Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34228
Docket No. TD-35317
00-3-99-3-101

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(American Train Dispatchers Department
(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Burlington Northern and Santa Fe Railway Company
(former Burlington Northern Railroad)

STATEMENT OF CLAIM:

"(A) The Carrier violated the July 1, 1970 agreement, as modified, when it did not properly compensate Mr. J. D. Bradshaw during a temporary leave of absence due to illness.

(B) The Carrier further violated Article 24(c) of the agreement when Mr. Bradshaw was provided no answer to his claim within the time limits.

(C) The Carrier shall now provide Mr. J. D. Bradshaw $378.00."

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 July 21, 1997, Claimant J. D. Bradshaw, who was employed by the Carrier as a Train Dispatcher at Ft. Worth, Texas, underwent surgery and was absent due to sickness from July 22, 1997 through August 17, 1997. During this period of surgery and illness the Claimant was eligible for sickness benefits from the Railroad Retirement Board. He was denied these benefits because his application was outside the required time limit, thus the Organization seeks compensation from the Carrier for the sickness benefits denied him by the Railroad Retirement Board. An appeal on behalf of the Claimant was made by the General Chairman in a letter dated April 29, 1998. This appeal was denied as were subsequent appeals.

At the outset the Organization has protested that a letter dated February 17, 1999 sent by the Carrier in continuation of the discussion of the instant dispute on the day the dispute was to come before the Board should either 1) not be included on the record as not timely, or 2) be held pending a response from the Organization. The Organization filed its Notice of Intent to the Board on February 17, 1999. The Board has reviewed the record and does not find that the letter in question was timely filed.

At this point in the administration of grievances in this Industry, the Board should not be called upon to hear arguments on matters that have been previously settled. The general expectation is that after multiple levels of handling the facts, arguments, and any applicable precedent should have been made a matter of record. Each party should have developed its position so that it is clearly understood. Each party is responsible to develop a complete record of their respective positions, see Third Division Award 22806. The response of the highest designated Carrier Official should be a response, both offensively and defensively, to the factual, substantive and procedural arguments that have been advanced.

However, in the real world, sometimes a fact of piece of evidence is first discovered or found after the process has been completed. When that occurs, the material should be timely raised, joined and responded to. If necessary a limited time limit extension should be requested and/or granted. If, however, such material comes in a fashion such as to preclude a timely response before a time limit deadline has passed, the Board has recognized such impropriety and has dealt with it accordingly, see Third Division Awards 20025, 20773, 22762, 24757, 28008, 33514. The Board has recognized, moreover, that all matters raised prior to the date of the Notice of Intent to this Board are proper matter for the Board's consideration, see Third Division Awards 18120, 19832, 30782; Fourth Division Award 3331. Such material must, of course, be

substantiated – late date assertions without evidentiary support must, per se, be excluded from the Board's consideration. The material contested by the Organization falls clearly in a category which prevents the Board from considering it; therefore the Organization's request that the Board consider a response is moot.

With respect to the merits of the case, the Organization alleges that the Carrier committed a contractual violation when it failed to grant Claimant Bradshaw's claims, made on two daily time reports, that he be compensated by the Carrier for a total of $378, which the Claimant did not receive from the Railroad Retirement Board. Further, the Organization asserts that the BNSF is responsible for full compensation up to the 80% of the basic daily pro rata rate of the Claimant's regular position per the July 1, 1970, Agreement providing sick leave for dispatchers. The Organization contends that the Carrier must replace the amount deducted from the Claimant by the Carrier in anticipation of his receipt of benefits from the Railroad Retirement Board.

It is the Carrier's position that the Claimant's Sick Leave Form "is not and cannot be construed as a claim," thus there was no violation of Rule 24(c) of the Agreement. Further, the Carrier asserts that the Claimant's loss of his Railroad Retirement Board benefits during the period in question was due to his own negligence. The Memorandum of Agreement between the Carrier and the Organization signed July 10, 1970, reads in pertinent part as follows:

> "PARAGRAPH 7
>
> If the dispatcher forfeits any allowance from a governmental agency because of his failure to timely file for such benefits, he shall also forfeit any allowance he would otherwise be entitled to for such day or days under this rule.
>
> 1(d) NOTE B
>
> The daily sickness benefit comprehended by this rule is 80 per cent of the basic daily pro rata rate of the regular position of which the dispatcher is an incumbent. Where the benefits under this rule supplement an allowance from a government agency, the combined total of such supplemental benefits and the allowance received from the governmental agency for any one day shall not exceed 80 per cent of the basic daily pro

rata rate of the position to which the dispatcher holds incumbency. In no case shall the benefits prescribed herein be payable for more than the five days in any work week."

After careful review of the record, the Board does not find evidence that supports the Organization's position. The Claimant, by his own volition, failed to file the Railroad Retirement Board paperwork in time to receive the $42 per day benefit normally provided to railroad employees who are absent due to illness. Further, there is no evidence in the record to show that it is the Carrier's responsibility to reimburse the Claimant for benefits denied him by the Railroad Retirement Board.

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 23rd day of August, 2000.