

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40289
Docket No. MW-39585
10-3-NRAB-00003-060372
(06-3-372)**

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago and
(North Western Transportation Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier’s action in the disqualification of Mr. T. Jones as a low boy driver on Gang 3458 on May 5, 2005 and continuing was unjust and in violation of the Agreement (System File 4RM-9655G/1428881 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, “*** The disqualification must be removed from Claimant’s record and he must be allowed to return to his low boy position. Claimant must also be made whole for the differential in wages from any lower rated positions he has held since this disqualification.”**

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 was notified by Engineering Supervisor Mart that he was disqualified from his position of Lowboy Driver on Gang 3458 because of an incident involving damage to equipment and track on April 27, 2005.

Rule 20 entitled "Grievances" provides:

"Should an employee feel he has been unjustly dealt with in other than discipline matters, he may make his written protest to the designated Carrier Officer, with copy to the General Chairman. If a hearing is requested to develop the facts, same shall be granted within fifteen (15) calendar days and written decision rendered within 10 calendar days. If the employee is dissatisfied with the decision same may be progressed in accordance with Rule 21 – Time Limit on Claims.

If protest is sustained and compensation features are involved, proper adjustment shall be made."

On May 5, 2005, the Organization sent a letter regarding the disqualification to the Manager Labor Relations. The letter provided:

"I am writing this letter as a formal request to have a conference concerning the disqualification of employee T. Jones according to the provisions of Rule 20 of the November 1, 2001 Agreement.

Mr. Jones received a letter (copy enclosed) from the Carrier stating that he was disqualified as a low boy driver on Gang 3458. A conference must be held to determine the facts that led to this disqualification.

Please inform me as to when a conference will be arranged, with whom, location, date and time."

The General Director's May 9, 2005 response provided, in pertinent part:

"This is to confirm our discussions concerning the application of Rule 20 of the Agreement.

*** * ***

You advised that historically such requests have been made to the carrier officer handling the first level of claims or grievances. Such an arrangement however is inefficient in that this officer is not involved in the disqualification decision and would become involved only if a formal claim is later filed.

Effective immediately, the designated officer for receipt of requests for unjust treatment hearings pursuant to Rule 20 will be the employee's Director. For example, an employee working on a section gang will submit his request for an unjust treatment hearing to the Director of Track Maintenance for that service unit."

Because the Manager Labor Relations did not respond to the Organization's May 5, 2005 request for a conference, the Organization filed its claim dated June 28, 2005 which reads, in pertinent part, as follows:

"This letter is to file a claim on behalf of Employee T. Jones. Mr. Jones has been disqualified as a low boy driver on gang 3458. The Brotherhood requested a conference, copy attached, concerning this disqualification on Claimant's behalf on May 5, 2005 according to the provisions of Rule 20.

It is the position of the Brotherhood that the Carrier has failed to afford Claimant the opportunity for work and compensation by violating the November 1, 2001 Agreement. Rule 20 serves to establish the contractual right of the Claimant to be granted a hearing to develop the facts surrounding this issue within fifteen (15) calendar days and a decision within (10) days. . . .

The Carrier has failed to arrange and hold such conference within fifteen (15) calendar days and therefore is in default of the provisions of Rule 20. The disqualification must be removed from Claimant's record and he must be allowed to return to his low boy position. Claimant must also be made whole . . .

It is the claim of the Brotherhood that the Claimant has suffered a loss of work and compensation as a direct result of the Carrier violating the November 1, 2001 Agreement. This included, but is not restricted to Rule 20. Claimant must be compensated."

The Manager Labor Relations' August 17, 2005 declination cited the facts of the disqualification. Regarding the Organization's contention that a conference was not held within 15 days of the request, the Carrier stated:

"Without prejudice to the above, Manager Mart stated that he did not receive the request for conference on the above matter. He stated that if said request was received that he was more than happy to accommodate the Claimant's request for a conference. Track Supervisor Mart stated that if Claimant does want to hold the conference that he can proceed with that decision by calling [his] office at [number omitted]. If Claimant chooses to exercise this option, then I urge him to contact Manager Mart at the listed number. If the Claimant does not wish to proceed with this option, the claim as presented is declined in its entirety."

The General Chairman sent a letter to the Director of Labor Relations dated September 15, 2005. The letter provided, in pertinent part:

"The June 28, 2005 claim is precise and to the point. The Carrier violated the Agreement when it failed to grant a grievance hearing as requested in the May 5, 2005 letter. Since the Carrier failed to grant a grievance hearing in a timely manner, anything else that occurs after that fact doesn't matter. The May 5, 2005 letter simply requested to have a conference concerning the April 27, 2005 disqualification according to the provisions of Rule 20."

