

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40555
Docket No. MS-40412
10-3-NRAB-00003-080239**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (James A. Pauly
(BNSF Railway Company

STATEMENT OF CLAIM:

“Did the carrier violate the provisions of Rules 2, 58, 64 of the TCU Agreement, along with other pertinent rules and agreements not specifically stated herein, at Brainerd, Minnesota on June 22, 2007, by declining the request for an Unjust Treatment Hearing which was properly submitted by Mr. James A. Pauly on June 7, 2007?

Shall the Carrier now be required to reverse its decision and allow a hearing on all the facts and circumstances pertaining to Mr. Pauly’s situation arising to the formal request made and hold hearing in accordance with Rule 58 of the agreement as per the above mentioned request?

Shall the claimant be compensated eight (8) hours pro rata pay at WGR 10 for each and every day Claimant is not granted an unjust treatment hearing, commencing with June 7, 2007 and continuing until Unjust Treatment Hearing is held?”

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.

After reporting that he had encountered difficulties hearing adequately while operating a propane forklift, the Claimant was removed from service in 2003 pending medical evaluation. According to the record before the Board, despite repeated explanations with respect to what medical information was required to assure the Carrier that his hearing was not a safety concern, the Claimant did not secure clearance from his medical provider addressing those concerns. Accordingly, he has remained on medical leave of absence since 2003.

On June 7, 2007, the Claimant wrote Material Manager J. Minnie to request an Unjust Treatment Hearing pursuant to Rule 58 of the Agreement, stating, in pertinent part, as follows:

“I respectfully request Rule 58 of the working agreement to investigate unjust treatment by you. Your signature of May 28, 2008 was not requested and contact, explanation, and discussion stated by Mr. Tom Goetz was not forth coming. I requested a current fax number for you through Mr. Jeff Schurman. Telephone message by Mr. Ken Hasskamp and myself were not returned. The meeting room of either the Brainerd City Hall or Brainerd Public Library will be used depending on availability.”

After Minnie responded by letter dated June 22, 2007 indicating that because it appeared that the Claimant was questioning the medical findings of Dr. Sharon Clark, Field Medical Officer, Ft. Worth, Texas, the matter was not a proper subject for a Rule 58 Unjust Treatment Hearing, but should be handled under Rule 68 of the Agreement.

On July 13, 2007, the TCU Local Chairman submitted a claim on the Claimant's behalf asserting violations of several Rules. That claim was declined on July 27, appealed on September 27 to the General Director - Labor Relations and denied by letters dated November 27, 2007 and January 3, 2008 setting forth in detail the reasons for the declination.

Thereafter, it is undisputed that there was no further action on the part of the Organization or the Claimant in this connection until January 25, 2008, on which date the Board acknowledged receipt of a Notice of Intent submitted by the Claimant indicating that he intended to file a Submission within 75 days addressing this unadjusted dispute.

The Carrier argues first that Claimant was advised by letter dated May 8, 2007, from Dr. Clark that his case had been reviewed and that workplace restrictions had been issued based upon medical evidence obtained. The Claimant's request for an Unjust Treatment Hearing was dated June 7, 2007. It thus did not comply with the provisions of Agreement Rule 58, which states:

"An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided for in Rule 56, provided written request is made to his immediate superior within fifteen (15) calendar days of knowledge by the employe of the cause of complaint." (Emphasis supplied)

Secondly, the Carrier argues that issues concerning medical matters must be handled under Rule 68 of the Schedule Agreement – INCAPICATED EMPLOYEES AND PERSONAL INJURIES. That Rule provides:

B. In the event an employe is disqualified for physical reasons by a Company designated physician or by the Company Chief Surgeon or Medical Director, upon presentation of dissenting opinion as to the employe's physical condition by a competent physician, the employee may, individually or through his accredited representative, request further physical examination by a mutually agreed upon neutral physician, whose decision will be rendered as promptly as possible and will be final and binding as to the employe's physical condition.

Expense of said neutral physician will be borne equally by the carrier and the employee.”

Upon careful review of the record, the Board finds no violation of the Agreement. As the Carrier correctly asserts, the Claimant failed to comply with the provision of Agreement Rules 58 and 68 and it would be unnecessary to reach the merits of the case. Notwithstanding, were the Board to reach the merits of this particular claim it would be bound to examine the record as established and would of necessity have to deny the claim. In this claim a denial will serve as well as a dismissal.

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 29th day of June 2010.