

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41816
Docket No. MW-41852
14-3-NRAB-00003-120126**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
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(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld from service by letter dated February 23, 2010, and subsequent dismissal by letter dated March 31, 2010) imposed upon Mr. C. J. Gebhart for alleged violation of MOWOR 1.6 Conduct in connection with charges of alleged dishonesty and misrepresentation of his on-duty injury on February 19, 2010 at Havre, Montana while working as a water service mechanic was arbitrary, capricious and in violation of the Agreement (System File B-M-2165-M/11-10-0287 BNR).**
- (2) The claim as presented by Vice General Chairman D. L. Maier on April 16, 2010 to Mr. R. T. Bartoskewitz, General Manager Montana Division, shall be allowed as presented because said claim was not disallowed by Mr. R. T. Bartoskewitz in accordance with Rule 42(A).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant C. J. Gebhart shall now have his record ‘. . . cleared of the charges and proceedings of this investigation (File Number MON-MOW-10-0089). We also request that Mr. Gebhart be made whole for any loss of earnings from the time withheld from service on February 23, 2010, until he is returned to service and he be reimbursed for personal mileage, on a round trip basis, from his home in Great Falls, Montana, to Havre, Montana where the investigation was held. We further request Mr. Gebhart be made**

whole for any loss of fringe benefits, including but not limited to, insurance, railroad retirement credit, vacation credit, etc.’”

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 Organization objects to the matter on a procedural ground. It asserts:

“The Carrier committed a serious procedural error when it failed to properly disallow the instant claim as presented in accordance with Rule 42 A of the Agreement requiring the instant claim be sustained.”

Rule 42 A states:

“All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances.” (Emphasis added)

The relevant facts follow:

1. The occurrence on which the claim was based took place on February 19, 2010.
2. The relevant Investigation was held on March 3, 2010.
3. As a result of that investigation, the Claimant was dismissed effective March 31, 2010.
4. By letter dated April 16, 2010, the initial claim was filed on behalf of the Claimant with General Manager Bartoskewitz, the officer of the Company authorized to receive it. This was within the 60-day requirement of Rule 42 A. Vice General Chairman D. Maier filed the claim. Maier's office is in Milius City, Montana.
5. By letter dated June 14, 2010, Bartoskowitz sent a letter to General Chairman Bruce G. Glover declining the grievance. This was within the 60-day requirement of Rule 42 A. The letter was sent to Glover's office in Minneapolis, Minnesota.
6. 60 days elapsed without receipt by Maier of a response from the Carrier.
7. By letter dated June 19, 2010, Maier informed Bartoskowitz that because there had not been a timely response, the claim must prevail.
8. By letter dated July 9, 2010, Bartoskewitz wrote Maier, in relevant part:

“A careful review of my records indicates that a response to your April 14, 2010 letter was in fact, sent to the Organization. However, it appears the June 14, 2010 response was inadvertently sent to BMWED Chairman, Bruce Glover at the address listed on your letterhead.”
9. In a letter dated October 7, 2010, the General Director of Labor Relations wrote:

“The Organization's original appeal was submitted on letterhead displaying the Organization's 510 1st Avenue North #601, Minneapolis, MN address. Clearly this is

misleading and invites the risk of correspondence being misdirected as was the case here.

As you know, this is not the first such problem of this nature and continued use of this stationary only serves to invite additional problems in the future. If the Organization continues to file claims or appeals on stationary containing not one but seven addresses – some printed predominantly, some not – with the most predominant being the 510 1st Avenue North address, confusion will cause a continuation of this kind of error.

But is this error such that it rises to the level of procedural default as alleged here? Of course not. The error is obviously harmless. The Organization received the certified letter declination on time at the General Chairman's 510 1st Avenue North address and you have not shown otherwise. The fact is that if Vice Chairman Maier truly did not timely receive the declination, it was only because the General Chairman did not forward the letter in order to generate a procedural argument."

In its Submission, the Carrier takes up the argument:

"The grievance was submitted on letterhead prominently displaying the Organization's 510 1st Avenue, Minneapolis, MN address, which is the General Chairman's address; however, there were six additional addresses on that letterhead, shown in smaller print size, one of which was Mr. Maier's. Clearly, a letter bearing seven return addresses was misleading and invited the risk of reply correspondence being misdirected, and that is exactly what happened here.

