

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41377
Docket No. MS-41357
12-3-NRAB-00003-100249**

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

(James A. Pauly

PARTIES TO DISPUTE: (

(BNSF Railway Company

STATEMENT OF CLAIM:

“Carrier violated the provisions of Rules 2, 7, 23, 24, 56, 57, 58, 64 and 75 of the TCU Agreement, along with other pertinent rules and agreements not specifically stated herein, at Brainerd, Minnesota on April 1, 2009, by Mr. Jeff Schurman, by not acknowledging and not being present for a properly submitted Unjust Treatment Hearing scheduled by James A. Pauly for April 1, 2009 at the Brainerd Public Library.

Carrier shall now be required to reverse its decision and allow a hearing on all the facts and circumstances pertaining to Mr. Pauly’s situation arising to the formal request made and hold hearing in accordance with Rule 58 of the Agreement as per the above mentioned request.

Suspended Claimant shall be compensated 8 hours per rata [*sic*] at WGR 11 for each and every day Suspended Claimant is not granted an Unjust Treatment Hearing commencing with April 1, 2009 and continuing until Unjust Treatment Hearing is held. Suspended Claimant is without compensation and benefits from the Carrier.”

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 claim under consideration follows on the heels of three related claims previously submitted by the Petitioner over the same or similar issues and rejected by the Board.¹ All, in one way or another, implicate the circumstances surrounding the Petitioner's placement on medical leave of absence in 2003 and the conditions imposed upon him for returning from that leave and resuming work as a clerical employee for the Carrier at Brainerd, Minnesota.

In this claim before the Board centering on the underlying issues, the Petitioner attempts to persuade the Board that the Carrier violated the Agreement by its failure to have its representative attend an Unjust Treatment Hearing that he had scheduled to discuss the grounds on which his efforts to resume work had been rejected. Specifically, on March 25, 2009, the Petitioner faxed a letter to J. Schurman, Superintendent Brainerd Roadway Shop, directing him "... to attend a Rule 58 Investigation to be held in the Brainerd Public Library, Brainerd, Minnesota . . . on Wednesday, April 1." In that communication, the Petitioner demanded that Schurman at that time "... be prepared to present supporting documentation that this leave is voluntary." In sum, the Board is again asked to

¹ In Third Division Award 40555, the Board rejected Pauly's claim of Agreement violation by the Carrier's refusal to schedule an Unjust Treatment Hearing in the face of his failure to comply with the terms of the Schedule Agreement in several important respects. In Third Division Award 40556 the Board reached a similar conclusion as a result of claim handling by the Claimant again inconsistent with the terms of the Agreement. In Third Division Award 40557 the Board once more determined that the Carrier's failure to make its representatives available for a Rule 59 Investigation could not be considered as violative of several Agreement terms because the claim was not properly progressed under the provisions of the governing Rules. Additionally, the record reflects that on March 5, 2009, the Honorable Earl E. Maus, Judge of MN District Court, Ninth Judicial District, Crow Wing County, entered an Order granting the Carrier's Motion for Dismissal of the Petitioner's appeal from an earlier Conciliation Court dispute where judgment had been entered in favor of the Carrier on the identical issues. Court File No. 19 CV-08-5610.

declare that the Carrier violated the Agreement by denying the Petitioner's demand for an Unjust Treatment Hearing, in this case unilaterally scheduled by the Petitioner. The Petitioner requests that the Board impose a penalty of eight hours' pay for each day such a Hearing is not granted.

As the Carrier's multiple written communications with the Petitioner plainly state, just as was the case with the Petitioner's three prior Submissions to the Board, this claim was also not properly progressed under the applicable Agreement terms. First, the matter was untimely submitted. Second, it was not properly progressed thereafter, having at no time been handled by a TCU Local Chairman as commanded by Rules 59 and 60, but instead appealed directly to the Carrier's highest designated officer authorized to receive such claims. Thirdly, there is no Agreement support for the \$800,000.00 relief claimed by way of daily penalties for failure to attend an improperly scheduled Hearing. Lastly, beyond the fatal procedural defects, the charge of "discrimination" lodged against Schurman in not allowing the Petitioner to return to work was not a proper subject for an Unjust Treatment Hearing.

The claim suffers from other shortcomings as well. No useful purpose is seen in addressing them, for by his own actions the Petitioner appears to have clearly abandoned his claim. The record reflects that proper and timely notice of the arbitration of these issues on May 16, 2012 was provided to the Petitioner. For his convenience and in the interest of eliminating any economic burden to him posed by travel, appropriate arrangements had been made for the Petitioner to appear and state his case from Brainerd via audio visual facilities provided by the National Mediation Board. On that date, although the Board was prepared to hear the arguments of the Petitioner at the appointed hour as scheduled, the Petitioner failed to either appear or advise the Board of his whereabouts. In response, the Board recessed the Referee Hearing for one hour so as to afford the Petitioner ample opportunity to appear, without success.

For the reasons stated above the claim is dismissed with prejudice.

Form 1
Page 4

Award No. 41377
Docket No. MS-41357
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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 25th day of July 2012.