

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40239
Docket No. MW-40440
09-3-NRAB-00003-080284**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employes 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 Carrier violated the Agreement when it improperly removed and withheld Foreman R. Dusterhoft from his assigned position on the Paynesville Surfacing Crew by letter dated July 20, 2006 and when it failed to schedule and hold an unjust treatment hearing which was timely and properly requested in compliance with Rule 20(a) (System File C-06-440-007/8-00501).**
- (2) As a consequence of the violations referred to in Part (1) above, ‘ . . . all reference to his removal from service shall be removed from Mr. R. E. Dusterhoft’s record, and he shall be immediately reinstated to service on his assigned position with all rights and benefits restored, and compensated for any and all lost wages relating to the hours and work performed by the Paynesville Surfacing Crew beginning July 21, 2006 and continuing until he is reinstated.’”**

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.

This is one of a number claims filed on behalf of the Claimant, who was working as a Foreman on the Paynesville Surfacing crew when he received a letter removing him from service on July 20, 2006 pending the outcome of a job performance analysis (JPA) which was originally scheduled for July 28, 2006. By letter dated July 27, 2006 the General Chairman requested an Unjust Treatment Hearing concerning this action pursuant to Rule 20. The Carrier's response of August 14, 2006 sets forth its position that Rule 20 does not apply because there had been no disciplinary action taken against the Claimant, who was being paid pending a determination of his qualification. In denying the request for a Unjust Treatment Hearing, the Carrier stated that there was no demonstration how the Claimant had been wronged and that it determined that such Hearing would serve no useful purpose. On August 23, 2006 the Claimant was disqualified from service as a result of a JPA held on August 3, 2006. A claim was initiated by the Organization on August 25, 2006 protesting the Carrier's decision to deny the Claimant an Unjust Treatment Hearing with respect to his removal from service and being subject to a JPA. The instant claim deals solely with the denial of the Unjust Treatment Hearing, and not with the eventual disqualification, which is the subject of a different claim.

It is clear from reading the record that the parties were dealing with the removal from service, denial of an Unjust Treatment Hearing, and eventual disqualification in their correspondence concerning this claim. An October 2, 2006 letter was issued to the Claimant setting forth the results of its track work JPA and the Claimant's disqualification. The Carrier responded to the August 25, 2006 claim by letter dated October 20, 2006 indicating that the October 2 letter was a reply to such claim, and attaching a copy of it. The October 2 letter makes no mention of the claim. By letter dated December 1, 2006 the Organization filed an appeal indicating that there was no reason to hold the Claimant out of service, there were other options available which the Carrier did not use, and alleging that its

refusal to hold an Unjust Treatment Hearing improperly denied the Claimant the right to any Hearing to protest being indefinitely withheld from service. On December 4, 2006 the Organization replied specifically to the October 2 letter taking issue with the JPA process used in this case. On January 1, 2007 the Carrier denied the content of the Organization's December letters, characterizing them as an untimely attempt to protest the August 17 disqualification, and indicating that the Organization had not presented a claim with respect to a denial of the Unjust Treatment Hearing until December 4, 2006.

The balance of the correspondence on the property includes the Organization's appeal after conference indicating that this claim relates to the denial of the Unjust Treatment Hearing to which the Claimant was entitled under Rule 20, that the Carrier's alleged responses were not proper notification of disallowance of its claim under Rule 21, that it had no reason to construe the October 2 letter as a response to its August 25, 2006 claim, and that the Carrier was attempting to commingle the issue here with the Claimant's disqualification. The Carrier's denials set forth its position that the Organization filed two separate claims for the same incident requesting the same remedy, the claims were excessive, that the Claimant was provided two opportunities to demonstrate that he could perform the duties of his position and he could not do so, that it was made clear that the Claimant was allowed to return to work after successfully completing a JPA, and that Unjust Treatment Hearings are intended for actions relating to discipline, dismissal and disqualification, and not for all grievances.

The Organization initially notes that it timely filed and appealed its claim concerning denial of the Unjust Treatment Hearing, and argues that the Carrier's failure and refusal to schedule an Unjust Treatment Hearing in connection with its decision to withhold the Claimant from service from July 21, 2006 when a timely request was made is a violation of Rule 20(a) which does not require an employee to be disciplined or dismissed by its clear terms. The Organization asserts that it is nonsensical to say that an Unjust Treatment Hearing is tied only to disciplinary matters when the Carrier is required to hold Hearings in connection with such matters unrelated to an employee's request, and relies upon many Awards to support its position including Third Division Awards 23923, 24049, 29605, 32770, 35019 and 37973.

The Carrier contends that the Organization's request for an Unjust Treatment Hearing was untimely, because it was made prior to any disciplinary or

adverse action being taken or any determination of the Claimant's qualification and while he was being paid. It notes that the Carrier has the absolute right to withhold employees pending evaluation, and absent a showing that the Claimant was wronged, it has the discretion to decide that an Unjust Treatment Hearing would serve no useful purpose. The Carrier asserts that Rule 20 only requires the granting of an Unjust Treatment Hearing when an employee is dismissed, disciplined or disqualified, citing Public Law Board No. 6302, Award 8; Third Division Awards 20135 and 21329; and Second Division Award 2916. Additionally, the Carrier argues that the Organization presented duplicate claims requesting the same relief (December 1 & 4, 2006) as well as a third one here about the same incident and not limited to the denial of an Unjust Treatment Hearing, which were not handled in the usual manner on the property and are not properly before the Board, relying on Third Division Award 23239 and Second Division Awards 1720, 1721 and 1733. The Carrier contends that it properly disqualified the Claimant because there is no contractually agreed upon method to determine ability, and the Claimant was told that he could return to work once he demonstrated his ability, which he failed to do, as well as failing to mitigate his damages. It asserts that the Organization failed to meet its burden of proof, citing Third Division Awards 10637 and 10601.

