

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41378
Docket No. MS-41530
12-3-NRAB-00003-110119**

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

PARTIES TO DISPUTE: (James A. Pauly
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(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 within, at Brainerd, Minnesota on December 2, 2009, by Mr. Ollie Wick/RS, by not acknowledging and not being present for a properly submitted Rule 58 UNJUST TREATMENT HEARING scheduled by James A. Pauly, on November 23, 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.

Railroaded non-employee Claimant shall be compensated eight (8) hours per rata [sic] at WGR 11 for each and every day railroaded non-employee Claimant is not granted a RULE 58 UNJUST TREATMENT HEARING commencing with December 2, 2009 and continuing until RULE 58 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.

This dispute is the fifth claim submitted by the Petitioner arising out of common background facts. Succinctly, for purposes of this case it is sufficient to note that the Petitioner was removed from service in 2003 when it became apparent that his hearing was so impaired that it posed safety issues while he operated a propane forklift. Although informed clearly and repeatedly that he would be required to submit clearance from his medical services provider before he would be permitted to return to work, the record is clear in establishing that no such documentation was ever provided. As a result, the Petitioner has been on a leave of absence from the Carrier since 2003 and at least through November 17, 2010, by agreement with the Transportation Communication International Union (TCU) was permitted to engage in outside employment while in leave status.

On November 25, 2009, the Petitioner wrote to General Director, Labor Relations O. Wick and directed him to attend a "Rule 58 Grievance Hearing" at the Brainerd Public Library at 2:00 P.M. on Wednesday, December 2, 2009 for the purpose of ". . . ascertaining facts concerning your document dated November 16, 2009" in which the Carrier had advised him that it and the TCU had extended his right to engage in outside work for another calendar year, until November 17, 2010. In response to the Carrier's reply declining a Rule 58 Grievance Hearing as not provided for in the Schedule Agreement, the Petitioner filed this claim asserting that the Carrier violated numerous provisions of the Agreement by not having its representative in attendance at a Hearing on December 2 as directed. As remedy, the Petitioner sought eight hours' pay for each day not granted an Unjust Treatment Hearing.

As with the Petitioner's four prior claims considered and rejected by the Board, this claim must be dismissed on grounds of fatal procedural flaws. In the interest of economy, we cite only one of those serious defects. Pauly filed the initial claim and then appealed the first level declination directly to the highest designated officer to receive claims without the requisite involvement of the Local Chairman. The Petitioner's

appeal to the Carrier's designated Labor Relations Officer constituted an improper progression of the dispute under the provisions of Agreement Rules 59 and 60. Those terms require inter alia that ". . . all declined claims must go through the Local Chairman before being progressed to higher levels of appeal." Special Board of Adjustment Appendix K, Case No. 135 (1986) (LaRocco). Additionally, as was the situation with Third Division Award 41377, even without the serious procedural infirmity noted, the Board would be compelled to dismiss this claim as abandoned by the Petitioner. With no notice or explanation, and despite a Referee Hearing recess in an effort to locate the Petitioner, he failed to participate in the teleconferenced audio-visual Hearing with the Referee, Carrier representatives and his own TCU representative on May 16, 2012, after specific arrangements had been made so as to alleviate travel cost burdens on the Petitioner. Under the circumstances, the Board finds it reasonable to conclude that no-showing his Referee Hearing in this instance without notice or explanation constitutes an effective abandonment of his claim.

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

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.