

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26598
Docket Number CL-26070

Gil Vernon, Referee

PARTIES TO DISPUTE: (Norfolk and Western Railway Company
(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees

STATEMENT OF CLAIM: "Claim of the Norfolk and Western Railway Company
(GL-9943) that:

1. The Carrier did not violate the agreement between the parties when on September 8, 1983, it denied Clerk R. L. Fluty an unjust treatment hearing under Rule 28 of the Master Agreement.

2. Carrier shall not be required to hold a hearing under Rule 28.

3. Carrier shall not be required to compensate Clerk Fluty for 8 hours pay at the punitive rate for July 12, 1983, and continuing."

OPINION OF BOARD: Certain facts are undisputed. Claimant entered the service of the Carrier as a clerk on Seniority District No. 1, General Office Building, Roanoke, VA, on November 6, 1969. Another clerk, N. D. Lilly, had a knee operation on May 4, 1983, and was granted a medical leave of absence beginning May 11, 1983, through July 1, 1983. Mr. Lilly's position, Investigator, Customer Accounting Department, Roanoke, VA, was advertised "duration unknown" and Claimant was the successful bidder. Claimant was awarded the Investigator position effective May 23, 1983. On June 30, 1983, Mr. Lilly received approval from the Carrier's Medical Department to return to work. At 2:45 P.M. on the same date, Mr. Lilly made his official request, pursuant to Rule 18 of the April 1, 1983 Master Agreement, to return to his former position effective 8:00 A.M., July 5, 1983.

Beyond this the facts are disputed. Specifically, there is a factual dispute concerning what attempts were made to notify the Claimant of Lilly's return to work. The Carrier asserts an attempt was made to reach the Claimant at home on June 30, 1983. It was their belief he was on vacation. They claim they were told he was out of town for the weekend. The Organization asserts the Claimant was at work June 30 and July 1, 1983, less than 50 yards from the Supervisor who allegedly called him at home. Moreover, it is asserted he made four inquiries concerning Lilly's return on July 1, 1983. In any event it is agreed that on July 5, 1983, Claimant reported at 7:45 A.M. for his regular assignment to find that Mr. Lilly was at his desk and the Claimant was not allowed to work that day.

Subsequently, by letter dated July 11, 1983, Claimant requested an "Unjust Treatment" Hearing pursuant to Rule 28 of the April 1, 1973 Master Agreement. The Carrier denied the request. Next, on October 31, 1983, the Local Chairman appealed the request to the Assistant Vice President-Accounting Operations and it was denied on November 30, 1983. On December 29, 1983, the General Chairman appealed the request to the highest designated Officer and it was denied on January 23, 1984. Conference was held on July 17, 1984. On August 20, 1984, the Carrier notified the Third Division, National Railroad Adjustment Board of its intention to file Ex Parte Submission.

Rule 28 which provides for unjust treatment Hearings reads as follows:

"Rule 28 - Unjust Treatment

An employe who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of investigation, hearing, appeal and representation as provided in these rules, if written request which sets forth the employes' grievance is made to his immediate superior, within sixty (60) days of cause of complaint."

The key qualifier in Rule 28 is ". . . otherwise than covered by these rules" Thus, a Hearing is required only if the subject of the complaint is not covered and/or addressable under other Rules. This is consistent with many previous interpretations of Rule 28 on this property.

It is the Board's opinion that the Carrier's duty to notify the Claimant of Lilly's return is covered, albeit impliedly, by Rule 18 and addressable under the general grievance Rule. Therefore, it was not a violation of the Agreement to deny the Hearing request.

This leaves the question of compensation. Certainly since a Hearing was not required a continuing Claim until a Hearing is held is unfounded. However, the Board cannot ignore the obvious in this case, namely, the Carrier's clear lack of due diligence in its attempts to notify the Claimant of Lilly's return to work. With respect to the nature of the attempts to reach the Claimant, the Organization's version of the facts is more believable. However, even if we believe the Carrier's version of the facts, there is no reason more than one attempt could not have been made. Moreover, they at least could have left a message at the Claimant's home.

There is an implied obligation of reasonableness in Rule 18 on the part of the returning employe to give advance notice of his return and on the Carrier's part to in turn notify the employe who is to be displaced. In view of the facts, the Claimant is entitled to one day's pay for July 5, 1983, at the straight time rate.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

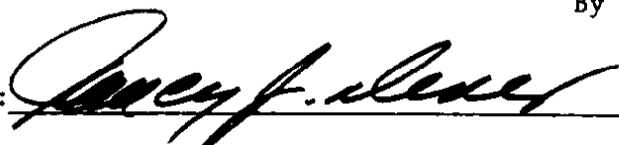
That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1987.