Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42755
Docket No. MW-42407
17-3-NRAB-00003-140015

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

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it refused to grant Claimants J. Lavoie, J. Rowe, Jr., P. Sledziewski, T. Rodgers, K. Mertsch, A. Parma and S. Sinclair a one (1) year leave of absence (Carrier's File 2013-139397 CSX).

(2) The claim as presented by General Chairmen T. J. Nemeth and D. A. Bogart, Jr. To Division Engineer G. G. Whilhite shall be allowed as presented because said claim was not disallowed by Mr. G. G. Wilhite in accordance with Rule 24(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Lavoie, J. Rowe, Jr., P. Sledziewski, T. Rodges, K. Mersch, A. Parma and S. Sinclair shall be considered on a One (1) year leave of absence from the Carrier commencing on the date '* a sustaining award is issued by a tribunal constituted under Section 3 of the Railway Labor Act.'"**

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 Carrier, in 2010, entered into a transaction to sell certain line segments to the Massachusetts Department of Transportation, thereby relieving it of the responsibility for track maintenance and the dispatching of trains on the lines. Thereafter, rail traffic would be operated by the Massachusetts Bay Commuter Railroad under contract with the Massachusetts Bay Transportation Authority ("MBTA"). The Carrier also retained an easement for freight operations, but intended to sell a portion of that easement to Massachusetts Coastal Railroad, LLC ("Mass Coastal"). In conjunction with this transaction, the Carrier and the Organization entered into an agreement, dated June 10, 2010, for the protection of affected employees. Section 1 of the agreement states:

> **"The Parties agree that economic protective benefits equivalent to those contained in Article I of the New York Dock employee protective conditions will be provided to any employee who may be determined to be displaced or dismissed as a result of the Mass Line Transaction."**

Under this agreement, the parties agreed that the Carrier will grant one-year leaves of absence to employees who accept official or craft positions with MBTA or Mass Coastal. Section 6 provides, in relevant part, as follows:

> **"The Parties recognize that employees subject to this Agreement who are offered positions with MBTA, Mass Coastal or their operators subsequent to the effective date of this Agreement may be faced with an element of uncertainty. Therefore, a written leave of absence without impairment of seniority shall be granted upon written request from such employee to CSXT's Highest Designated Officer (HDO) to accept an official or craft position with MBTA, Mass Coastal or their operators with the following conditions:**

On September 27, 2012 Claimants submitted a request for a leave of absence to Director Labor Relations N. V. Nihoul, the HDO for handling claims by the maintenance of way craft. Nihoul sent letters to each Claimant on January 4, 2013 advising that their requests were denied because they were neither displaced nor dismissed as a result of the transaction. On January 30, 2013, the General Chairman filed a claim on behalf of Claimants with Division Engineer G. Wilhite. By letter dated March 28, 2013, Director Nihoul denied the claim. An appeal was filed on April 30, 2013, asserting, inter alia, that the claim must be allowed because it was not denied by Division Engineer Wilhite within the 60 day time limit.

The Carrier first asks the Board to dismiss the claim, arguing that it should have been handled pursuant to Section 11 of the New York Dock employee protective conditions. It denies, therefore, that the Board has jurisdiction. The Board rejects this argument. While disputes of this nature generally are within the exclusive jurisdiction of the dispute resolution procedures established under employee protective conditions imposed by the Surface Transportation Board, we find that the parties herein have agreed otherwise. Section 8 of the June 10, 2010 agreement states:

> **"The parties recognize that, with respect to the Mass Coastal Transaction, any dispute whether this Agreement satisfied the requirements of the STB or 49 U.S.C. § 11326 (a) for an implementing agreement and any disagreement over the interpretation, application or enforcement of this Agreement is within the jurisdiction of the STB. Any dispute concerning the application of this Agreement to the Mass Line Transaction is a minor dispute and is subject to the exclusive dispute resolution procedures of the Railway Labor Act."**

Accordingly, we find that the dispute is properly before this Board.

We turn next to the Organization's argument that the claim must be sustained without regard to the merits because of the Carrier's failure to properly deny the claim in accordance with Rule 24(a) of the Agreement, which states:

> **"A claim or grievance must be presented, in writing, by an employee or on his behalf by his union representative to the Designated Officer, or other designated official within (60) days from the date of the occurrence on which the claim is based. The Designated Officer, or**

> **other designated official shall render a decision within sixty (60) days from the date same is filed, in writing, to whoever filed the claim or grievance (the employee or his union representative.) When not so notified, the claim will be allowed."**

The Organization asserts it submitted the claim to the official designated by the Carrier to receive claims at the initial level. It is that person, says the Organization, who should have issued the denial. We do not find the Rule to be so limiting. It does not explicitly require that the claim be denied by the same person to whom it was filed, so long as it is denied by a "designated official." In this regard, the Rule is distinguished from the rule relied upon in Award 39957, cited by the Organization. In that case, the parties' rule required the claim to be filed to the supervisor, and specifically required the supervisor to issue the notification of disallowance.

In the instant case, the claim was denied by the Highest Designated Officer, who satisfies the Rule's requirement. We especially note that the request for the leaves of absence was initially presented to the HDO in accordance with the terms of the protective agreement. As he represents the last step in the claims process, it makes sense for him to be the person to issue the denial of the claim, regardless of the level at which it was initially presented. It would be illogical to require the Division Engineer to pass judgment upon the HDO's decision to deny the leaves, when the claim must then be progressed back to the HDO. As the claim was denied within the 60 day time limit, we will consider it on its merits.

Our reading of the June 10, 2010 agreement, particularly Section 1, leads to the conclusion that it was intended to cover those employees "who may be determined to be displaced or dismissed as a result of the Mass Line Transaction." Section 6, then, grants the privilege of obtaining a leave of absence to those "employees subject to this Agreement." If the parties intended to extend the opportunity to obtain a leave of absence to all maintenance of way employees, it would not have been necessary to add that phrase. Because they did use the phrase, we must find that it has some meaning.

The record does not establish that Claimants were either displaced or dismissed as a result of the transaction. Therefore, we find that they were not employees subject to the agreement. Accordingly, they were not entitled to leaves of absence under Section 6. The Carrier's denial of their request was not a violation of the Agreement.

AWARD

Claim denied.

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 September 2017.