

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40486
Docket No. MW-40719
10-3-NRAB-00003-080587**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 Agreement was violated when the Carrier terminated Group 4, Rank A Machine Operator Michael W. Conzet’s seniority on November 18, 2005 (System File C-06-160-005/8-00492).
- (2) The Agreement was further violated when the Carrier failed and refused to allow an unjust treatment hearing pursuant to Rule 20.
- (3) The Agreement was further violated when the Manager Track Programs/Work Equipment failed to deny the claim submitted by the General Chairman on January 14, 2006.
- (4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Group 4, Rank A Machine Operator Michael W. Conzet shall now be reinstated to service with seniority and all other rights unimpaired and 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.

By letter dated November 18, 2005, the Carrier notified the Claimant as follows:

“You have failed to protect your assigned position on Production Crew 3 since October 31, 2005. 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.”

A second letter dated November 25, 2005 was sent to the Claimant and reads as follows:

“Please refer to my letter dated November 18, 2005 advising of your forfeiture of seniority as a result of failure to protect your assignment and accepting a leave of absence other than as prescribed in Rule 16 of the Scheduled Rules and Agreement.

Inasmuch as you are no longer an employee of the Soo Line Railroad Company . . . a formal investigation in connection with your alleged attempt to claim pay for vacation not entitled for the dates of October 20, October 31, November 1, and November 3, 2005 will not

be conducted at this time. However, should you for any reason be returned to the service of the Company through a third party, these charges will be reviewed for appropriate handling.

Falsification of claim for vacation pay is a violation of GCOR #1.6, Conduct, and 1.15 Duty-Reporting or Absence.”

By letter of December 7, 2005, the Organization requested an Unjust Treatment Hearing in accordance with Rule 20. On January 14, 2006, the Organization filed what it termed a “continuing” claim protesting the Claimant’s dismissal from service on November 18, 2005 and contending that the Claimant should have been afforded a fair and impartial Hearing pursuant to Rule 20. The Carrier responded by letter dated March 2, 2006, stating that Rule 16 of the Agreement is self-executing and no Unjust Treatment Hearing was warranted.

The Organization contends that the Claimant did not violate Rule 16, nor did he fail to protect his assignment. Moreover, the Organization asserts that the Carrier violated Rule 20 by rejecting its timely request for an Unjust Treatment Hearing.

The Carrier argues that the Claimant was absent without permission and, therefore, the self-executing provisions of Rule 16 were properly invoked. The Carrier further argues that the claim must be denied because it was not filed within the time limits set forth in Rule 20, which stipulates that a request for a Hearing must be made within 20 days of the incident. Finally, the Carrier asserts that the Organization failed to establish with probative evidence that the Claimant protected his position and, therefore, the claim fails on the merits.

After careful review of this lengthy record, the Board finds that there is a threshold procedural issue which determines the outcome in this case. Even if the Claimant and the Organization had the right to present a request for an Unjust Treatment Hearing under Rule 20, there was no timely request under that Rule. Rule 20 requires that a request for a Hearing must be made in writing to the designated Carrier officer within 20 days from the date of the incident. The Manager’s letter notifying the Claimant of the forfeiture of his seniority rights was dated November 18, 2005. Even if we were to agree with the Organization that the

request for an Unjust Treatment Hearing was made on the date that it was mailed, rather than the date that it was received by the Carrier, it was the Organization's burden to establish that the request was mailed on or before December 8, 2005.

The evidence on this crucial point reveals that a certified letter was mailed to the Carrier on December 8, 2005, but the certified mail receipt number does not match the certified number on the letter itself. As the Carrier correctly points out, the evidence is at variance with the Organization's assertion that this discrepancy was the result of a typographical error. We must conclude that the Organization failed to prove that the request for an Unjust Treatment Hearing was sent in a timely manner because the certified mail receipt is inconsistent with the certified mail number reflected on the Organization's letter dated December 8, 2005.

Moreover, and contrary to the Organization's assertion, the request for an Unjust Treatment Hearing is not a continuing claim. The date of the incident which gave rise to the request was November 18, 2005, when the Claimant was notified that his seniority was forfeited pursuant to Rule 16. This was a definitive action which took place on a date certain. It did not continue on a day-to-day basis.

Under these circumstances, we find that the Claimant's request for an Unjust Treatment Hearing was untimely and the claim must be dismissed on that basis.

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 14th day of May 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40486, DOCKET MW-40719
(Referee Kenis)

The Organization respectfully dissents from this award because, in dismissing the claim, the Board failed and refused to decide one of the issues presented to it, contrary to the requirements of Section 3 of the Railway Labor Act. The award therefore fails to comply with the Act and constitutes an erroneous and improper failure of the Board to exercise its statutory jurisdiction and to perform its statutory function.

As is noted in the award, the claim presented on behalf of the Claimant on January 14, 2006 presented two principal assertions of contract violations: a violation of Rule 16 of the BMWED-SOO Agreement by termination of the Claimant's seniority and a subsequent violation of Rule 20 of that Agreement by denial of an unjust treatment hearing. Although the Organization disagrees with the Board regarding the Board's analysis and reasoning with respect to the issue of improper denial of an unjust treatment hearing under Rule 20, this dissent concerns the issue of improper termination of Claimant's seniority under Rule 16.

The action that gave rise to the claim in this case was the Carrier's letter of November 18, 2005 purporting to terminate Claimant's seniority and remove him from employment with the Carrier under Rule 16. Besides requesting an unjust treatment hearing under Rule 20, the Organization filed the Claim for the Claimant which asserted a violation of the Agreement by the termination of the Claimant's seniority and removal of the Claimant from employment pursuant to Rule 16. The claim was filed on January 14, 2006 and was plainly submitted within the sixty (60) day time limit for claims. The claim asserted that the Carrier violated Rule 16, set forth facts demonstrating that the rule was violated and contended that there was no basis for termination of the Claimant's seniority under Rule 16. Regardless of whether the request for an unjust treatment hearing was timely such that there was a valid claim for violation of Rule 20 (the Organization still maintains that the request was timely and the claim under Rule 20 was proper), there clearly was a timely claim for violation of Rule 16.

During the processing of the claim on the property, the Organization continued to assert that the Carrier violated Rule 16. See, for example, letters dated April 18, 2006, June 2, 2007 and February 11, 2008. The Organization's Ex Parte Submission to the Board also made that point and incorporated by reference and adopted the arguments and factual presentations on that point made during the on-property handling. See Ex Parte Submission Page 16. And, as the Board well knows, the Organization continued the assertion of a violation of Rule 16 and again noted the facts in support of that assertion in the Organization's presentation of its case in the hearing before the Board.

However, in its award in this case, the Board dismissed the claim in its entirety, based solely on the conclusion that the request for an unjust treatment hearing was not timely. But the Board never ruled on or even discussed the aspect of the claim that asserted the Rule 16 issue and

Labor Member's Dissent

Award 40486

Page Two

that the Carrier had violated the Agreement by termination of Claimant's seniority and termination of his employment. The entire claim was simply dismissed based on the finding that the request for an unjust treatment hearing was untimely without addressing the Rule 16 issue and that element of the claim. Dismissal was therefore clearly erroneous, ignored the terms of the Agreement, was contrary to the RLA and was an improper failure and refusal of the Board to perform its statutory function.

For these reasons, the Organization respectfully dissents.

Respectfully submitted,

A handwritten signature in cursive script, reading "Timothy W. Kreke", written over a horizontal line.

Timothy W. Kreke
Labor Member