

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44788  
Docket No. SG-46092  
22-3-NRAB-00003-200336**

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

**(Brotherhood of Railroad Signalmen  
PARTIES TO DISPUTE: (  
(Union Pacific Railroad Company**

**STATEMENT OF CLAIM:**

**“Claim on behalf of J.L. Berding, for the removal of the disqualification from his record and placement on his former Skilled Signal Maintainer position along with the difference in pay, including overtime, between the Signaller position he was forced to and the Skilled Signal Maintainer position he was removed from starting on October 1, 2018, and continuing until he is placed back on the Skilled Signal Maintainer position; account Carrier violated the current Signalmen’s Agreement, particularly Rules 55(B), and 57, when it failed to render a decision for the Unjust Treatment Hearing held on November 29, 2018, and failed to provide the transcript for said Hearing. Carrier's File No. 1716146. General Chairman's File No. N 0171. BRS File Case No. 16151-UP. NMB Code No. 117.”**

**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 October 1, 2018, Carrier informed the Claimant that he was disqualified from the position of Skilled Signal Maintainer and prohibited the Plaintiff from working any Skilled Signal Maintainer position while disqualified. In a letter dated October 4, 2018, the Organization requested an Unjust Treatment Hearing under Rule 57 to resolve the Claimant's disqualification issues. The Carrier held the Unjust Hearing on November 29, 2018.

By letter dated January 10, 2019, the Organization filed a claim on behalf of the Claimant contending the Carrier violated Rule 57. The Organization argued Carrier disqualified the Claimant from his Signal Maintainer position and failed to render a decision and provide the transcript from the Unjust Treatment Hearing held on November 29, 2018.

#### **RULE 55 – INVESTIGATIONS, DISCIPLINE AND APPEALS**

**“B. If a waiver is not offered and accepted, a formal investigation will be held and the employee will have the right to be represented at the investigation by an employee of his choice or by his duly accredited representative, and the employee and his representative will have the right to interrogate all witnesses produced by the Carrier. If the employee desires to have witnesses present at the investigation, the employee will have the right, at his expense, to bring to the investigation such witnesses. The Carrier will have the right to interrogate witnesses produced by the employee. The degree or level of discipline offered an employee on a waiver will not be increased to a higher level due to the employee not accepting the waiver. The employee may, however, be held out of service pending such investigation if serious infractions of the rules or safety are involved. In all disciplinary cases, except as otherwise provided in the footnote, the employee will be notified in writing of the specific charge or charges against him within fifteen (15) calendar days from the date the Carrier had knowledge of the alleged offense. Certified U.S. Mail will be considered written notice.**

**When the Claimant is being held out of service, the investigation will be held within fifteen (15) calendar days from the date the employee is held out of service. When the Claimant is not being held out of service, the investigation will be held within thirty (30) calendar days from the date the employee is charged.**

**C. In cases wherein the Claimant is being held out of service, a decision will be rendered and the employee notified within fifteen (15) calendar**

days after the completion of the investigation. If discipline is to be assessed, a transcript of the testimony taken at the investigation will be furnished to the employee under charge and his representative within fifteen (15) calendar days after the close of the investigation. In cases where the Claimant is not being held out of service, a decision will be rendered and the employee notified within thirty (30) calendar days after the completion of the investigation. If discipline is to be assessed, a transcript of the testimony taken at the investigation will be furnished to the employee under charge and his representative within thirty (30) calendar days after the close of the investigation.”

#### **RULE 56 – CLAIMS AND GRIEVANCES**

A. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim be disallowed, the Carrier will, within 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 will be allowed as presented, but this will not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances...

#### **RULE 57 – UNJUST TREATMENT**

“An employee who considers himself unjustly treated, other than covered by these rules, will have the same right of hearing and appeal as provided in Rule 55 B if written request is made to his immediate supervisor within ten (10) calendar days of cause of complaint. Failing to dispose of the complaint in such hearing, appeal may be taken in accordance with Rule 56. Any complaint made by one employee against another will be made in writing.”

By letter dated February 18, 2019, The Carrier referenced and responded to the Organization’s letter dated January 10, 2019, stating the claim is without merit, and simple allegations do not satisfy the burden of proof. The Carrier contended the Organization failed to provide documentation with the claim, and such documentation should be provided with the appeal. The Carrier concluded the claim was denied in its entirety for lack of merit.

In a letter dated March 15, 2019, the Organization responded to Carrier's denial letter dated February 18, 2019. The Organization notified Carrier that as a result of the violation of Rule 56 and Article V of the August 21, 1954, National Agreement that it was outside of the 60-day time limit to respond to the claim with reasons in writing for the disallowance. Thus, the claim should be allowed as presented.

By letter dated April 25, 2019, Carrier denied the claim and asserted it is not obligated to provide the Transcript of the Unjust Treatment Hearing when it does not involve discipline. Carrier attached the decision rendered by the General Director and the Transcript of the Unjust Treatment Hearing. Carrier alleged the Organization failed in its burden to prove the Claimant was treated unjustly or that his disqualification was not warranted.

On July 9, 2019, the parties conferenced the claim, and the positions of the parties remained unchanged. The dispute is now properly before the Board for adjudication.

#### **The Position of the Organization**

The Organization contends that Carrier violated Rule 56 when it failed to provide reasons for the disallowance of the claim within the 60-day time limit. As a result, the claim shall be allowed as presented. The Organization also contends that the Carrier violated Rules 55 and 57 when Carrier failed to render a decision and provide the transcript until nearly a month after the Organization submitted the claim. Further, the Organization contends that the Carrier arbitrarily disqualified the Claimant from his Signal Maintainer's position and from holding all other Signal Maintainer positions without providing evidence to substantiate the disqualification. Lastly, it is the position of the Organization that the claim is allowed.

#### **The Position of the Carrier**

The Carrier contends that the Organization failed to meet its burden of proof. The Carrier asserts its managerial right to determine the fitness and ability of its employees. The Carrier argues that the evidence of record does not establish that the determination was either arbitrary or capricious. The Carrier contends that the parties did not negotiate a requirement to provide a transcript for a Rule 57 hearing. The Carrier further points out there is no language that requires the parties to record the hearing. Moreover, the Carrier states that the Organization

was provided with a copy of the transcript rendering their argument moot. Lastly, it is the position of the Carrier that the claim should be denied.

After review of the record and reflection on the Advocates' arguments, this Board finds that Article 56 requires the Carrier to notify the Organization in writing of the reasons for such disallowance. The evidence of record establishes that the Organization provided sufficient notice of the claim. A review of the denial letters indicates that the Carrier uses a general form letter to advance claims to the next response level and does not set forth the reasons for the denial as prescribed by Rule 56. The Organization is on point with its argument that the contract language requires case-specific reasons for the denial to promote resolution at the earliest level of the grievance process. The Board finds that the use of a form letter at the first-level response fails to refine the issue for the next level response. In addition, the lack of reasons for denial of the claim negates the Organization's opportunity to assess whether or not the claim should proceed to the next level. If the requirement for reasons is to have any meaningful construction, the reasons should be stated at the first-level response rather than the second-level response as shown here and further makes the first-level response a vain and futile act in this process. Thus, the Board finds a violation of Rule 56.

While it is generally agreed among Arbitrators that a case should be heard on the merits rather than make a decision based on procedural objections, the negotiated language of the Agreement is clear as to the remedy for the improper response by the Carrier and obligates the Board to allow the claim as presented.

**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 19<sup>th</sup> day of September 2022.