

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12694
Docket No. 12453
94-2-91-2-290

The Second Division consisted of the regular members and in addition Referee Joseph S. Cannavo, Jr., when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen Division/TCU
(Southern Pacific Transportation Company

STATEMENT OF CLAIM:

- "1. That the Carrier violated the terms of the controlling agreement between the Southern Pacific Transportation Company and the Organization, Rules 31, 32 and 39, effective April 16, 1942, as subsequently amended, as it pertains to Mr. G. L. Kallvet, when they did not allow him to go to work on September 4, 1990, thereby disallowing him to establish seniority at this Roseville, California, seniority point and in effect suspending him from service without formal hearing by the proper officer of the Carrier.
2. That the Carrier violated Rule 38 of the controlling Agreement when it failed to respond to the Organization's letter of October 31, 1990 within the sixty (60) day requirement, and therefore, that the claim be allowed as presented."

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 employee 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 issue before the Board is whether Claimant properly filed his grievance within 60 days of the date of occurrence in accordance with Rule 38(b) which states:

"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 of 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 days from the date same is filed notify whoever filed the claim or grievance..., in writing, of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented..."

The record establishes that: On April 26, 1990, the Claimant was recalled from furlough as a carman; on June 4, 1990 the Claimant was informed that he did not pass his return to duty physical and, therefore, could not be recalled to service; on July 26, Claimant submits letter to Carrier requesting pay, benefits and statement regarding his dismissal, termination, etc. or other status; on August 8, Medical Officer restates Claimant as medically unfit to work; on August 27, Claimant submits medical clearance; on September 4, Carrier would not allow Claimant to return on October 31, 1990, Local Chairman submits to work time claim on behalf of Claimant; on January 5, 1991, Local Chairman requests that claim be allowed as Carrier did not respond in accordance with Rule 38(b).

The Organization contends that September 4, 1990 was the first day Carrier would not allow Claimant to return to service after Claimant had furnished Carrier with his personal physician's medical report on August 27, 1990. This is the date it bases its claim upon, as stated in letter of October 31, 1990, presented by Local Chairman Velis. In that October 31, 1990 letter, the Local Chairman made a claim in behalf of the Claimant "for one (1) days' pay at the pro rata rate of pay for each day subsequent to September 4, 1990, when he was not allowed to work at Carrier's Roseville Terminals." The Organization requests that this Board allow the claim as the Carrier did not respond to the Organization's letter of October 31, 1990, within 60 days as required by Rule 38.

It is the Carrier's position that June 4, 1990, was the date of occurrence on which the sixty (60) day time limit of Rule 38(b) should be based. Local Chairman's time claim, dated October 31, 1990, was not filed within sixty (60) days from the date of occurrence and, therefore, there was no valid claim for the Superintendent to deny. Carrier supports its position by referring to Third Division Award 16164. In that case, the Carrier's failure to comply with the time limit rules for declination was justified on the theory that if the claim was invalid when presented, no declination was necessary. In that case, the claim was invalid because it was not filed within 60 days after the occurrence out of which the claim arose.

The Board's review of this matter leads it to conclude that no valid claim existed on June 4, 1990. As such, the tolling period for Rule 38 was not in effect. This finding is based on the fact that on June 4, 1990, the Claimant was properly notified that he was being withheld from service because of his failure to pass the fitness-for-duty examination. Consequently, the Board rejects the Carrier's claim in this regard. The Board finds and the record establishes that a valid claim was filed on the Claimant's behalf on October 31, 1990, and that this claim was in response to the Carrier withholding the Claimant from service on September 4, 1990 after his medical release. It was not until September 4, 1990, that a valid claim arose. The Organization's written claim was within the time limits as provided by Rule 38. The Carrier did not respond. Consequently, this claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 4th day of May 1994.