Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39149
Docket No. MW-38103
08-3-NRAB-00003-030573
(03-3-573)

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division
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(Lake Superior & Ishpeming Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed and refused to assign Foreman R. Paquette to the position of Foreman Section 5 on Assignment No. 9 on June 6, 2002 and instead assigned junior employe J. Sommers (System File R1.816).

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. Paquette shall now '. . . be paid any and all lost wages and benefits that were lost to him during the period referenced and continuing.'"

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 Statement of Claim explains the nature of the controversy. The facts surrounding the assignment of the junior employee are not in dispute. Rule 16 of the parties' Agreement is a typical "sufficient ability" clause. It provides as follows:

> "Promotion shall be based on ability and seniority. Ability being sufficient, seniority shall prevail."

Rules 12, 13 and 14 also recognize the customary system of entitlements based on relative seniority.

The Claimant had previously demonstrated his ability to fill a Foreman position and held a seniority date of June 11, 1992 on the Foreman seniority roster which was senior to Sommers by approximately three months. He also held a valid Michigan license to drive a motor vehicle and had personal automobile insurance through GEICO at the time the claim arose.

According to the record, the sole reason why the Claimant was bypassed for the Foreman position was because he was excluded from coverage by the Carrier's insurance provider. Documents exchanged on the property reflect that the Carrier was able to pay a lower premium for business automobile insurance if ten employees, including the Claimant, were excluded from coverage. There is no evidence that the Organization and/or the Claimant knew of this insurance arrangement. There is also no evidence that the Carrier would have been unable to obtain higher cost insurance to cover the Claimant and the others excluded. Although the record does not explain the underwriting standards used by the Carrier's insurance company, comments in the record suggest that employee driving records are examined for accident and moving violation activity when the policy comes up for renewal. The record reflects that the Claimant had some kind of "serious infraction" in 2000, but had a clear record thereafter.

After the claim was conferenced twice on the property, the Carrier, in its November 17, 2003 letter, said ". . . in early October the Company took it upon its own initiative to petition the insurance carrier to reconsider its exclusion of Mr. Paquette from the authorized drivers list. As a result, the insurance agency removed its restrictions on Mr. Paquette, and his qualifications to drive company

vehicles were reinstated on October 23, 2003." The Claimant was allowed to displace onto the disputed position and has apparently held it successfully since then. Accordingly, the Organization's final correspondence on the property limits the claim for relief to a make-whole remedy for the period from June 6, 2002 to October 23, 2003.

Although it did not do so on the property, the Carrier advanced a challenge to the Board's jurisdiction in its Ex-Parte Submission. According to its challenge, Rule 41 for the applicable Agreement reads as follows:

> "All claims and grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board. . . . It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to."

In support of its challenge, the Carrier notes that the decision of the highest designated officer was dated January 30, 2003, but the Organization's Notice of Intent was dated December 26 and date-stamped by the Board on December 29, 2003.

The Organization's Submission does not deal with the foregoing jurisdictional challenge because it was unaware of any such problem during the handling on the property. At the Hearing before the Board, the Organization maintained that there had been an agreement to extend the nine-month time limit for two months until December 29, 2003. It pointed out that the Carrier responded only on the merits in its November 17, 2003 letter that said nothing about a time limit violation.

It is well settled that objections to the jurisdiction of the Board may be raised at any time. Therefore, the failure to take exception on the property does not prevent the Carrier from advancing the challenge in its Submission to the Board.

That said, however, to be valid, a jurisdictional challenge must still be perfected by demonstrating that it is supported by a proper factual foundation.

Because of the importance of this procedural issue, we closely and repeatedly examined the relevant correspondence in the on-property record. We also observed that Rule 41 does not require agreements to extend the nine-month time limit to be in writing. As written, it permits agreements to extend time limits by other recognized means such as verbal agreement, agreement by silence, agreement by action, and the like.

The Carrier's initial denial of the claim was dated July 5, 2002. It was not appealed by the Organization to the Carrier's highest designated officer until December 3, 2002, nearly five months later. The Organization's appeal contains only this initial sentence before asserting contentions on the merits:

> "This is in regard to our correspondence to extend the time limits 'our file # R1.816' and allow me to respond to Robin Trembath letter of July 5, 2002, as I am the newly elected General Chairman and new to this aspect of the union."

Neither the Submission of the Organization nor the Submission of the Carrier neither provides any other written correspondence reflecting that there were discussions about extending the time limit for appeal from the Carrier's initial denial of the claim. Moreover, the very next Carrier correspondence in the record is the decision of the highest designated officer (HDO) dated January 30, 2003. However, careful review of the HDO's letter fails to disclose any reference to a time lime extension whatsoever; it deals only with various matters pertaining to the merits of the claim.

