

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39145
Docket No. MW-39324
08-3-NRAB-00003-060181
(06-3-181)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (seniority termination) imposed by letter dated September 7, 2004 upon Mr. L. Chadwick, Jr. for alleged leave of absence other than specified in Rule 16 by being absent from his assignment on August 30, 31, September 1 and 2, 2004 was arbitrary, capricious, unwarranted and in violation of the Agreement (System File D-04-380-002/8-00470).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. L. Chadwick, Jr. shall now ‘. . . be returned to service with seniority and all other rights unimpaired, his record cleared of any reference to his removal from service and he shall be compensated for all wage loss suffered.’”

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.

The Claimant, with seniority dating from May 12, 1997, had been assigned as an extra gang Laborer on Production Crew 5. He was assigned to work Monday through Thursday from 7:00 A.M. to 5:00 P.M., with Friday, Saturday, and Sunday as rest days. After the Claimant failed to report for duty during the four day period from Monday, August 30 through Thursday, September 2, 2004, the Manager of Track Programs and Equipment informed the Claimant by letter dated September 7, 2004, as follows:

“You have failed to protect your assigned position on Production Crew 5 on the following dates: August 30, August 31, September 1, and September 2, 2004. Failure to protect your assignment is a leave of absence other than specified in Rule 16 of the Scheduled rules and Agreement. Due to your failure to protect your assigned position for an extended period of time, effective immediately your seniority rights with Canadian Pacific Railway have been forfeited.”

By letter dated September 20, 2004, the Organization requested an Unjust Treatment Hearing in accordance with Rule 20. The Manager denied that request on November 1, 2004. The Organization filed a claim on December 21, 2004, requesting a fair and impartial Hearing pursuant to Rule 21, and the return of the Claimant to service with seniority and all other rights unimpaired, compensation for all wage loss suffered and his record cleared. The Carrier denied the claim by letter dated February 17, 2005 without an Unjust Treatment Hearing.

The Organization contends that the claim must be sustained because the Claimant complied with Rule 16(c) by attempting to notify his supervisor of his

absence prior to his August 30 shift and several times thereafter, including the day that he attempted to return to work. In addition, the Organization contends that the Carrier violated Rule 20 by rejecting its timely request for an Unjust Treatment Hearing.

The Carrier contends that the Claimant's request for an Unjust Treatment Hearing was properly denied because his termination was merely the application of self-executing Rule 16. In addition, the claim for reinstatement and compensation must be denied because it was not filed within the time limits set forth in Rule 21, which require that all claims and grievances be presented in writing within 60 days from the date of the occurrence, in this case, the termination of the Claimant's seniority. On the merits, the Carrier contends that the claim must be denied because the Claimant failed to present any evidence of illness to his immediate family or that he secured permission or notified his immediate supervisor of his absence as required by Rule 16, and the burden was on the Organization to prove that affirmative defense.

Rule 16 provides, in relevant part:

“(c) An employe who desires a leave of absence must secure permission from the proper officer. An absence of less than five (5) working days due to serving on committees, personal injury, sickness of an employe or his immediate family does not require a leave of absence. However, said employe shall notify his immediate supervisor as soon as practical.

* * *

2. All requests for leaves of absence of five (5) days or less shall be made to the immediate supervisor and may be granted verbally.

(g) Without just cause, employes who fail to secure a leave of absence as specified in previous sections (a), (b), (c), (d), (e) and (f), will forfeit all seniority rights.”

Upon review of the record, the Board determines that the claim is untimely. Rule 16 is “self-executing.” That means that the Carrier was entitled by the parties’ Agreement to treat the Claimant’s seniority as forfeited upon his apparent violation of Rule 16’s requirements. Rule 16 does not provide for any appeal or review of the Carrier’s application of Rule 16.

Even if the Claimant and the Organization had the right to present a claim or grievance under Rule 21, there was no timely claim under that Rule. Rule 21(a) requires that claims or grievances be presented “within 60 days from the date of the occurrence on which the claim or grievance is based.” But the claim of misapplication of Rule 16, with a demand for reinstatement and compensation, was not presented pursuant to Rule 21 within 60 days from the termination of the Claimant’s seniority.

The Organization’s request for an Unjust Treatment Hearing pursuant to Rule 20, while filed within the 20-day time limit of Rule 20, was not enough to preserve the Claimant’s claim. Rule 20(a) states:

“An employee who has been in the service of the Soo Line for sixty (60) days or more, and whose application has been approved will not be disciplined or dismissed without a fair and impartial hearing and shall be advised in writing of the specific charges. This will not preclude an employee being held out of service pending a hearing for serious rules infractions. An employee who considers himself unjustly treated shall be given a fair and impartial hearing provided that the request for a hearing is made in writing to the designated Company officer within twenty (20) days from the date of the incident. (Emphasis added)

Employees who have satisfactorily completed probationary periods for promotion will not be disqualified from the promoted position without a fair and impartial hearing. This will not preclude an employee being removed from the position, pending final outcome of the hearing.”

Thus, Rule 20(a) provides for a “fair and impartial Hearing” only for employees who face discipline, dismissal, or disqualification from a promoted position.

That Rule does not provide an Unjust Treatment Hearing for employees, like the Claimant, who have been notified of termination of their seniority under Rule 16.

In sum, the Rule 21 claim for reinstatement and compensation was not timely filed. Because the Claimant had no right to a Rule 20 Hearing, the 60-day time limit contained in Rule 21 began to run on September 7, 2004, when the Claimant was notified of the termination of his seniority. His December 21, 2004 claim was filed more than 60 days after the termination of the Claimant's seniority, and was therefore outside of Rule 21's time limit.

The Board sits as an appellate body. When a claim is untimely, as this one is, we have no authority to review the Carrier's decision, and it is for management, and not the Board, to entertain leniency considerations. In our appellate role, we must dismiss the claim as untimely filed.

AWARD

Claim dismissed.

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 7th day of July 2008.