

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42457
Docket No. SG-41515
16-3-NRAB-00003-110118**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Northeast Illinois Regional Commuter Railroad
(Corporation (Metra)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Northeast Illinois Regional Commuter Rail Corp. (formerly Northeast Illinois Regional Commuter Rail Corp.):

Claim on behalf of C. Cross, for Carrier to provide the Claimant with an Unjust Treatment hearing based on Rule 58 which Carrier violated when it would not provide the Claimant his Agreement right to a hearing, and that Carrier cease the practice of requiring the Claimant to stay home on his normal workday in order to avoid overtime. Carrier’s File No. 11-33-735. General Chairman’s File No. 32-D-09. BRS File Case No. 14500-NIRC.”

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 9, 2009 the Organization requested that Claimant, a Relief Maintainer, be given an Unjust Treatment (UT) hearing under Rule 58, to develop the record regarding Claimant's Supervisor's order not to work on October 26, 2009, his regular assigned work day, which, it alleged, was part of a continuing practice. Carrier denied the request by letter dated November 16, 2009, asserting that it was a request for wages which would be a claim under Rule 56. It appears from the record that a claim under Rule 56 was also filed by the Organization on November 23, 2009 alleging a violation of Rules 10, 12, 15, 74 and the Vacancy Relief Agreement (VRA) concerning requiring Claimant not to work his regularly assigned day in order to avoid paying overtime. That claim was denied by this Board in March, 2014 in Award 41827.

The instant claim was filed on January 11, 2010, and amended on January 13, 2010, protesting Carrier's refusal to grant Claimant a UT hearing under Rule 58, indicating that the supervisor made a determination about the validity of the complaint without an investigation, and that Claimant was treated in a disparate and discriminatory manner and prevented from being compensated at the overtime rate. The remedy requested by the Organization was a cease and desist order preventing Carrier from engaging in the unfair practice of requiring Claimant to stay home on his regularly assigned work day. The initial and subsequent denials and correspondence on the property establish the Organization's position that Carrier is not free to unilaterally combine claims and must provide a Rule 58 hearing once requested, and Carrier's position that the claim was procedurally defective, the intent of Rule 58 was not to permit claims seeking the same redress in multiple forums, and that the Board is not empowered to grant the injunctive relief requested.

The pertinent Rules provide:

"RULE 53. INVESTIGATIONS AND DISCIPLINE

(b) Such investigation shall be held within ten (10) days from the date his immediate superior of the rank of at least Signal Supervisor has knowledge of the offence Decision will be rendered within ten (10) days after the date the investigation is concluded. The employee and his representative will be advised in writing of this decision.

RULE 58 - UNJUST TREATMENT

An employee who considers himself otherwise unjustly treated will have the same right of investigation and appeal as provided in this Agreement, if written request is filed with the railroad within twenty (20) days from the cause of complaint. If such request is not made within twenty (20) days from last date of cause of complaint, all redress hereunder will be waived by all parties.”

The Organization argues that Carrier has no contractual right to deny Claimant's timely request for a UT hearing under Rule 58, even if he is seeking redress for the same underlying issue under Rule 56, citing Third Division Awards 11340, 38001, 26226, 10069; Public Law Board No. 5439, Award 22. It asserts that Claimant has the contractual right to progress a claim in accord with Rules 53 and 55. The Organization maintains that the denial of the request for a UT hearing was properly progressed directly to Labor Relations, and that there is no procedural defect barring consideration of this claim. Finally, the Organization states that the Board has the authority to issue a cease and desist remedy, which is appropriate in this case, relying on First Division Award 25950.

Carrier contends that this is a duplicative claim, since the Organization already tried to seek the same monetary remedy based on the same facts underlying this case and was unsuccessful, and it cannot be permitted to take multiple avenues to achieve the same result. It notes that the only appropriate remedy for a violation of Rule 58 would be to grant a UT hearing, which was not specifically requested until the Organization lost its Rule 56 claim, and posits that the Board has no jurisdiction to grant the injunctive relief requested in this case. Carrier also asserts that this claim is procedurally flawed because it was not timely filed or progressed to the appropriate Carrier officer.

A careful review of the record convinces the Board that, despite the fact that Claimant's request for monetary relief for being sent home and not permitted to work on his assigned work days of October 27-30, 2009 was denied by the Board in Third Division Award 41827, the instant claim is not duplicative since it protests Carrier's November 16, 2009 denial of Claimant's November 9, 2009 request for a UT hearing under Rule 58 concerning the underlying practice of not permitting Claimant to work on his assigned work days in order to avoid paying the overtime rate. This claim deals with the issue of whether Carrier is permitted to deny a timely request for a Rule 58 UT hearing based solely upon its belief that the underlying

issue is more properly processed as a Rule 56 claim, is actually being so processed, or is without merit. The plain language of Rule 58 does not give Carrier that unfettered right to deny a properly received request for a UT hearing. Rather, it gives an employee who “considers himself otherwise unjustly treated” the “same right of investigation and appeal as provided in this Agreement” While Claimant cannot obtain a duplicative remedy in two forums, there may well be appropriate remedies other than monetary to deal with proven allegations of unjust, disparate or discriminatory treatment. In the case of a Rule 58 violation, the appropriate remedy must, of necessity, be a direction for Carrier to hold the requested UT hearing. See, e.g. Third Division Award 38001, 26226.

Carrier, as well as the employee, are bound to comply with the time limits contained in Rule 53 in processing such claims. In this case, there is no evidence that Claimant was given a UT hearing at any point, let alone in a timely manner. While the cease and desist order requested by the Organization is not appropriate as it deals with the underlying merits of the dispute which were resolved in Third Division Award 41827, the Board is empowered to direct Carrier to grant Claimant a UT hearing, if he still so desires, and to comply with the provisions of Rule 58 in response to timely requests for a UT hearing in the future.

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 31st day of October 2016.