that after his termination, BMW refused to file a claim or assist him in the filing of an appeal.

The Claimant contends that when he transferred the first time, he was given new hire papers. However, when he transferred the second time, he did not receive a new hire package. Moreover, he contends that his benefits package remained the same and he was given the top rate of pay. He insists that the Agreement only provides a probationary period for new hires and contains nothing regarding lateral transfers within the Rail Division.

In addition, the Claimant contends that he agreed to have BMW dues taken out of his paycheck; thus, he was still an active member of BMW and eligible for representation. He maintains that he was told that as long as he paid his dues he would retain his seniority in the craft.

The Carrier argues that its actions were in full compliance with the BMW and IAMAW Agreements. In particular, it cites Rule 8 of the BMW Agreement, which provided that the Claimant would forfeit BMW seniority by accepting a position in another craft for more than 15 days. In addition, it cites Rule 1 of the IAMAW Agreement that provides for a 120-day probationary period during which the Carrier can approve or disapprove an employee's application. In this case, it submits, the Claimant was terminated for unsatisfactory work performance.

The Carrier maintains that the Claimant's forfeiture of BMW seniority as well as the disapproval of his application under the IAMAW Agreement were in compliance with the governing Rules. Moreover, as noted above, it contends this is a duplicate case to Second Division Docket 13607.

It says the case was improperly filed because it was never discussed on the property as required by Section 3, First and Second of the Railway Labor Act and Circular No. 1 of the Board. The Carrier cites First and Second Division Awards in support of its position.

The Board reviewed the record carefully. We concur with the Carrier's position that the Railway Labor Act requires that the Board's jurisdiction can only be invoked after the dispute has been handled "... in the usual manner up to and including the Chief Operating Officer of the Carrier designated to handle such disputes..." It is clear that the Claimant failed to process this case through the on-property appeals procedure. The only exchange of correspondence appears to be a February 22 letter and a February 27, 2001 reply from the Assistant Manager - Locomotive Department in which the Claimant's Counsel (Richard J. Kaplow) was advised that the Claimant's "... recourse and responsibility is to exhaust all avenues under the collective bargaining agreement." Immediately thereafter, i.e., by letter dated March 30, 2001, the Claimant filed one Notice of Intent with the Second Division and a second Notice of Intent with the Third Division. Because there is no evidence in the record that this matter was "handled in the usual manner" on the property, it has been prematurely advanced to the Board. In First Division Award 25067, the Board concluded that:

"... Claimant has failed to follow the proper procedures to resolve his claim. He has failed to follow the requirements of the BLE-NJT Agreement, as well as the on-property handling of a claim, as required by the Railway Labor Act (i.e., no on-property conference of this claim was held). Given this procedural shortcoming, this Board is compelled to dismiss this claim."

In addition, the jurisdiction of the Board is limited to interpreting Agreement disputes between employees and Carriers. The Board has no authority to resolve

disputes between an individual and his representative Organization. In Third Division Award 32391, the Board concluded:

“This Board admittedly does not have jurisdiction to resolve disputes between an individual employee and his Organization. Rather, the Board is empowered only to interpret the language, terms and conditions of collective bargaining agreements which are negotiated between the Organization and the Carrier.”

Clearly, the Board has no authority to resolve the particular matter that is contained in the Claimant’s March 30, 2001 Notice of Intent to the Board.

Notwithstanding the foregoing, the record before the Board reveals that the Claimant failed to support his assertion that he was aggrieved by citing and demonstrating a violation of any Agreement provision.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 22nd day of March 2004.