The foregoing suggests that the parties have a high degree of informality in their handling of agreements for time limit extensions. It further suggests that written confirmation of a time limit extension is not normally provided. Indeed, the foregoing exchange demonstrates that the agreement to extend the time limit was confirmed by silence as shown by the total absence of an explicit objection being raised or any reference to the matter whatsoever.

The next relevant consideration is found in the January 30, 2003 letter containing the HDO's decision. The Carrier's file copy of the letter contains the following handwritten notation in the upper right-hand margin:

9 months
Oct 2003

This shows that the highest designated officer penned a reminder to himself to maintain his awareness that the 9-month time limit would expire at the end of October 2003 unless properly extended.

Over the summer and early fall of 2003, the parties exchanged several documents pertaining to the merits of the claim. By letter dated October 29, 2003, the Organization enclosed a handwritten statement from the Claimant and made several assertions surrounding the statement. The final paragraph of this letter reads as follows:

> "This letter will also serve as notice that the Organization grants a 60 day time limit extension to the board, as the dead line date for this dispute to the board is October 29, 2003, this will effectively extend the dead line date of this dispute until December 29, 2003. This is to give the LS&I time to respond to this letter, if the LS&I needs additional time please inform."

By letter dated November 17, 2003, the Carrier's HDO replied. His letter raised no objection whatsoever based on the Rule 41 time limit. Instead, the first half of the letter is devoted to a discussion about the failure of the Claimant to provide the Carrier with a copy of his driving record and information about his personal automobile insurance. The letter concluded as follows:

> "Without receding from the foregoing, in early October the Company took it upon its own initiative to petition the insurance carrier to reconsider its exclusion of Mr. Paquette from the authorized drivers list. As a result, the insurance agency removed its restrictions on Mr. Paquette, and his qualifications to drive company vehicles

were reinstated on October 23, 2003. Copy of the insurance agency letter approving this reinstatement is attached as information.

Inasmuch as Mr. Paquette's driving qualifications have now been reinstated, it would be the Company's suggestion the claim be considered resolved. In any event, since Mr. Paquette has been allowed to displace onto the job of his choice (which occurred on or about October 23, 2003), any continuing liability comprehended by the claim must be considered as having ceased.

In view of the above information, Carrier respectfully requests the claim be withdrawn. Otherwise the declination of the claim is affirmed." (Emphasis added)

The final factor we note is that the Carrier's Submission raising the jurisdictional challenge was authored by someone other than the HDO who developed the record on the property.

After careful consideration of the relevant evidence in this unique record, we are compelled to find that there was a valid agreement to extend the nine-month time limit by two months until December 29, 2003. The suggestions in the November 17, 2003 letter of the HDO are consistent with an agreement to so extend the time limit. Those same comments simply are not consistent with the existence of a claim that had been extinguished by the nine-month time limit. From the handwritten note that the HDO wrote to himself the previous January, we know that the HDO should have been aware that the nine-month time limit would have expired on October 29, 2003. Indeed, the Organization's appeal of that date explicitly reminded the HDO of the deadline and the granting of the two-month extension. If the HDO did not agree with the extension, we would have expected him to so state in his November 17, 2003 reply. He did not. If the deadline had expired and the claim was no longer valid, we would have expected him to so assert. Again, he did not. Instead, he suggested that the claim be resolved on the basis of the reinstatement of the Claimant's insurance coverage. If the deadline had expired and the claim was no longer valid, we would not have expected him to be concerned

at all about the cessation of continuing liability. But he was so concerned and asserted that the liability should be considered as having ceased. Finally, if the deadline had expired and the claim was no longer valid, we would not have expected him to request that the claim be withdrawn. But he did. These comments are simply not logically consistent with any scenario other than the existence of a two-month extension of the time limit. Accordingly, the Carrier's jurisdictional challenge must be rejected for lack of proper evidentiary support.

Turning to the merits, it is undisputed that the Claimant held a valid driver's license and possessed personal automobile insurance coverage at the time he was denied the assignment to the Foreman position. Moreover, the Carrier was able to have him reinstated to coverage under its business policy simply by petitioning on its own initiative. There is no evidence it could not have done so successfully in June 2002 when the Claimant was bypassed for the position assignment. Finally, nothing in the applicable Rule language explicitly provided the Carrier with an insurance coverage exception to Rules 12, 13, 14 and 16. The Claimant's standing on the applicable seniority roster showed that he possessed both the requisite ability and seniority for the assignment.

Given the foregoing discussion, we must sustain the claim for the period from June 6, 2002 to October 23, 2003.

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 7th day of July 2008.