

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39365
Docket No. MW-39471
08-3-NRAB-00003-060280
(06-3-280)**

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (seniority termination) imposed by letter dated October 28, 2004 upon Mr. F. Ranta for alleged leave of absence other than specified in Rule 16 from Production Crew 2 on September 16 through September 22, September 30 and from October 4 through October 27, 2004 was arbitrary, capricious, unwarranted, and in violation of the Agreement (System File D-04-380-006/8-00473).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. F. Ranta shall now be reinstated to service with all seniority and other rights and benefits restored and he shall be compensated for all wage loss suffered as a result of the aforesaid October 28, 2004 letter and continuing until he is reinstated to service.”**

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.

On October 28, 2004, the Manager of Track Programs sent the Claimant a notice that he had failed to protect his assigned position on Production Crew 2 on September 16 through September 22, September 30, and October 4 through October 27, 2004, a "leave of absence other than specified in Rule 16." The notice concluded that due to his failure to protect his assigned position for an extended period of time, "effective immediately his seniority rights with Canadian Pacific Railway have been forfeited."

On November 19, 2004, the Organization sent the Manager by certified mail a request for an Unjust Treatment Hearing. The Manager responded on December 10 rejecting the request because Rule 16 is self-executing. The Manager offered to reconsider if the Organization would provide written documentation that the Claimant had filed for proper authorization for a leave of absence. The Organization filed an appeal on January 28, 2005, asking that the claim be allowed "as initially presented" and requested that the Claimant be "placed in line for pay as claimed." The Carrier responded on March 29, again denying the request for an Unjust Treatment Hearing, noting for the first time that the request was untimely under Rule 20, which requires that a request for an Unjust Treatment Hearing must be made in writing within 20 days from the date of the incident. The parties conferenced the claim in October 2005. After further correspondence, including an objection by the Carrier in its April 28, 2006 correspondence that the question was limited to the Claimant's right to an Unjust Treatment Hearing (the only remedy sought in the original request) the matter was docketed with the Board.

The Organization asserts that the Carrier's timeliness objection must be barred because it was not made in the Carrier's initial response to the request for

an Unjust Treatment Hearing. However, there is ample precedent that the issue of non-compliance with procedural requirements can be raised at any time during the handling of the claim on the property. See Third Division Award 36265 (citing Third Division Award 29260 and Second Division Award 8399). The timeliness question is properly before the Board.

The initial question is when the request for an Unjust Treatment Hearing was made. Although it is undisputed that the Carrier did not receive the request until November 29, there is no evidence to refute the presumption that the letter was sent on the day it is dated, in this case, November 19. According to precedents on this property and from the Third Division, the time of mailing determines the point of notification. See First Division Award 25925 and Public Law Board No. 5968, Award 7. Moreover, the Board takes "judicial notice" of the fact that November 25, 2004 was Thanksgiving Day. The most reasonable conclusion from the record (particularly in the absence of any evidence to the contrary) is that the request was sent on November 19, but its delivery was delayed by the holiday, through no fault of either party. For these reasons we deem that the request was made on November 19.

Even if the request was made on November 19, and even assuming that the Claimant was entitled to a Rule 20 Unjust Treatment Hearing, the request was untimely. The Manager's letter is dated October 28, 2004. Consistent with precedent that the time of mailing determines the time of notification, we read Rule 20 to have required the Claimant to request an Unjust Treatment Hearing within 20 days of the mailing of the October 28, 2004 letter. There is no evidence other than the date of the letter as to when it was mailed. Under these circumstances, we find that the Claimant's November 19 request, issued 22 days after the October 28 letter, was untimely, and deny the claim.

AWARD

Claim denied.

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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 21st day of October 2008.