

Award No. 6296

Docket No. 6171

2-UP-EW-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Joseph E. Cole when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Electrical Workers)**

DISPUTE: CLAIM OF EMPLOYEES:

1. That Radioman L. D. Foust was unjustly treated and the provisions of the current agreement were violated when he was dismissed from service effective February 3, 1971.

2. That the Carrier be ordered to compensate L. D. Foust for all time lost for all regular assigned work days, reinstating him to service with all seniority and vacation rights, and all other benefits due under current agreements.

EMPLOYEE'S STATEMENT OF FACTS: Radioman L. D. Foust, hereinafter referred to as the Claimant, entered the service of the Union Pacific Railroad Company, hereinafter referred to as the Carrier, in the Communication Department on May 14, 1962 at Cheyenne, Wyoming.

On March 9, 1970, the Claimant was injured by a Micro Wave Hut outside door at Spear, Wyoming, and withheld from service by orders of Doctor R. W. Taylor until May 22, 1970.

On August 25, 1970, Claimant was granted medical leave of absence for 30 days on orders of Dr. R. W. Taylor, expiring on September 23, 1970.

On September 23, 1970, Claimant was granted 90 day extension of medical leave of absence on orders of Dr. R. W. Taylor, expiring on December 22, 1970.

On December 23, 1970, Claimant made request for extension of medical leave of absence for a period of 5 months, December 23, 1970 through May 23, 1971. This application for leave of absence was sent through the same channels as the prior two leaves. They were delivered to Mr. D. C. Martin, Communication Manager at the Cheyenne, Wyoming Depot, and he put them in the Omaha mail bag.

On January 12, 1971, Mr. C. O. Jett, Superintendent Communications wrote to the Claimant that his present leave of absence dated September 22, 1970 expired on December 22, 1970.

contends that the claim was filed in writing by virtue of said letter, dated July 29, 1961, the 60th day from the date of the occurrence, May 30, 1961.

The test to determine whether or not this claim was 'presented' to Carrier within the 60-day time limit period is the date within said 60 day time limit period that Carrier actually 'receives' the claim. The Carrier herein denies receiving the letter on July 29, 1961, the last day of the 60-day time limit period. Therefore, the requirement of the claim being 'presented' or in this instance, since it was by letter, being 'received' by Carrier within said 60-day time limit period, not having been proved by the Petitioners herein on whom the burden rests to so prove compliance with said Article V, this claim must be dismissed."

In the instant case, the claim was not received by the Carrier until sixty-eight (68) days after the occurrence on which it was based. Thus, under the rationale applied by the Board in Award No. 5122, the claim was not presented within the time limits established in Rule 21 and must be dismissed.

The Carrier submits that the instant claim should be denied on at least two grounds:

1. The termination of Mr. Foust's seniority was proper as required by Rule 23(b) of the current Schedule, and

2. The Organization failed to present the claim or grievance within sixty days from the date of the occurrence on which the claim or grievance is based as provided by Rule 21(a)(1).

The Carrier respectfully requests a denial award.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

It is recognized that Rule 23 and Rule 24 of the Agreement are both very pertinent and would be given great probity and value, and be carefully examined. It is also recognized that a substantial question exists on the merits of this matter.

The occurrence on which the claim is based is the termination of services by the Carrier, which termination was mailed to Mr. Foust, the claimant, on February 3, 1971.

The grievance and claim was filed by D. F. Jones, District Chairman on April 9, 1971 by the Employes' submission, and on April 6 by the Carrier's submission. We shall take the most favorable date to the claimant, and use the

date of April 6, 1971, as the Carrier's answer on April 13th, as shown by the record, refers to the letter of April 6, 1971.

By taking the dates most favorable to the claimant, 62 days passed between the occurrence and the filing of the grievance and claim.

Rule 21-(1) says:

"All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim is based."

These agreements are carefully entered into and it is the intent of both parties to see that there are no dilatory tactics. It is the same principle as a non claim statute in Probate Law, and the Statute of Limitations in Law. In the absence of fraud or lack of jurisdiction, it is absolute.

Certainly, the possibility of injustice is not a defense to this limitaton.

The purpose of this part of Rule 21 is to ensure rapid handling of claims.

This claim and grievance was not filed and presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim was based.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of June 1972.