Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32386
Docket No. MW-31413
97-3-93-3-409

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Railroad

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to reinstate Mr. N. N. Ludeman to service beginning September 16, 1991 and continuing (System File S-P-463-W/1MWB 92-02-26).

(2) Claimant N. N. Ludeman shall be allowed eight (8) hours straight time at the applicable Group 2 Machine Operator's rate of pay for each day he is denied reinstatement beginning September 16, 1991 and continuing until he is reinstated to service. In addition, he shall be allowed any and all overtime pay that a junior Group 2 Machine Operator receives prior to this reinstatement beginning September 16, 1991 and continuing until he is reinstated to service."

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.

On June 27, 1990, Public Law Board 4381, Award 46 reinstated the Claimant from dismissal status under the following Award:

> "[The Claimant] shall be returned to employment with the Carrier as a Group 1 Machine Operator without back pay but with seniority restored. This reinstatement is dependent upon: (1) certification by the Carrier that Mr. Ludeman satisfactorily meets the requirements of the Carrier's employee assistance program, and (2) certification by the Carrier that [the Claimant] is retested and passes the Carrier's safety rules examination."

After unsuccessful attempts to reach the Claimant by mail, the Carrier wrote to the General Chairman on October 11, 1990 that it was "closing its files on the matter." Upon the General Chairman's request, however, the Carrier sent a further letter on October 23, 1990 advising the Claimant of his reinstatement, subject to the conditions in the PLB 4381 Award. There is a dispute, to be discussed further below, that the Claimant allegedly responded by letter dated October 29, 1990, stating in pertinent part as follows:

> "I am responding to the aforementioned certified letter [of October 23, 1990] regarding my return to Burlington Northern.
>
> I recently purchased a business that will require my complete attention for the next twelve to eighteen months. I have placed everything I own on the line for this business and I cannot just leave it at this time.
>
> If this is not acceptable or if you have any question please do not hesitate to let me know."

The Carrier contends it never received this letter.

On September 19, 1991, the Claimant advised the Carrier of his availability to return to service. The Carrier refused to reinstate the Claimant, and on November 5,

1991, the Organization initiated the claim here under review. The claim proceeded through the claim handling procedure, with declination by the Carrier's highest designated officer on April 23, 1992. At this point, the Organization requested and the Carrier granted a time limit extension until March 24, 1993.

On March 23, 1993, within the time limit extension, the Organization advised the Carrier that it wished to refer the claim to Public Law Board 4768. The Carrier declined to agree to listing the claim with PLB 4768, offering instead to refer the matter back to PLB 4381 for "interpretation." The Organization, in turn, did not agree with this suggestion, and on July 12, 1993 advanced the claim to this Board.

The Carrier now raises two procedural issues which, if supported, would find the matter not properly before this Board. The first is a contention that the Organization failed to meet the requirement of Rule 42.C that, within nine months of the highest designated officer's decision, proceedings must be instituted:

> "... before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3, Second, of the Railway Labor Act."

The Carrier notes the extended time limit of March 24, 1993 and the referral to the Board on July 2, 1993, "over three months after the Organization's time limit extension and almost fourteen months after the claim was denied by the Carrier's highest designated officer." The Carrier asserts that this makes the claim "fatally flawed."

The Board does not agree. The Organization referred the claim in timely fashion to PLB 4768. Rule 42.C discusses a Board of Adjustment "that has been agreed to." Since PLB 4768 was in existence, it is such a Board. Rule 42.C does not say that a particular dispute must be "agreed to." Contrary to the Carrier's view, there is no way the Organization would know in advance that the Carrier would refuse to docket this particular claim to an existing Public Law Board. Faced with this refusal, the propriety of which is not before the Board for resolution, the Organization chose simply to advance the claim to this Board.

The Carrier's second procedural point argues that the claim was not initiated within the required 60 days "of the occurrence on which the Claim . . . is based." The Carrier contends the "occurrence" was the Carrier's October 11, 1990 letter "closing its files on the matter."

This contention must fail on two counts. First, as pointed out by the Organization, it was not raised on the property. Second, it is inaccurate. The Carrier did not, in fact, "close its files", but rather kept the matter open by responding affirmatively to the General Chairman's request to send a further notification of reinstatement to the Claimant.