*** * ***

This is not the first such mishap. Unfortunately, the Organization's continued use of this confusing multi-address stationary virtually ensures repetition of this problem in the future: since clerical and administrative staff may rotate in and out, there is always the potential of one being misled by the Organization's use of a multi-address letterhead."

In support of its argument, the Carrier cites Third Division Award 35916 and Public Law Board No. 6204, Award 17. We are not able to assess the relevance of PLB 6204, Award 17 because the document included in the Carrier's Submission as Carrier's Exhibit No. 18 was PLB 6204, Award 11. Third Division Award 35916 dealt with the following language:

"Rule 62 UNJUST TREATMENT

An employee who considers himself unjustly treated in matters other than discipline, or in matters other than those arising out of the interpretation and application of the rules of this Agreement, shall have the same rights as provided in Rule 40, if written request is made to his immediate supervisor within twenty (20) calendar days after the occurrence of the cause for complaint."

In the case addressed by Award 35916, an employee was disqualified from a position and the Organization sent the Rule 62 request to the Division Superintendent, a Carrier Official who, the Carrier asserted, was not the employee's immediate Supervisor. The Board in that case wrote:

"Notably, the Carrier did not dispute that the Division Superintendent received the Organization's claim and request; nor is it disputed that the Carrier was aware of the Claimant's desire to have an Unjust Treatment Hearing. However, the Carrier made no attempt to inform the Organization or the Claimant of the apparent error, nor did the Carrier identify the proper Carrier Officer to whom the request could be made. In these circumstances, it is clear that the Carrier's actions or rather lack thereof, deprived the Claimant of a valuable contractual right and violated the intent of the Agreement between the parties."

We do not find the Carrier arguments referenced above to be persuasive for the following reasons.

- The Carrier makes much of the fact that the Organization's letterhead contains seven addresses and is therefore confusing. This argument fails for two reasons.
- The first and controlling reason is that mailing the Carrier's denial of the claim to the wrong address is not what is important. What is important is that the language of Rule 42 A of the Agreement states without ambiguity that the Carrier's response

“... shall ... notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance.” The person who filed the claim was Duane L. Maier, Vice General Chairman of the Organization. The person to whom the denial was sent was Bruce G. Glover, the Organization’s General Chairman. Glover was not the person who had filed the claim. Rule 42 A also states, also without ambiguity, “If not so notified [that is, if the person who filed the claim is not notified of the denial in writing], the claim or grievance shall be allowed as presented ...” Maier filed the claim. Glover was notified of the denial. This was not what Rule 42 A commanded. Because this was so, the Rule also provides, “... the claim or grievance shall be allowed as presented ...”

- Whether intended or unintended, the Carrier’s characterization of the letterhead as confusing is but a red herring. Moreover, the reasoning presented in support of this is unpersuasive. Because the Organization has a large service area, it has several officers located throughout that area and it has chosen to list all such offices on one letterhead. The design of its stationary is its decision to make.
- If one notices seven addresses on that one letterhead, one – by that very awareness – might also take notice that the seven addresses differ one from the other. Moreover, each differing address is headed by the specific officer of the Organization to whom that address applies.
- The Carrier argues that the letterhead “... virtually ensures repetition of this problem in the future: since clerical and administrative staff may rotate in and out, there is always the potential of one being misled by the Organization’s use of a multi-address letterhead.” The Board notes, however, that the person who sent the denial of the claim to the wrong person (by name, as well as address) was not a member of the Carrier’s clerical or administrative staff; he was the General Manager of the Montana Division.
- The Carrier states – with regard to the “confusing multi-address stationary” – “This is not the first such mishap.” If so, one is forced to wonder why the Carrier has not learned from past experience and set up defenses against repeating an error that does serious harm to its interests.

The Board has no choice in this matter. As the Organization points out, the Carrier has faced situations where discipline must be overturned because clear procedural requirements were not honored in instances in which the Agreement clearly

spells out the requirement and consequences if the requirement is not met. (Examples are found in Third Division Awards 32016, 32889, 35607, 36041, and 37269.)

Once it is determined, as it has been in this case, that the requirement of Rule 42 A that the Carrier “notify whoever filed the claim or grievance . . . of the reasons for such disallowance” has not been observed, the Board has no alternative but to obey the remainder of the Rule; namely, “the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances.”

AWARD

Claim sustained.

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 27th day of February 2014.