

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40295  
Docket No. MW-39762  
10-3-NRAB-00003-060563  
(06-3-563)**

**The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(Union Pacific Railroad Company (former Chicago and  
( North Western Transportation Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier’s action in the disqualification of Mr. J. Hasler as a track foreman from Gang 3405 beginning on October 4, 2005 and continuing was unjust and its failure to grant and hold a hearing pursuant to the provisions of Rule 20 was in violation of the Agreement (System File 4RM-9689G/1435747 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, the disqualification shall now be removed from Claimant J. Hasler’s record and he shall ‘\*\*\* be compensated for the differential in wages since the disqualification and until he has bid and is assigned to a comparable rated position.’”**

**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.**

**The Claimant was assigned as a Track Foreman prior to October 4, 2005. He was disqualified from that position on October 4, 2005. His service with the Carrier began in September 1978 and he has held Track Foreman seniority since March 1990.**

**On October 13, 2005, Vice Chairman R. Mulder sent a letter to Ms. Allen, Manager Labor Relations, Mr. C. Callaway, Manager Track Projects and Mr. J. Mart, Track Supervisor ARASA. Mart was the Claimant's supervisor and the one who disqualified him. The letter provided, in pertinent part:**

**"I am writing this letter as a formal request to have a conference concerning the disqualification of employee J. F. Hasler . . . according to the provisions of Rule 20 of the November 1, 2001 Agreement. . . .**

**Mr. Hasler was informed on Tuesday, October 4, 2005 by ARASA [Track Supervisor] J. E. Mart that he was disqualifying him as a Track Foreman. . . No written notice of this disqualification has been provided to the Brotherhood as of yet, so no copy is included with this request. A conference must be held to determine the facts that led to this disqualification."**

**On November 8, 2005, Vice Chairman R. Mulder sent a letter to Manager Labor Relations Allen that provided, in relevant part:**

**"This letter is to file a claim on behalf of employee J. F. Hasler . . . [who] has been disqualified as a Track Foreman from Gang 3405. The Brotherhood requested a conference (hearing), copy attached, concerning this disqualification on Claimant's behalf on October 13, 2005, according to the provisions of Rule 20.**

**It is the position of the Brotherhood that the Carrier has failed to afford Claimant the opportunity for work and compensation by violating the November 1, 2001 Agreement. Rule 20 serves to establish the contractual right of the Claimants to be granted a hearing to develop the facts surrounding this issue within fifteen (15) calendar days, and a decision within ten (10) calendar days. The provisions of Rule 20 state:**

**Rule 20 GRIEVANCES**

**Should an employee feel he has been unjustly dealt with in other than discipline matters, he may make written protest to the designated Carrier Officer, with copy to the General Chairman. If a hearing is requested to develop facts, same shall be granted within fifteen (15) calendar days and written decision rendered within ten (10) calendar days. If the employee is dissatisfied with the decision same may be progressed in accordance with Rule 21 – Time Limit on Claims. . . .**

**The Carrier has failed to arrange and hold such conference within fifteen (15) calendar days and therefore is in default of the provisions of Rule 20. The disqualification must be removed from Claimant's record and he must be allowed to return to this Track Foreman position. . . .**

**It is the claim of the Brotherhood that the Claimant has suffered a loss of work and compensation as a direct result of the Carrier violating the November 1, 2001 Agreement. This includes, but is not limited to Rule 20. The Claimant must be compensated for the differential in wages since the disqualification and until he has bid and is assigned to a comparable rated position.**

**The Brotherhood is filing this claim under the provisions of Rule 49 (b) . . .”**

**The Carrier responded in a letter dated December 22, 2005, and asserted that there was no procedural error because a conference was held on November 15, 2005**

with the Claimant, Supervisor Mart and Manager Callaway. The Carrier further asserted that a procedural error does not qualify the Claimant for the position.

In a January 4, 2006 letter addressed to the Director of Labor Relations, the Organization maintained:

**“The November 8, 2005 [letter] is precise and to the point. The Carrier violated the Agreement when it failed to grant a grievance hearing as requested in the October 13, 2005 letter. Since the Carrier failed to grant a grievance hearing in a timely manner, anything else that occurs after the fact doesn’t matter. The October 13, 2005 letter simply requested to have a conference. . .**

**The Carrier has failed to arrange and hold such a conference within fifteen (15) calendar days and therefore is in default of the provisions of Rule 20, and in violation of the Agreement.**

**The Carrier had ample opportunity to comply with the request for hearing and has failed to do so. The November 15, 2005 conference call was nothing more than . . . to try and explain the reasoning for the disqualification. . . . Any information disclosed at that time . . . came after the time limits of Rule 20 and is inadmissible.”**

In a January 30, 2006 letter to the Vice Chairman, the Director of Labor Relations stated that the Carrier did not violate Rule 20. The Carrier stated that Rule 20 was not followed because the employee did not make the claim to his supervisor. Any past practice of the Organization making the claim to Manager Labor Relations Allen was not persuasive because the Rule requires that the request be made to the “designated Carrier officer” and that officer is the employee’s supervisor. The initial request must come from the employee who felt that he was unjustly treated and must be made to the individual who issued the disqualification. The Rule is not ambiguous and past practice cannot control.

The Carrier continued that the Claimant chose not to follow the clear language of the Rule and did not file a protest with his supervisor. However, the Carrier honored the request and held a conference on November 15, 2005.

