

PUBLIC LAW BOARD NO. 7738

Award No. 30
Carrier File No.: 11-13-0048
Organization File No.: T-D-4168-M
Claimant: James P. Clinton

BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION - IBT RAIL)
CONFERENCE)
)
-and-)
)
BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company)
)
)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed to assign Claimant J. Clinton to perform rail grinding train duties on the Jamestown Subdivision between Mile Posts 31 and 194 on September 30, 2012, October 1 and 2, 2012 (System File T-D-4168-M/11-13-0048 BNR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Clinton shall now '... be made whole for any and all losses incurred as a result of the violation claimant should be allowed 13 hours at the overtime rate of time and one-half at their rate of pay, and all benefits that the claimant did not receive because of these violations'. (Employees' Exhibit 'A-1'). "

FINDING

The Board finds that the parties herein, Carrier and Claimant are within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction of the parties and the subject matter.

The Claimant, J. Clinton hold seniority within the Maintenance of Way and Structures Department as sectionman on the Jamestown Subdivision, where he regularly performed duties of a sectionman. On September 30, October 1 and 2, 2012, the Carrier assigned employees of Mobile Gang TMGX424, M. Zupan, B. Buchholtz, C. Heidinger, R. Gengler and R. Piatz to perform sectionmen duties in connection with the rail grinding car on the Jamestown Sub-division. These are sectionmen's duties which are normally performed by the Claimant. The Organization submitted a claim on behalf of the Claimant and alleged a violation of the Collective Bargaining Agreement.

The Organization maintains that the Carrier has regularly assigned the duties of sectionmen to the Maintenance of Way and Structure Department. The Organization insists that the assignment of employees in the Mobile Gang to perform sectionmen duties was a clear violation of the Agreement. The Organization specifically points to Rule 1 Scope, Rule 2 Seniority Rights and Sub-Department Limits, Rule 5 A, Seniority Roster, Rule 24 Forty Hour Work Week, and Rules 55 Classification of Work, as being violated. In support of its position, the Organization cites several NRAB Third Division Awards to support their interpretation of the above Rules. As a remedy, the Organization, claims that the Claimant is entitled to be compensated for 13 hours at the overtime rate of time and one-half at his rate of pay.

The Carrier contends that the issue is an intra-craft dispute, thus the Organization must establish that the disputed work has been exclusively performed by the Claimant on a system-wide basis. The Carrier states that the Organization failed to meet its burden to establish exclusivity or any past practices to support its claim. The Carrier cites Rule 78, Intra-Craft Work Jurisdiction to support its position that it was permissible under the Agreement to assign the work to employees in the Mobile Gang. The Carrier insists that there is no Rule within the Agreement which reserves any work to employees and the Rules cited by the Organization do not support their reservation arguments. The Carrier cites several past arbitral precedents to support its position.

In addition to the substantive issues, the Organization also raises a procedural issue. Specifically, the Organization maintains that the Carrier did not notify the Organization within sixty (60) days from the date of the letter of appeal that the claim was disallowed, as required by Rule 42. The facts indicate that the Carrier received the Claimant appeal letter on February 20, 2013. The Carrier issued the denial letter on April 19, 2013 and was received by the Organization on April 22, 2013. The Carrier maintains that " [t]here is a long arbitral precedent-including one on this property-that defines "notify" as the time of dispatch, not the time of receipt." The Carrier cites NAMB Third Division Awards 32727 and 24440 to support its position. (See, Carrier's Submission). The Union maintains that that the Carrier failed to comply with Rule 42 time requirements of notifying the Organization within sixty (60) days of the denial of the claim; thus, the claim must be granted. The Organization cites NAMB Third Division Awards 37811 and 37842 to support its position. (See, Organization's Submission).

RULE 42. TIME LIMIT ON CLAIMS

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.

Under Rule 42, the Board is presented with a very basic issue. Does the word "notify" require the Carrier to establish that the Organization received their response to the claim within sixty (60) days of the mailing or "dispatch" of the response within the time requirement is sufficient to comply with Rule 42? Here, the facts are clear that the Carrier mailed the response within sixty (60) days but it was actually received by the Organization after sixty (60) days from the appeal.

Both parties have submitted prior arbitral awards that reached different conclusions on how the word "notify" should be interpreted in the context of the Agreement. There are prior awards which state that the "mailbox rule" should apply. If the Board applies the "mail box rule" or "dispatch rule" the Carrier would have met the time frame. The mere dropping of the response in the mail would have been sufficient to comply with Rule 42. (See, NRAB Third Division Awards 32727 and 41162 On the other hand, the Organization cites convincing authority that Rule 42 requires more than mailing a response, it must be received. (See, NRAB Third Division Awards 37811 and 37842.

The Board recognizes that the "mail box rule" is often applied in contract disputes regarding time frames, especially where there is ambiguity in the language of the contract. But here the language in Rule 42 is not ambiguous. It clearly states "notify". How can the Organization be officially notified within the time frames if they don't get notification of the response until after sixty (60) days? There is a clear violation of Rule 42.

After careful review of the record, the Board finds that the evidence presented by the Parties establish that the Carrier violated Rule 42 of the Agreement. Under Rule 42, the term "notify" is interpreted to mean actual notification, not dispatch of the notification. Therefore, in accordance with Rule 42, 'the grievance shall be allowed as presented.' Because the Board has determined the Carrier violated Rule 42 it is not necessary to determine whether Rules 1,2, 5, and 55 were violated as set forth by the Organization.

Rule 42 provides directions on what the appropriate remedy should be when there has been a procedural violation. However, the Carrier and the Organization disagree as to the appropriate remedy the Board should issue when there is a violation of Rule 42. The

Carrier and the Organization presented several past awards that reach the same and different interpretations of the above language in Rule 42. For example, the Carrier presented Public Law Board 4370, Award 63; National Railroad Adjustment Board, Third Division Award 37811; and National Railroad Adjustment Board, Third Division, Award 33403 to illustrate that referees have discretion and the flexibility in crafting a remedy when there has been a time limit violation. Similarly, the Organization presented Third Division Awards 37842 and 41816 to support their position that the Board has no choice but to comply with the plain language of Rule 42 and grant the requested remedy.

The Board finds that Rule 42 clearly and specifically states that when the timeframe has not been met "the claim or grievance shall be allowed as presented." This language is clear and unambiguous. The plain meaning of the terms in Rule 42 limits the Board's authority to deny or modify a requested remedy when a party has failed to comply with a mandatory timeframe. Based on the Board's interpretation of Rule 42, the Claimant is granted the remedy as requested.

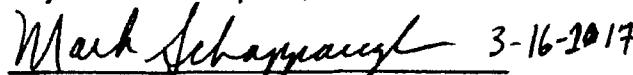
AWARD:

In accordance with Rule 42, the Claim of the Organization is Granted. The Claimant is awarded the remedy as presented in Part (2) of the Claim.

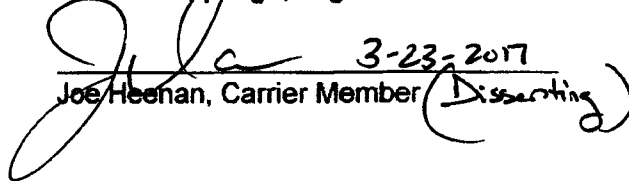
March 13, 2017



Floyd D. Weatherspoon, Neutral Member

 3-16-2017

Mark Schappagh, Organization Member

 3-23-2017
Joe Heenan, Carrier Member (Dissenting)