

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43698
Docket No. MW-45176
19-3-NRAB-00003-180702**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1) The discipline [fifty-six (56) day suspension and one (1) year review period] imposed upon Mr. J. Hansen by letter dated June 2, 2017 for violation of EI 14.3.3 in connection with his alleged conduct surrounding an incident resulting in damage to a Carrier machine on April 7, 2017 was on the basis unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-17-D040-25/10-17-0278 BNR).**
- 2) The claim as presented by letter dated June 19, 2017 to General Manager Chicago Division J. Jenkins shall be allowed as presented because said claim was not disallowed by Mr. Jenkins in accordance with Rule 42.**
- 3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. Hansen shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits. ”**

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.

On April 7, 2017, Roadmaster J. Blydenburgh received a service interruption email stating that a switch was out of correspondence at East Winona due to a switch machine being damaged. When he arrived at the scene, he was informed that an on-track machine had struck the switch machine, damaging it. Blydenburgh then spoke with the Claimant, a machine operator, who said while waiting on a train at East Winona, he let the wing of the machine down so he could clean the windows. Then, when it was time to move on, the Claimant did not put the wing all the way up and lock it. While he was traveling, the wing came down and made contact with the switch machine.

The Organization complains that BNSF violated Rule 42 because the letter assessing discipline dated June 2, 2017, was not picked up by Vice-General Chairman George Loveland until June 7, 2017, 34 days after the investigation was conducted. The Organization further argues that General Manager Jenkins' declination dated August 21, 2017, was again not picked up by Vice-General Chairman George Loveland until August 24, 2017.

Rules 40 and 42 state as follows in pertinent part:

"RULE 40. INVESTIGATIONS AND APPEALS

- D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employee, with copy to local organization's representative. * * ***

- J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.

RULE 42. TIME LIMIT ON CLAIMS

- A. 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.”

The chronology of key correspondence in this case was as follows:

- “ • June 7, 2017: Discipline letter (dated June 2, 2017) received by Vice General Chairman Loveland;
• June 23, 2017: Loveland appeal letter (dated June 19, 2017 and sent to Carrier via Certified Mail on June 21, 2017) received by the Carrier;
• August 24, 2017: Carrier declination letter (dated August 21, 2017, accepted at USPS Origin Facility on August 22, 2017) available for pickup by Loveland.”

The Organization’s timeline calculation is: 7 days in June + 31 days in July + 24 days in August = 62 days.

The Carrier contends the act of placing the notification letter into the shipper’s control prior to the expiration of the 60-day time limit constituted compliance with the timeliness requirements of Rule 40.

The Organization references Awards 7738 and 42698, insisting that the language of the Agreement must control. It notes this is the fourth time this issue has been brought to arbitration, in an effort to ignore the express precedent of three different arbitrators.

In terms of the merits, the Organization notes the Claimant is a 37-year veteran with no prior discipline. The reason he needed to clean his window is that he had a hydraulic leak, a situation not at all his fault. Further, he was being rushed. These mitigating circumstances were completely ignored by the Carrier, it asserts. In addition, the Organization maintains the hearing officer was biased and prejudiced the case by getting evidence from witnesses before the hearing then introducing it. Further, the Carrier never offered any documentation that showed how fast the Claimant was moving at the time of the alleged incident, never offered a damage estimate, and failed to identify how the Claimant was a danger to himself or his co-workers.

We will first address the procedural issues, noting that the history of arbitral interpretation of Rule 42 is a critical factor in this case:

Award No. 37911, issued by R. Meyers in June of 2006, states in pertinent part:

“Moreover, the record reveals that the Organization's initial appeal was sent by the Vice General Chairman on November 5, 2003, and was received by the Carrier on November 6, 2003. Rule 42(A) requires that the claim must be disallowed" ... within sixty (60) days from the date same is filed." The Rule goes on to state that "... if not so notified, the claim or grievance shall be allowed as presented" The record reveals that the Carrier responded to the appeal by the Organization by letter dated January 5, 2004, which was not received by the Vice General Chairman until January 6, 2004. Consequently, the Carrier's response was not received by the Organization's representative until either 61 or 62 days after it was filed. The Carrier, therefore, violated the requirements of Rule 42(A) and, once again, the claim must be sustained as written.”

Award 42698, issued by B. Helburn in July of 2017, states as follows in pertinent part:

“Third Division Award 32889 explained that “We follow this [Marx Award] precedent because to do so provides the parties with a greater degree of certainty and predictability in their claims handling process.” This Board, subscribing to the reasoning expressed in the Third Division Award, follows the precedent set in the latest, definitive on-property award, and thus finds a violation of Rule 42.A.”

Award 42966, issued by M.G. Whelan in February of 2018, states as follows in pertinent part:

“Similarly, in Third Division Award 42698, the Board reviewed several awards considering whether denials of claims must be mailed or received with the sixty (60) day time frame. In that case, the denial of an unjust dismissal claim was delivered to the Organization sixty-one (61) days after the claim was filed. The Board held that:

“Third Division Award 32889 explained that “We follow this [Marx Award] precedent because to do so provides the parties with a greater degree of certainty and predictability in their claims handling process.” This Board, subscribing to the reasoning expressed in the Third Division Award, follows the precedent set in the latest, definitive on property award, and thus finds a violation of Rule 42.A.”

The Carrier maintains the timeline calculation ends when it places a notification document in the mail. In support of this argument, it cites Awards 45176, 45099 and 45130. The Organization notes none of the awards cited by the Carrier are on property.

We are cognizant of the deep value of precedent in offering the parties predictability and stability in their relationship. In our view, on property awards must be followed absent some convincing reason for doing otherwise. We do not view off property interpretations in the same light and therefore defer to the consistent rationale of referees who have carefully reviewed this question, each reaching the same consistent and well-reasoned determination.

Rule 42 flatly states that when the 60-day limit has been exceeded, “the claim or grievance shall be allowed as presented.” “Shall” is mandatory language, leaving no option for alternative results. We agree with Referees Meyers, Helburn and Whelan that the language of Rule 42 is in no way ambiguous; its meaning is clear: unless the declination letter is actually received by the Claimant(s) and the Organization representative within 60 days of the Organization’s appeal, the claim must be allowed as presented. In this case, the letter was not received until 62 days after receipt of the Organization’s appeal. It follows that the claim shall be allowed as presented. Given this mandated result, we do not reach the other procedural arguments or the merits of the case.

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 18th day of June 2019.