

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42458
Docket No. SG-41613
16-3-NRAB-00003-110255**

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 Railroad Corp. (formerly Northeast Illinois Regional Commuter Rail Corp.):

Claim on behalf of R.B. Haywood, for four hours pay at the overtime rate and for Carrier to cease its unfair practices against the Claimant, account Carrier violated Agreement Rule 58 when it denied the Claimant his right to an Unjust Treatment hearing which was requested on November 9, 2009. Carrier’s File No. 11-63-734. General Chairman’s File No. 31-D-09. BRS File Case No. 14515-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 Signal Maintainer, be given an Unjust Treatment (UT) hearing under Rule 58, to

develop the record regarding Claimant's allegation that he was instructed by Director Richardson to stay after regular work hours to fix a problem on October 21, 2009, and was not paid for the additional four hours since the Director denied giving such instruction, which, the Organization alleged, was part of a continuing practice of unfair treatment against Claimant. 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.

The instant claim was filed on January 11, 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. The remedy requested by the Organization was for compensation for four hours at the overtime rate and for Carrier to cease its unfair practices. The claim for four hours pay was denied by Carrier on March 11, 2010 based upon the fact that Claimant was a monthly rated employee and the disputed work performed fell within that rate. However, without prejudice to its position, Carrier granted Claimant's request for a UT hearing, indicating that it would be scheduled by the Engineering Department. The claim was conferenced on September 28, 2010 and denied on October 15, 2010.

In its November 9, 2010 appeal, the Organization noted that no UT hearing had yet been held, and that since it was not timely scheduled and Carrier had prejudged the merits, no fair and impartial hearing could occur. Carrier's November 24, 2010 denial points out that this last appeal was the first time the Organization raised the fact that the UT hearing had not taken place, that it was never discussed at conference, that the matter was not scheduled due to an oversight by the Engineering Department, but that the Organization bears joint responsibility for the delay since it did nothing between March 11 and November 9 to bring this fact to Carrier's attention. It asserted that a fair and impartial hearing could be conducted, and there was no evidence of bias or prejudgment shown by the Organization. The transcript of the UT hearing held on December 10, 2010 appears in the record and reveals that both Claimant and Director Richardson testified. By letter dated December 22, 2010, Claimant was notified that no evidence of unjust treatment by Richard against him had been established.

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 the time limits contained in Rule 53 apply to the holding of a UT hearing under Rule 58, and that Rule 58 does not give Carrier the right to deny such a request when it is timely made, as it did in this case. It asserts that there can be no compliance with Rule 58 when there is unreasonable delay in granting the UT hearing, and that such delay prevents Claimant from timely appealing the matter in accord with the provisions of Rule 55. The Organization requests that Claimant be paid the 4 hours sought by the claim as the appropriate remedy for a violation of Rule 58 in this case.

Carrier contends that the only remedy available under Rule 58 is the holding of a UT hearing, which occurred in this case. It notes that the Organization bears joint responsibility for the delay in holding the hearing, which was granted on March 11, 2010, by taking no action to raise the issue until some 8 months later. Carrier maintains that Claimant was given a fair and impartial hearing and there is no showing as to any bias or prejudgment. Carrier asserts that since the remedy request reveals that this is actually a time claim, it was not progressed in accordance with the Agreement and should be dismissed.

A careful review of the record convinces the Board that, the Organization has sustained its burden of proving a technical violation of Rule 58 in the circumstances of this case. The November 16, 2009 denial of Claimant’s request for a UT hearing was not in compliance with the plain language of Rule 58, which gives an employee who “considers himself otherwise unjustly treated” the “same right of investigation and appeal as provided in this Agreement . . . ,” and does not give Carrier the unfettered right to deny such a request based solely upon its position on the merits of the underlying dispute involving the entitlement to a monetary remedy under the circumstances of a particular case, or its belief that it would best be handled through the Rule 56 claims process. See, e.g. Third Division Award 38001 and 26226.

Since the appropriate remedy for a violation of Rule 58 is an order directing the holding of a UT hearing, the issue in this case is whether the holding of such hearing some 13 months after the initial request, adequately remedies the violation. Carrier, as well as the employee, are bound to comply with the time limits contained in Rule 53 in processing such claims. Carrier initially granted Claimant's right to a UT hearing in its March 11, 2010 claim denial. The Board is in agreement with Carrier that both parties bear some responsibility for the extensive delay in holding the UT hearing in this case. While it is Carrier's responsibility to schedule a hearing, it is the Organization's responsibility to assure that Claimant's right to a timely hearing is met, and to bring to the attention of Carrier the fact that the agreed hearing had not yet been held, especially during the time that the monetary claim was being processed and the parties met for conference. Based upon a review of the transcript of the UT hearing, we find no basis for concluding that Claimant was not afforded his Agreement right to a fair and impartial hearing. Under the particular facts of this case, the Board concludes that no further remedy is appropriate.

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.