

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 40557  
Docket No. MS-40581  
10-3-NRAB-00003-080497

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 Mr. Ollie Wick, BNSF Labor Relation General Director, allow Carriers File D1200801014 to be allowed as presented within seven (7) calendar days as stated in Rule 56 of the Agreement with the TCU by not disallowing the claim within the sixty (60) days as stipulated by Rule 59 of the Agreement with the TCU that states in part:

Should any such claims or grievance be disallowed, the carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver to the contentions of the Carrier as to other similar claims or grievances.

Shall the claimant be compensated eight (8) hours pro rata pay at WGR 11 for each and every day Claimant is not granted an unjust treatment hearing, commencing with January 10, 2008 and continuing until Unjust Treatment Hearing is held?

Did the Carrier violate the provisions of Rules 2, 56, 58, and 64 of the TCU Agreement not specifically stated herein, at Brainerd, Minnesota on January 10, 2008, by not acknowledging a properly submitted request for an Unjust Treatment Hearing submitted by Mr. James A. Pauly on December 31, 2007?

Shall the Carrier now be required to reverse its decision and allow a hearing on all the facts and the both unique and complex circumstances as referred to by Mr. Ollie Wick pertaining to Mr. Pauly's situation arising to the formal request made, and hold the hearing in accordance with Rule 58 of the Agreement as per requested?"

**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 somewhat unusual matter arises from the same general fact pattern as presented by companion Third Division Awards 40555 and 40556 involving the same parties and decided concurrently. In brief, the Claimant had apparently developed hearing problems that presented safety concerns to his employer over his continued operation of a propane forklift. That problem ultimately led to his being placed on a medical leave of absence in 2003 until the issue was sorted out by the appropriate medical authorities.

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 continuously since 2003.

By letters dated March 14 and November 20, 2007, the Carrier responded favorably to the Claimant's request to engage in outside employment during his leave

of absence through November 17, 2008 under the unique circumstances involved. On December 31, 2007, the Claimant then wrote to the Carrier stating, in pertinent part, as follows:

“Please arrange to attend a Rule 58 investigation to be held in the Brainerd Public Library on Thursday January 10, 2008 at 1400 hours for the purpose of ascertaining facts as to your letter of December 17, 2007 of engaging in outside employment and your inability to answer my questions asked in my November letter to you. This request for a Rule 58 Grievance is in accord under current working agreement of TCU and Carrier.”

The Claimant here seeks a declaration from the Board finding the Carrier in violation of numerous Agreement provisions for failure to make its Labor Relations Officer available at a Rule 58 Investigation. Secondly, he also requests monetary damages under Rule 64 – PAY SHORTAGE in the amount of eight hours pay for each day that he was not granted an Unjust Treatment Hearing. Lastly, he asks the Board to find the Carrier in violation of Agreement Rule 2 – NON-DISCRIMINATION.

The Carrier at the outset asserts the claim was not properly progressed under the provisions of Rules 59 and 60, requiring, inter alia, that it be appealed by the Local Chairman within sixty (60) days of the date disallowed by the designated officer for handling claims. After filing the initial claim on January 28, 2008, Claimant Pauly, rather than the Local Chairman, appealed the Carrier’s declination directly to the highest designated officer for receiving such claims. Additionally, it asserts that no evidence of either loss of pay or discrimination was ever offered in claim handling.

The Board concludes after careful review of the record that the Claimant has failed to process his claim consistent with the controlling terms of the Agreement. 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 for the same rationale as stated in Third Division Award 40555. In this claim a denial will serve as well as a dismissal.

### 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 29th day of June 2010.**