As to the merits, the Carrier argues that PLB 4381, Award 46 cannot be read to give the Claimant more than a "reasonable time" to respond to the reinstatement offer. Thus, the Carrier's position is that only by seeking an "interpretation" from PLB 4381 can it be determined if the Claimant had the right to wait 11 months to return to work.

The Board finds that the delay in offer to return to work is <u>not</u> the issue. According to the Organization, the Claimant wrote to the Carrier within six days of the Carrier's October 23, 1990 notification. Receiving no response from the Carrier, the Claimant assumed, again according to the Organization, that his request had been approved.

<u>If</u> the Carrier received this letter, the Claimant's proposed return to work was within its terms, since the Carrier failed to respond or to notify the Claimant of his termination of employment status. The question becomes, did the Carrier receive the October 29, 1990 letter?

The only available information on this question is the exchange of post-conference letters between the parties. On February 17, 1993, the General Chairman wrote to the Assistant Director, Labor Relations in pertinent part as follows:

> "During conference, [a member] of your staff concurred that the Company did receive [the Claimant's October 29, 1990 letter] advising that he would need this additional time in order to return to service. He further concurred that the Company did not respond to [the Claimant's] letter in any way, shape or form."

The February 21, 1993 Assistant Director's response makes no reference to the specifics of this contention, other than to say "no such letter was received." The response does acknowledge that the Claimant made "two cursory calls" to the Carrier.

The evidence is convincing that the Claimant at minimum sent a timely response and quite probably that it was received. What is certain is that at no time did the Carrier write to the Claimant stating that his employment status was terminated.

The Carrier also refers to the Claimant's failure to meet PLB 4381's condition as to the Carrier's Employee Assistance Program. How this requirement could be met prior to reinstatement is not explained.

In its Submission, the Carrier stated that PLB 4381, Award 46 "found the discipline of dismissal was warranted." A careful reading of Award 46 does not support this conclusion. Award 46 partially sustained the claim before it by negating the dismissal action and directing offer of reinstatement with conditions. The Award here will support the Claimant's reinstatement with seniority unimpaired. Since the Claimant must share some responsibility in not following up on his October 29, 1990 letter, the Board finds that backpay is not warranted. The Award directs offer of reinstatement under the same conditions as provided by PLB 4381.

One further detail requires discussion. PLB 4381, Award 46 refers to the Claimant as a "Group 1" Machine Operator and directs reinstatement in that classification. The claim seeks his reinstatement as a "Group 2" Machine Operator. The Board assumes that PLB 4381 intentionally reinstated the Claimant as a "Group 1" Machine Operator, and this Board does not interfere with such intention. If the parties agree that Group 2 is appropriate (and was intended), the Award, of course, does not bar such classification.

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 30th day of December 1997.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 22386, DOCKET MW-31413
Referee Marx)

The rather unique circumstances surrounding this particular dispute were adequately set forth within the body of this award and it would serve no purpose to regurgitate them here. In this case the Board determined that the claim should be sustained, however, it did not award back pay to the Claimant. Since the award was sustained in part, the small concurrence required is only to the extent that the Claimant was finally reinstated. However, Organization is compelled to dissent to the Board's determination that the Claimant was not entitled to any back pay.

The Board recognized that the crux of this dispute was the issue of whether the Carrier received the Claimant's October 29, 1990 letter requesting additional time to attend to personal business before returning to service following the issuance of Award 46 of Public Law Board No. 4381. In that letter the Claimant stated, "If this is not acceptable or if you have any questions please do not hesitate to let me know." The Board quite correctly determined that the record contained convincing evidence that, "... the Claimant at minimum sent a timely response and quite probably that it was received. What is certain is that at no time did the Carrier write to the Claimant stating that his employment status was terminated." When the Carrier denied the Claimant's request to return to service the following year the instant claim was filed.

Having determined that the Carrier received the Claimant's October 29, 1990 letter, the Board clearly rejected the Carrier's primarydefense to this claim, i.e., that it did not receive the letter. On that basis the claim should have been fully sustained and the Claimant awarded back pay for the period of time he was improperly withheld from service by the Carrier. However, this Board held that, "Since the Claimant must share some responsibility in not following up on his October 29, 1990 letter, the Board finds that backpay is not warranted." We submit that such a finding is wholly inappropriate and arbitrary. Especially since the Board recognized the Carrier's admission that the Claimant made at least "two cursory calls" to the Carrier regarding his status and that the Carrier received the Claimant's October 29, 1990 letter wherein he advised, "If this is not acceptable or if you have any questions please do not hesitate to let me know." Under the circumstances, the Claimant had no reason to initiate further contact with the Carrier prior to his September 19, 1991 request to return to service.

