

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: { System Federation No. 114, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Carmen)
 { Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That the Southern Pacific Transportation Company violated the terms of the controlling agreement when Superintendent W. M. Jones did not make reply to Local Chairman G. Lepas's claim dated May 23, 1977, until October 21, 1977, which is 151 days after date said claim was filed.
2. That under the terms of the controlling agreement, Carman G. Lepas was unjustly deprived of his service rights and compensation when he was improperly withheld from service from March 29 to April 4, 1977, and April 12 to July 26, 1977, after thirty (30) years of service with the Carrier.
3. That accordingly, the Southern Pacific Transportation Company be ordered to compensate Carman George Lepas for all days he would have worked during the period withheld from service, plus all other benefits he would have earned.

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.

There is no dispute between the Carrier and the Organization concerning the facts of this dispute. They are recounted here, however, as necessary background to the claim on procedural grounds, which is its sole basis.

Claimant was injured on duty on February 16, 1977, causing him to be off duty under medical care until his return on March 17, 1977. The Carrier ordered him to report for medical examination on March 29, 1977, which he undertook and again returned to work on April 4. Claimant was placed on

restriction on April 11, limiting the type and extent of physical exertion he was permitted to perform, which caused him to be denied employment from this point. Thereafter, medical restrictions on the Claimant were loosened, permitting him to return to duty on July 26, 1977.

On May 23, 1977, Claimant filed a claim in good order with the Carrier stating in part:

"Under Rule 38, as an employee who considers himself unjustly treated I am applying for reinstatement with no restrictions to continue my employment in the capacity of Carman with all wages and benefits paid back and restored due to this uncalled for action."

On June 17, Carrier's Superintendent responded in full as follows:

"Referring to your letter of May 23, 1977, the physical restrictions were recommended by the Chief Medical Officer following his review of the results of physical examination at St. Joseph's Hospital, and the three physicians' statements enclosed with your letter of May 23, 1977, have been referred to Dr. Meyers.

Enclosed is the Credit Life Insurance claim form forwarded to this office."

On September 24, Claimant (who is also Local Chairman) again wrote to the Superintendent, stating that 99 days had passed since his letter of May 23, 1977, quoting the requirements of Rule 38(b), claiming violation of said rule, and requesting that the claim be allowed.

On October 21, the Superintendent again wrote to the Local Chairman/Claimant, stating as follows:

"Further in connection with your letter dated September 24, 1977, claim for time loss by Carman George Lepas under the provisions of Rule 38(B) in the current agreement with the Brotherhood of Railway Carmen:

Records indicate that Carman George Lepas was released for duty last April with medical restrictions which prevented his working; therefore, he is not entitled to any of the earnings included in the claim, and claim as presented in your letter of September 24, 1977, is declined in its entirety."

The cited Rule 38(b) reads as follows:

"Rule 38(b). A claim or grievance may be presented in writing by the duly authorized committee to the master mechanic (to shop superintendent in General Shops), provided said written claim or grievance is presented 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 Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe 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 Carrier as to other similar claims or grievances. Any claim or grievance not presented within sixty (60) days of the occurrence on which based will be deemed to have been abandoned."

The Carrier's October 21, 1977 letter answered in timely fashion the September 24, 1977 claim that the May 23, 1977 claim was not answered within the time limits of Rule 38(b). In no way, however, can the June 17, 1977 letter from the Superintendent be considered a proper denial under Rule 38(b) of the May 23 claim. It fails to be a denial at all by direct statement nor does it give reason for denial, even if denial were to be inferred.

As to the question of necessity of stated reason for denial, Awards No. 7371 (Franden) and No. 7500 (Wallace) are relevant. In this instance, the insufficiency of the June 17 goes even further, in that it does not deny anything, much less give a reason. Finally, the Carrier did not argue on the property that the June 17 letter was to be considered a denial.

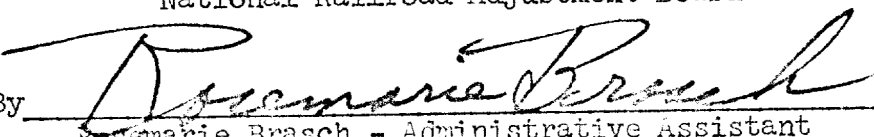
On these procedural grounds, the claim must be sustained, making the state of the Claimant's physical condition irrelevant for this purpose.

A W A R D

Claim allowed as presented.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of September, 1979.