**In a May 23, 2006 letter to the Director of Labor Relations following a conference of the instant claim, the Organization maintained that the Carrier failed to schedule a Hearing within the required 15 days. Further, the Organization has the right to make the request under Rule 20 and the Organization followed the Agreement when the initial request was sent to the Manager Labor Relations, the Manager Track Projects and the Track Supervisor ARASA. The Carrier violated the Agreement by failing to grant the Hearing within the time frame of Rule 20.**

**In a June 8, 2006 letter to the Vice Chairman, the Carrier's Director of Labor Relations reiterated the Carrier's earlier position that it did not violate Rule 20 and that a Hearing was held on November 15, 2005.**

**The Organization maintains that the Carrier violated Rule 20 when it failed to comply with the Organization's request for a conference about the Claimant's disqualification.**

**The Board carefully examined the record. We are limiting our analysis only to the issues and evidence raised during the handling of the dispute on the property. The Carrier raised a jurisdictional issue over Paragraph 1 of the Statement of Claim wherein the Organization claims that the Claimant's disqualification was "unjust" because it differs from the claim raised on the property.**

**After a careful examination of the record, the Board agrees with the Carrier's argument that any issue about whether the disqualification was unjust was not discussed on the property. The Organization limited its claim to the timeframe for responding to a request for an Unjust Treatment Hearing. There are numerous Awards which stand for the proposition that when there is a substantial variance between the issues addressed on the property and those advanced before the Board, the faulty aspect of the claim must be dismissed. Accordingly, the portion of Paragraph 1 of the claim that asserts "unjust treatment" is dismissed.**

**The issue remaining for our analysis is whether the Carrier's failure "to grant and hold a hearing pursuant to the provisions of Rule 20 was in violation of the Agreement." On this issue, the Organization relies on the language of Rule 20.**

**"Should an employee feel he has been unjustly dealt with in other than discipline matters, he may make written protest to the**

**designated Carrier Officer, with copy to the General Chairman. If a hearing is requested to develop facts, same shall be granted within fifteen (15) calendar days and written decision rendered within ten (10) calendar days. If the employee is dissatisfied with the decision same may be progressed in accordance with Rule 21 – Time Limit on Claims. . . .”**

**The Carrier defends on the basis that the Claimant did not request a Hearing, rather, the Organization requested the Hearing. The Carrier also asserts that the request was sent to Labor Relations and not to the Claimant’s supervisor. In support, the Carrier points to a letter from General Director Wayne Naro to General Chairman Bushman dated May 9, 2005 concerning their discussions of “the proper application of Rule 20 of the Agreement.” That letter provides, in pertinent part:**

**“Effective immediately, the designated officer for receipt of requests for unjust treatment hearings pursuant to Rule 20 will be the employee’s Director. For example, an employee working on a section gang will submit his request for an unjust treatment hearing to the Director of [Track] maintenance for that service unit.”**

**Similar to the Carrier’s contention that the claim of “unjust treatment” was not properly before the Board, neither is the letter of May 9, 2005 because it was not exchanged on the property. Numerous Awards address the very issue of whether the Submissions to the Board are an appropriate avenue for addressing new evidence. Submissions are not the proper venue for introducing new evidence and the May 9, 2005 letter has not been considered.**

**However, even if it was considered, an examination of the record reveals that the Organization’s request was addressed not only to the Manager of Labor Relations, but also to the Manager of Track Projects and the Track Supervisor who disqualified Claimant. Under the facts presented in the instant matter, the supervisors were put on notice of the request for a Hearing. The Organization complied with the May 9, 2005 letter. However, this does not end the inquiry.**

**The Board finds the Carrier’s citation to Referee Peter Meyers decision in Special Board of Adjustment No. 924, Award 248, involving the same parties as**

compelling. In that Award, the parties advanced many of the same arguments that are now presented to the Board. The following language from that Award is instructive:

**“This Board finds that there is nothing in Rule 20 which requires the sustaining of the claim because of the Carrier’s failure to schedule a hearing within the time limits set forth in the Rule. Moreover, there is evidence in this record that the Organization rejected the Carrier’s subsequent attempt to hold a hearing and then pursue the results through the procedure outlined in Rule 21. Consequently, there is no basis for this Board to sustain the claim as it is written.**

**However, a review of the correspondence . . . makes it clear that, although they argued extensively about the procedural matter, the loser in the argument was the Claimant. There was never a hearing to determine whether . . . Claimant was properly disqualified. . . . Rule 21 gave the Carrier sixty days to schedule the hearing; but since the Organization persisted in its argument that the hearing should have been held within fifteen days, no hearing was ever held for the Claimant. We find that the Claimant should not suffer a derogation of his rights because the parties had a dispute as to who was the ‘designated Carrier officer’ and which Rule applied.**

**Consequently, this Board orders that within sixty days of receipt of this Award, the Carrier must schedule a hearing concerning the disqualification of the Claimant [and] whether . . . there was a legitimate basis for the disqualification. If it is found that Claimant was improperly disqualified from his job, then he should be entitled to the relief requested in the Claim and compensated for all time lost.”**

Here too, the parties argued about whether there was proper notice and whether the Hearing was held in the proper time frame. Although the Carrier contended that a Hearing was held in November, the Organization opined that it was irrelevant because it occurred more than 15 days after the notice was received by the Carrier. The Organization did not participate and the record is unclear

**whether it was ever notified of the Hearing or whether it ignored the Hearing. Regardless, the Claimant is the one who suffers.**

**Accordingly, the claim is sustained in part and denied in part. A Hearing shall be held within 60 days of the adoption of this Award to determine whether the Claimant was properly disqualified from his position as a Foreman.**

**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 1st day of March 2010.**