

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41438
Docket No. MW-41655
12-3-NRAB-00003-100303**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Agreement was violated when the Carrier failed to render a decision as prescribed by Rule 40 in regard to a hearing/investigation held on April 9, 2008 on behalf of Mr. R. Prescott in regard to his charges of unjust treatment by Supervisor B. Roper on February 29, 2008 and continuing (System File S-P-1316-G/11-08-0440 BNR).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant R. Prescott shall now be compensated for '***eight (8.0) hours of straight time pay for each work day from May 19, 2008 and continuing at his current rate of pay as a Structures Foreman, until a decision is rendered in his favor and the Unjust Treatment Ceases.***”**

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 dispute involves an accusation of racial discrimination. On February 28, 2008, the Claimant was working as a Structures Foreman at the Interbay Terminal in Seattle, Washington. At approximately 8:30 A.M., Structures Supervisor B. Roper walked into the shop checking on crews under his supervision. During his visit, Supervisor Roper and the Claimant had a disagreement regarding the directive that all crews must have daily job briefings and the necessity to document those briefings. The Claimant felt that filling out the mandatory job briefings was not a necessity, whereas the Supervisor explained that it was not only necessary, but also required.

After the disagreement between Roper and the Claimant, Roper visited with other employees at the shop. Shortly after that visit, the Claimant requested an Unjust Treatment Hearing on March 10, 2008, claiming racial harassment. After a postponement, the Carrier provided and held the Unjust Treatment Hearing on April 9, 2008, in Seattle, Washington.

On May 15, 2008, General Director Maintenance M. Theret advised the Claimant and the Organization that there was no evidence presented at the Unjust Treatment Hearing that supported the allegations of harassment or discrimination.

On July 17 the Organization filed a claim on behalf of the Claimant alleging that the harassment charges were valid and the Carrier failed to render a timely decision. It is the position of the Organization that the claim should be sustained not only because of the time limit violation, but also because the record shows that the claim was valid. The Organization concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that the transcript of the Unjust Treatment Hearing does not contain any evidence that the Claimant was harassed. It argued that the Claimant and his Supervisor had a disagreement regarding a directive to conduct and document daily job briefings. It asserted that the Organization points to an instance where Supervisor Roper did not shake the Claimant's hand or the hand of another employee. There was, however, according to the Carrier, no need

for Roper to shake the Claimant's hand because they had just concluded a conversation in another room. The Carrier suggested that it made no sense for a person to have a conversation with someone, then enter another room with that same person and then re-introduce one's self to that same individual and shake their hand. It further argued that even if a time limit violation did occur, that by itself, does not mean that the Claimant was harassed, or that he is entitled to monetary damages. The Carrier closed by asking that the claim remain denied.

The language of Rule 62 - Unjust Treatment provides employees with the means to address those situations where they believe they have been unjustly treated in matters other than discipline with the opportunity to request an Unjust Treatment Hearing. The Claimant in this instance felt that he had been discriminated against and was within his right to request the Unjust Treatment Hearing. Rule 62 further states that employees will have the same right of hearing and appeal as provided in Rule 40.

There are two issues in this dispute. The first issue involves whether the time limits provisions apply to an Unjust Treatment Hearing, and if they do, how a violation is remedied. The second issue concerns whether there was a showing of racial discrimination against the Claimant by Structures Supervisor Roper.

Turning to the first issue, the Board is persuaded that the Organization's argument is correct that Rule 62 governs the filing of Unjust Treatment Hearings and its subsequent claims and, by its express terms, incorporates Rule 40D investigatory hearing procedures and strictures. Therefore, the Board finds that the Carrier is obligated to render a notice of decision within 30 days following the holding of an Unjust Treatment Hearing. In the instant case, the Unjust Treatment Hearing was held on April 9, 2008, and the subsequent decision regarding that Hearing was rendered on May 15, 2008, which was not within the required 30 days.

The Carrier argued that if the Board was inclined to find that it failed to issue its decision in a timely manner, that failure would not be fatal and there should be no award of punitive damages - only "make whole" relief, which would amount to nothing because the Claimant suffered no loss. The Organization countered by arguing that the Carrier defaulted and asserted the claim is payable as presented until the requested relief is provided. It further argued that a violation of the Agreement that offers no remedy is an invitation to further violations.

The Board does not agree with the Organization's contention that because the Carrier failed to render a timely decision after the Unjust Treatment Hearing the claim should be sustained as presented without reviewing the merits of the dispute. Instead the Board will follow the same reasoning and rationale set forth in Third Division Award 41437 regarding Decision No. 16 of the National Disputes Committee. As was done in the aforementioned Award, the Board will follow property precedent and sustain the claim for eight hours per day at the straight time rate from April 9 - the date of the Unjust Treatment Hearing - until May 15, 2008 - the date of the General Director Maintenance's untimely declination.

Addressing the second issue, the record indicates that this case involves a serious charge of racial discrimination. The Board's close review of the transcript reveals that on February 28, 2008, Supervisor Roper walked into the shop at Interbay performing his normal duties of checking on crews under his supervision. During that visit the Claimant and Supervisor Roper had a discussion concerning a directive to conduct and document daily job briefings, which led to a disagreement. The Claimant and one of the members of his crew attempted to explain why they did not fill out job briefing forms on days when they were performing routine work, but still conducted the verbal job briefing every day. Although there is no dispute that voices were raised during that discussion, it is disputed as to who raised their voice first. Nevertheless, at some point Supervisor Roper exclaimed that the Claimant was "bull****ing" him with excuses for non-compliance and he directed the Claimant to fill out the form on a daily basis. That concluded the conversation. Thereafter, Supervisor Roper continued his visit of the facility. Supervisor Roper would have been well advised to use less colorful language, but those comments do not rise to the level to substantiate that the Claimant was harassed. Instead they indicate that Supervisor Roper became agitated and misspoke.

In summary, it is undisputed that there was a directive from the Carrier that job briefings must occur on a daily basis, and that a form was supposed to be filled out to document those job briefings. On the date in dispute, Supervisor Roper and the Claimant disagreed over filling out the form every day. The record further shows that the Claimant and Supervisor Roper did not interact on a daily basis and there was no evidence produced that the Claimant suffered any sort of daily harassment. The Board finds and holds that there was no evidence presented that supports the Claimant's allegations of harassment or discrimination. Consequently, the claim on its merits is denied. However, as stated above the Claimant shall be

compensated eight hours per day at the straight time rate from April 9 through May 15, 2008, because of the Carrier's time limit violation.

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 5th day of September 2012.