In his response dated October 25, 2005, the Director Labor Relations denied the claim and further stated:

“ . . . without prejudice to the Carrier’s position in this case, by Carrier initiative I am advising Manager James Mart’s office to schedule and hold a Rule 20 hearing for Mr. Jones on a date, time and location mutually agreeable to Mr. Jones and your Organization. Any remedy is governed by the second paragraph of Rule 20, subject to the further provisions of Rule 21. Be so advised.”

The Organization maintains that the claim must be granted because the Carrier did not hold a timely Rule 20 Unjust Treatment Hearing after the Organization wrote to the Manager Labor Relations. According to the Organization, it filed over a score of requests for Rule 20 Hearings in this manner and the Carrier has always granted Hearing requests. By ignoring the request, the Carrier deprived the Claimant without the evidence being examined at a Hearing.

The Carrier counters that the Board lacks jurisdiction to hear the instant matter because the claim is not the same claim that was progressed on the property. The Carrier has the right to disqualify an employee and the employee has the right to challenge that disqualification under Rule 20. Further, the claim fails on its merits because the Organization did not follow the proper procedures for requesting a conference and then chose to ignore the offer to hold a conference. Moreover, there is nothing in the Rules that requires sustaining a claim because of the failure to schedule a Rule 20 Hearing. Finally, even if the Carrier failed to follow the proper procedure under Rule 20, there is nothing in the record to establish that the disqualification was arbitrary or capricious.

The Board carefully reviewed the record evidence. The claim presented on the property and the claim presented to the Board does not have a substantial variance that renders it procedurally defective.

The Organization’s arguments are procedural. The Organization maintains that it requested the Rule 20 conference in the same manner that it had done in the past, by notice from the Vice Chairman to the Manager Labor Relations dated May 5, 2005. The Carrier did not dispute that the notification had been done to the Manager Labor Relations on prior occasions. The Carrier responds that the

Organization did not follow the proper notification as outlined in the May 9, 2005 letter to the General Chairman about Rule 20 notifications.

The Carrier letter advising of the new procedure “effective immediately” was sent four days after the request for conference. “Effective immediately” means just that, not “effective four days ago.” A letter after the fact cannot serve as notice before the fact. However, this does not end the inquiry.

This claim alleges a failure to hold a Hearing pursuant to Rule 20. The Carrier points to Third Division Award 36422 in support of its argument that Rule 20 was not violated. The Carrier also argues that there is nothing in the record to establish that the disqualification was arbitrary or capricious. Although later offered, there was no Rule 20 conference. Absent a Rule 20 conference, no evidence could be developed.

At the Hearing in the instant matter, the Carrier cited to Special Board of Adjustment No. 924, Award 248 in support of the argument that the Carrier did not violate Rule 20. The Board finds the analysis of the cited Award compelling and notes the following quotation:

“This Board finds that there is nothing in Rule 20 which requires the sustaining of the claim because of the Carrier’s failure to schedule a hearing within the time limits set forth in the rule. Moreover, there is evidence in this record that the Organization rejected the Carrier’s subsequent attempt to schedule and hold a hearing and then pursue the results through the procedures outlined in Rule 21. Consequently, there is no basis for this Board to sustain the claim as it is written.

However, a review of the correspondence between the Organization representative and the Carrier representative makes it clear that although they argued extensively about procedural matters, the loser in that argument was the Claimant. There was never a hearing to determine whether or not the Claimant was properly disqualified from his position as truck driver. Rule 21 gave the Carrier sixty days to schedule the hearing; but since the Organization persisted in its argument that the hearing should have been held within fifteen

days, no hearing was ever held for the Claimant. We find that the Claimant should not suffer a derogation of his rights because the parties had a dispute as to who was the 'designated Carrier officer' and which rule applied.

Consequently, this Board orders that within sixty days of the receipt of this Award, the Carrier must schedule a hearing concerning the disqualification of the Claimant to determine whether or not there was a legitimate basis for that disqualification. If it is found that the Claimant was improperly disqualified from his job, then he should be entitled to the relief requested in the claim and compensated for all wage loss suffered."

The instant matter is similar to the above. Although offered in the instant matter, the Claimant never received his Rule 20 Hearing. Accordingly, the Board orders that within 60 days of the receipt of this Award, the Carrier must schedule a Rule 20 Hearing regarding whether the Claimant was properly disqualified. If it is found that the Claimant was improperly disqualified, then he should be entitled to the relief requested in the claim and compensated for all wage loss suffered.

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 1st day of March 2010.