We submit that the Board's failure to award monetary reparations in this instance represents a miscarriage of justice. Failure to award back pay in this instance does nothing but reward the Carrier for its blatant efforts to stonewall the Organization's attempts to reach a timely resolution of this claim. In this connection, the award points out that the reason this dispute ended

up at the Third Division was because the Carrier refused the Organization's initial, timely attempt to place it in line for adjudication on Public Law Board No. 4768. Incidentally, this Referee was the sitting Neutral on that Board at the time. Had this dispute been placed on Public Law Board No. 4768 it would have been argued before that Board as a part of the next scheduled docket of cases, on July 16, 1993. Of the ten (10) cases argued on July 16, 1993: five (5) decisions were rendered on February 24, 1994; four (4) decisions were rendered on April 29, 1994 and one (1) decision was rendered on September 12, 1994. Hence, a decision on this dispute could have been reached, at the latest, in September of 1994.

Solely because of the Carrier's stonewalling tactics, the Organization was required to take this claim to the NRAB for resolution. The Organization filed its notice of intent to the NRAB on July 12, 1993. The claim was docketed on October 15, 1993. A referee hearing was scheduled to be held on November 19, 1996 in the offices of the NRAB in Chicago. At the request of the Carrier (by letter dated November 4, 1996), the referee hearing was postponed until March 13, 1997. The referee hearing was held on March 13, 1997 <u>without a BN representative in attendance</u>. This decision was finally rendered on December 30, 1997, <u>over three (3) years after it should have been resolved by this same arbitrator on Public Law Board No. 4768</u>. Under the circumstances, it is simply

unconscionable that the Claimant should be made to suffer monetarily because of the Carrier's success in stonewalling the timely resolution of this claim. For the above reasons, I respectfully dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 32386, DOCKET MW-31413
(Referee Marx)

Public Law Board No. 4381 Award 46 reduced Claimant's dismissal to a suspension. After several attempts to locate the Claimant over several months the Carrier was about to close the record when the Organization requested that the Carrier make one last try. That was done and the Claimant responded on November 1, 1990.

While this Board has returned Claimant to the status he had immediately after the adoption of Award 46 of Public Law Board 4381, the real issue that was before this Board was what jurisdiction the National Railroad Adjustment Board had to dispose of the action taken by Public Law Board 4381. This Board does not have the authorization to review the actions of another arbitration forum. Any further determination of what was or was not contemplated in Award 46 should have been addressed to Public Law Board 4381. Even the matter here, raising the question of whether an individual can defer his return to service is a matter that should have been addressed to Public Law Board 4381 and NOT TO ANY OTHER FORUM.

This matter is one that grew out of the disposition made in Public Law Board 4381. At minimum, that is where the matter should have gone in the first instance. Not to another Public Law Board nor to this Board.

In Public Law Board No. 2529 Award 29 involving the SAME PARTIES as here, the matter of the Claimant's entitlement was returned to that Public Law Board for an Interpretation. In denying the Organization's claim, the Interpretation noted:

> "It is axiomatic that no one should be permitted to profit by his own dereliction or dilatoriness, and Claimant's claim for time lost... must be denied."

Further in recent Third Division Award 31869 we find:

> "The claim now before us clearly presents a dispute involving the application of Award 304 of Special Board of Adjustment 976, properly referable to that Board under the terms of Paragraph H, supra. We are compelled to dismiss the claim for lack of subject matter jurisdiction." (Emphasis Added)

One point of evidence that the Majority seems to rely upon, it was the Carrier's consistent position on the property that it never received the alleged October 29, 1990 letter from the Claimant. The Organization's late assertion that the Carrier admitted it had received the letter was specifically responded to 3 days later, ie., "no such letter was received" (pages 4-5 of the Award). To conclude from this that the Carrier probably did receive the letter (page 5 of the Award) simply defies logic.

An assertion specifically refuted requires something more in the way of evidence to be considered credible. No such support was produced by the Organization in this regard.

We Dissent.

Paul V. Varga

Martin W. Fingerhut

Michael C. Lesnik

January 16, 1998