A careful review of the record convinces the Board that, while this claim may not encompass the Carrier's ultimate decision to disqualify the Claimant as a result of the JPA, it clearly protests both the Carrier's removal and withholding of the Claimant from service on July 20, 2006 and thereafter, as well as the Carrier's denial of the requested Unjust Treatment Hearing under Rule 20, which provides in pertinent part:

“RULE 20 - DISCIPLINE AND GRIEVANCES

(a) An employe 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 employe being held out of service pending a hearing for serious rule infractions. A employe 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.

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 employe being removed from the position, pending final outcome of the hearing.”

The claim correspondence enmeshes the issues of the Carrier’s initial action in withholding the Claimant from service from July 20 and denying the requested Unjust Treatment Hearing on that action with the eventual results of the JPA and the Claimant’s disqualification. If the ultimate disqualification decision is separated out from the other actions commenced on July 20, the Board does not believe that this is to be considered a duplicative claim, or that its initiation occurred in December 2006. Rather, this claim was timely filed on August 25, 2006 pursuant to the Carrier’s denial of the July 27, 2006 request for an Unjust Treatment Hearing, and makes clear that is what is being protested. The fact that the remedy - which requests that the Claimant be reinstated to service commencing on July 21, 2006 with all rights and benefits restored - is similar to the remedy later requested in response to the disqualification does not make this claim improper.

There are two parts to this claim. First, that the Carrier improperly removed and withheld the Claimant from service on July 20, 2006 pending establishment of his qualifications via a JPA. Second, that the Carrier improperly denied the Claimant’s request for an Unjust Treatment Hearing protesting such action. With respect to the first issue, Rule 20 recognizes the Carrier’s right to withhold an employee from service for reasons including serious Rules infractions and determination of questions of qualification. Public Law Board No. 6302, Award 8 confirms that a determination to withhold an employee from service for medical reasons pending the outcome of a fitness for duty examination should not be overturned unless it is arbitrary.

The second issue is the thrust of this case and requires an interpretation of Rule 20(a). The Carrier’s position is that an employee’s entitlement to an Unjust Treatment Hearing is tied to him suffering some disciplinary or adverse action including dismissal or disqualification. The Carrier’s denial of the Claimant’s request for an Unjust Treatment Hearing in this case was based upon the fact that he suffered no disciplinary or adverse action, because he was being paid while he was withheld from service pending a JPA, and he was not charged with any Rule violation. While most of the cases relied upon by the parties relate to requests for

Unjust Treatment Hearings with respect to disqualifications (see e.g. Third Division Awards 35019, 29605 and 21329) they also make clear that an employee is entitled to an Unjust Treatment Hearing when the allegation is that he lacks the fitness and ability to do the job, and he timely requests a Hearing. See Third Division Awards 23923 and 24049. Third Division Award 32770, an on-property Award in which an employee was withheld from service for allegedly issuing a threat, is instructive with respect to the intent of Rule 20. While the focus of the case was on whether the employee resigned prior to the holding of an Investigation into the alleged Rule violations, the Carrier's denial of the request for an Unjust Treatment Hearing based upon such resignation was overturned when it was found that the individual was still an employee, and the Carrier was ordered to continue the Investigation process into whether the employee was guilty of any disciplinary infractions, as well as grant the employee the requested Unjust Treatment Hearing. Similarly, Third Division Award 21329 makes note that the term "discipline" is not rendered synonymous with the term Unjust Treatment for purposes of appeal under a clerical contract where Investigations were required in discipline cases and an Unjust Treatment Hearing was provided in grievances where an employee otherwise considers himself unjustly treated.

A plain reading of Rule 20(a) as previously interpreted, reveals that the first two sentences deal directly with an employee's right to a fair and impartial Hearing prior to being dismissed or disciplined. As noted by the Organization, there is no prerequisite for a request from the employee for such a Hearing. The final sentence of that paragraph provides an employee who considers himself unjustly treated with the right to a fair and impartial Hearing upon timely request. This provision is distinct from the Investigation requirement that attaches with respect to discipline. It is not specifically defined to encompass only disqualifications, although it appears that is how it has been used in most cases. In this case, there is no question that a timely and proper request for an Unjust Treatment Hearing was made following the Claimant's notification that he was being removed and withheld from service pending the results of a JPA. While the Claimant suffered no loss of wages, he was clearly adversely affected in his ability to challenge the basis upon which the Carrier determined that a JPA was necessary, as well as the use of that procedure to determine his fitness and ability to perform his job rather than some other contractual procedure, including a fitness for duty examination. Thus, we conclude that the Carrier violated Rule 20(a) in denying the request for an Unjust Treatment Hearing. However, as in Third Division Award 32770, we find that it is premature to issue a monetary award in relation to such a technical violation, especially

because the same period of time is encompassed within the claim filed protesting the Claimant's ultimate disqualification as a result of the JPA. The parties are directed to determine whether there were any losses suffered by the Claimant solely as a result of the denial of an Unjust Treatment Hearing prior to his disqualification and to compensate the Claimant accordingly.

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 21st day of December 2009.