

**Award No. 4853  
Docket No. 4774  
2-DW&P-FO-'66**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Levi M. Hall when award was rendered.

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 71, RAILWAY EMPLOYEES'  
DEPARTMENT, AFL-CIO (Firemen & Oilers)**

**DULUTH, WINNIPEG AND PACIFIC RAILWAY COMPANY**

**DISPUTE: CLAIM OF EMPLOYEES:**

1. That under the current agreement, Claimant Lyle D. Peterson is wrongfully being withheld from his position as a laborer for the Duluth, Winnipeg and Pacific Railway Company.

2. That accordingly the Claimant be restored to his position as a Laborer at the Duluth Roundhouse-Repair Track.

3. That Claimant Lyle D. Peterson be reimbursed for all time lost from May 16, 1963 and continuing each day, five days per week, until Claimant is properly restored to his position as Laborer, account being wrongfully withheld from service and failure of General Manager to reply to Organization's final appeal letter within the 60 day time limits set forth in the National Agreement of August 21, 1954, Article V.

**EMPLOYEES' STATEMENT OF FACTS:** Lyle D. Peterson, hereinafter referred to as the claimant, was first employed by the Duluth, Winnipeg and Pacific Railway Company, hereinafter referred to as the carrier, September 19, 1953 as a laborer in the carrier's Duluth, Minnesota Roundhouse and repair track, with dual seniority permitting the claimant to work either at the roundhouse or repair track, in accordance with his seniority. Claimant was continuously employed by the carrier until July 1962, when he marked off sick and entered St. Lukes Hospital at Duluth, Minnesota for examination and treatment of sudden severe headache and convulsive seizure.

With treatment and medication by Dr. W. S. Pollard, claimant recovered from his illness and was discharged from the hospital in August 1962. Following his discharge from the hospital claimant continued under the care of Dr. Pollard, and in the latter part of 1962 when it was felt that he had sufficiently recovered to return to work, he so advised the carrier and submitted to exam-

**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 were given due notice of hearing thereon.

Claimant, Lyle D. Peterson, marked off sick and entered hospital for treatment of a severe headache and convulsive seizure; it is contended that he recovered from his illness and is wrongfully being withheld from his position as a Laborer and that he be restored to his position and asks that he be reimbursed for all time lost from May 16, 1963, and continuing each day thereafter on account of his being wrongfully withheld from service; he further contends that the General Manager failed to reply to the Petitioner's final appeal letter within the 60 day limit period set forth in the National Agreement of August 21, 1954, Article V.

On July 16, 1963, a continuing claim was filed in behalf of Claimant. The claim was progressed on the property and appealed to the General Manager, Carrier's highest officer designated to receive such appeals by letter dated November 13, 1963. The General Manager replied by letter denying the appeal on January 31, 1964. On March 20, 1964, the General Chairman directed a letter to the General Manager asking that the claim be paid in accordance with Article V of the August 21, 1954 Agreement.

Carrier has tacitly conceded that there was a violation of the 60 day limitation for rejection of claims as provided for in the August 21, 1954, National Agreement, Article V. The claim, therefore, must be allowed as it appears the General Manager failed to notify the Claimant within 60 days of November 13, 1963, that his claim was disallowed. A party's failure to make a timely denial of a continuing claim does not mean that the substantive nature of a continuing claim must be granted for the unlimited future.

In Third Division - Interpretation No. 1, Award No. 9578, Referee Johnson assisting, we note the following statements which are applicable to this present situation: "and as of the amount then due, the Claimants received under the cut-off rule what was essentially a default judgment \* \* \*. The question is not here presented to what, if anything, the Board might have found the claimants entitled to as damages if they had established the substantive claim on the merits \* \* \*." (Emphasis ours.)

At the point Carrier notifies the Claimant in writing that it is denying the claim it terminates its procedural defect. A violation of the August 21, 1954, Agreement having been established our allowance is limited to the period prior to January 31, 1964, the date Carrier denied the claim in writing. There has been no attempt here to determine this claim on the merits.

Third Division Award 13780 concerns a dispute which is similar to the one here involved. It was referred to the National Disputes Committee which was established by Memorandum Agreement dated May 31, 1963. On March 17, 1965, that Committee rendered the following:

**"Findings and Decision:**

The National Disputes Committee rules that the receipt of Carrier's denial letter dated December 29, 1959, stopped the Carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement."

The Carrier should make payment to the Claimant of the amount which he became entitled to from May 16, 1963, to January 31, 1964, as indicated in these Findings.

See Third Division Awards 8318 (Daugherty); 10401 (Mitchell); 10644 (Bailer); 11211 (Miller); 11326 (Dolnick).

**AWARD**

Claim sustained in accordance with Findings.

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION**

**ATTEST: Charles C. McCarthy  
Executive Secretary**

Dated at Chicago, Illinois, this 13th day of April, 1966.