

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (James G. O'Rourke
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(Southern Pacific Transportation Company

STATEMENT OF CLAIM: Claimant James G. O'Rourke, respectfully claims:

1(a) That Carrier did violate the Collective Bargaining Agreement, Rules 39, 45, 49, 50, and 77, Section 2 of Memorandum B, Carrier's Rule M, and Carrier's Company Policy, comprising terms, conditions and rules inherent in the Agreement; the California Occupational Safety and Health Act (California Labor Code Sections 149-149.5, 6300-6711, and 9000-9061 and California Code of Regulations, Title 8) and the Federal Railroad Safety Act, hereinafter "Cal/OSHA" or "the Act" (FRSA); and Claimant's rights under the 8th Amendment to the U.S. Constitution; all of which violation resulted in Claimant's injuries of May 10, 1982 and August 16, 1984;

(b) That Carrier did violate Rules 25, 39 and 46 of the Agreement, Claimant's 5th Amendment rights, and Claimant's contractual seniority and due process rights and property rights, when Carrier arbitrarily and capriciously, and without just cause, withheld Claimant from service on September 6, 1984;

(c) That Carrier did violate the California Labor Code Section 132(a) when Carrier threatened Claimant with discharge on August 14, 1984, and discriminated against Claimant on September 6, 1984;

2(a) That Claimant is entitled to compensation from Carrier for the twenty (20) month period from May 17, 1982 to January 2, 1984, and the seventeen (17) month period from August 16, 1984 through September 6, 1984 to December 12, 1985, at the rate of \$14.54 per hour for each 40-hour week, together with interest thereon at the rate of ten (10%) per cent per annum; and (b) That Claimant is entitled to compensation from Carrier for all contractual vacation rights, pay and time accrued for vacation purposes, contractual back pay, lump sum payments, holiday and sick pay, medical and dental expenses, railroad retirement tax credits, and any other contractual right, privilege or benefit provided in any agreement between Union and Carrier, together with interest thereon at the rate of ten (10%) per cent per annum from May 17, 1982 through January 2, 1984, and from August 16 through September 6, 1984 to December 12, 1985;

3) That Claimant is entitled to be made whole for all contractual rights, privileges and benefits provided in any Employee Protection Agreement between Union and Carrier(s) (Southern Pacific, Santa Fe, and Denver & Rio Grande) and any I.C.C. employee protection order, ruling or directive that pertains to the transfer of the Southern Pacific Transportation Company; and

4) That Carrier should be directed by the National Railroad Adjustment Board to pay Claimant Ten Thousand (\$10,000.) Dollars for each occurrence on August 14, 1984 and September 6, 1984 pursuant to California Labor Code Section 132(a).

FINDINGS:

The Second 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 employees 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.

The record shows that the Claimant sustained an on-duty injury on May 10, 1982 and was medically unable to work from May 17, 1982, to January 2, 1984. He worked from January 1984, through August of that year when he again laid off for medical reasons. Subsequently, the Carrier's Chief Medical Officer found him to be medically qualified to return to service subject to a return-to-duty physical examination. The Carrier made appointments for the examination on January 12, 23, and February 6, 1986. The Claimant did not appear for these exams even though he was advised pursuant to a letter dated January 30, 1986, that his failure to do so would be a violation of Carrier rules. The Claimant was subsequently dismissed from service on April 1, 1986, following an investigation for insubordination and indifference to duty. Although a Claim was filed, the Claimant thereafter did sign a leniency reinstatement agreement in February 1987 wherein he agreed to drop his Claim and take a physical examination prior to returning to service. The Claimant passed the examination with no restrictions. He reported for duty on February 20, 1987, however, indicating his condition necessitated 30 days of light duty. The Claimant was advised that he could not return to service until such time as he was able to perform all the duties of his assignment. Thereafter, after an examination by a psychologist, in July 1987, to which Claimant had agreed, he was found incapable of returning to service and was so notified by the Carrier's Chief Medical Officer on July 13, 1987. Thereafter, the Claimant proceeded to represent himself before this Board and filed a claim for reinstatement. The Board rendered Second Division Award 11624 in that case wherein it ruled that pre-1987 Claims were dismissed. Subsequently, claims were denied on grounds that the Claimant was not physically qualified to perform duties as a Sheet Metal Worker. The language of that Award is cited here, in pertinent part, for the record:

"The Board finds and holds that under the clear terms of the reinstatement letter of Agreement of February 2, 1987, all claims prior to February 2, 1987, became moot. Claimant could not unilaterally invalidate that agreement. It was final and binding on all claims prior to that date. That portion of the claim must be dismissed.

As to that portion of the claim subsequent to February 2, 1987, the record is clear that Claimant was not physically qualified to perform the duties required of him. That portion of the claim will be denied.

We point out that this Board does not have the authority to interpret or enforce State or Federal statutes or regulations. Our authority is limited to interpreting or applying agreements between Carriers and their employees."

This Board also adjudicated a second Claim progressed by the Claimant stemming from the circumstances as previously described. In Second Division Award 12149 that Claim was dismissed by this Board on grounds that it was untimely, that it failed to establish a Rule's violation, and that no conference had been held on the property as required by the Railway Labor Act.

In the instant case before the Board, the Claimant now alleges that the Carrier violated a number of Agreements Rules, various state and federal statutes, and provisions of the Constitution as a result of his May 10, 1982, and August 16, 1984 injuries. He also alleges "discrimination" against him occurred on September 6, 1984. Lastly, the Claimant alleges that the Carrier failed to respond in a timely manner to his appeal.

The Carrier responds that the Claimant's September 28, 1988 Claim was untimely since it was based upon occurrences in May 1982, and August and September 1984. Additionally, the Carrier argues that the Claimant's appeal was not properly handled under the provisions of Rule 38(d) of the Agreement nor was a conference held on the property. The Carrier also states that state and federal statutes identified by Claimant as having been violated do not come under the purview of the Railway Labor Act.

The Board must here conclude that the Claimant's September 28, 1988 Claim is in violation of Rule 38 of the Agreement since this Claim was not progressed in a timely manner subsequent to the Claimant's alleged injuries in May 1982, and August of 1984, nor was it progressed properly after the alleged incident of discrimination which also took place in 1984. The Claimant was a member of the Sheet Metal Workers' Association and was governed by that craft's Agreement. In accordance with Rule 38 of that Agreement, Claims must be filed within sixty (60) days of the date of their occurrence. In fact, the Claimant waited for periods of from four to six years prior to filing Claim. On this point alone the instant Claim before the Board must be dismissed.

The instant case shows additional procedural and legal improprieties. It was not handled in the proper manner as required by the Railway Labor Act, nor does this Board have jurisdiction to rule on state or federal law and/or on Constitutional matters.

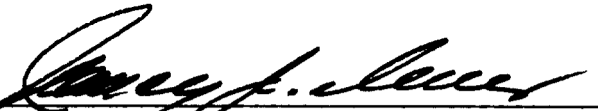
Upon the record as a whole, the instant Claim must be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of December 1991.