

**PUBLIC LAW BOARD NO. 7738**

**Case No. 32**

**Carrier File No.: 11-13-0097**

**Organization File No.: T-D-4182-L**

**Claimants: L. Stewart and T. Even**

\_\_\_\_\_)  
**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 assigned Welding Sub-department employee Welder Phillip Olson to performed Track Sub-department track inspector work inspecting track on the Mobridge Subdivision between Mile Post 709.0 and 741.0 on November 16 and 26, 2012 (System File T-D-4182-L/11-13-0097 BNR).
2. The claim as appealed by former General Glover on March 26, 2013 (Edmployes' Exhibit 'A-3') to former General Director Labor Relations W. Osborn shall be allowed as presented because said appeal was not disallowed by former Director Labor Relations W. Osborn in accordance with Rule 42.
3. As a consequence of the violation referred to in Part 1 and/or 2 above, Claimants L.B. Stewart and T.R. Even shall each receive eight (8) hours' pay at their respective and applicable overtime rate."

## **FINDING**

The Board finds that the parties herein, Carrier and Claimants 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 Claimants, L. Stewart and T. Even hold seniority as track inspectors in the Track Sub-department. On November 16 and 26, 2012, the Carrier assigned P. Olson a Welding-Sub-department employee to perform Track Sub-department work of inspecting track on the Mobridge Subdivision. The Organization submitted a claim on behalf of the Claimants and alleged a violation of the Collective Bargaining Agreement.

The Organization maintains that the Carrier has regularly assigned the track inspection work to Track Sub-department employees. The Organization insists that the assignment of Welding Sub-department employees to perform Track Sub-department 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, and Rule 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 each Claimant is entitled to be compensated for eight (8) hours' pay at their respective and applicable overtime rate.

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 claimants 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 an employee in the Welding Sub-department. 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 appeal was disallowed. The facts indicate that the Carrier received the Claimant appeal letter on March 27, 2013. The Carrier issued the denial letter on May 24, 2013 and was received by the Organization on May 28, 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 Award 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.

#### 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 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.

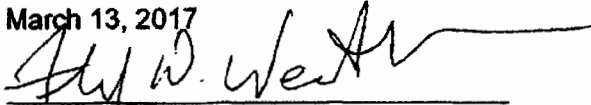
Rule 42 provides directions on what the appropriate remedy should be when there has been a procedural violation. However, the Carrier and the Organization disagree as to the appropriate remedy the Board should issue when there is a violation of Rule 42. The Carrier and the Organization presented several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

**AWARD:**

In accordance with Rule 42, the Claim of the Organization is Granted. The Claimants are awarded the remedy as presented in Part (3) 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)