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NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6352
Docket No. 6208
2-SPT(PL)-CM-'72

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

Parties to Dispute: System Federation No. 114, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)

Southern Pacific Transportation Company (Pacific Lines)

Dispute: Claim of Employes:

1 - (a) That the Southern Pacific Transportation Company, hereinafter refered to as Carrier, on October 4, 1970 knowingly violated Rules 31, 32, 52, Memorandum "A" MP&C Department Agreement, and Memorandum of Agreement dated 12-8-1960 and 7-18-1962, in using other than shop force carmen to work on Tank Car S.C.C.X. 1476.

(b) That the Carrier Master Mechanic has additionally violated Rule 38(b) current agreement when he failed to observe the 60 day time limit for his reply to the claim as presented by the Local Chairman.

2 - That Freight Carmen N. A. Chavez, B. C. Pacino and S. J. Disimoni, hereinafter refered to as the Claimants, be compensated each for four (4) hours at the freight carmens rate of pay in effect on October 4, 1970, account of said agreement rule violations.

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.

Petitioner, alleging violations on Sunday, October 4, 1970, of certain agreements between it and the Carrier relative to assignment of Carmen at Carrier's Los Angeles Car Repair Plant, seeks compensation for Claimants, who it contends are the employees who should have been called upon to do the work and were not. It further alleges that its claim must be sustained in that Carrier failed to comply with the time limits for disallowance of claims or grievances as set forth in Rule 38 (b) the Controlling Agreement between the parties.

Rule 38 (b) reads:

> "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 employee 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..."

The grievance and claim, dated October 10, 1970, was forwarded by mail that date to the Carrier's Master Mechanic in Los Angeles, California, by the Local Chairman of the Organization. The Master Mechanic disallowed the claim by letter dated December 9, 1970.

Petitioner claims that the Master Mechanic's letter was not received by the Local Chairman until December 14, 1970, sixty five (65) days after date that the Local Chairman sent his claim letter, and therefore, pursuant to Rule 38 (b), "the claim shall be allowed as presented...". The Carrier avers that the letter dated December 9, 1970, was posted in the regular Company mail service, identically with the manner correspondence had been transmitted to the Local Chairman, who works in Carrier's Los Angeles Car Repair Plant. On Thursday, December 10, 1970, the Local Chairman did not work; a nationwide rail strike occurred on that day and with his rest days following, actual receipt of Carrier's reply by him might not have happened until Monday, December 14.

Time limit problems in connection with Rule 38 (b) have been the subject of a number of Awards of this and other Divisions of the Board. (Second Division 3541; Third Division 10490, 11575, 13270 and 16537) In essence, our holdings have carried forward established concepts of law relating to notice. The principle is that notice is effected upon the mailing or posting thereof. Adams v. Lindsell, In the Kings Bench, 1818; also 1 Restatement of the Law of Contracts 49, Section 64, American Law Institute Publishers, St. Paul, Minnesota. Applying this doctrine to the instant case, we find that posting of the letter of disallowance for delivery on December 9, 1970, was on the sixtieth day from the day the claim was initiated by the Local Chairman and met the requirements of the Rule.

In the absence ofprobative evidence to the contrary, we have consistently held that we will believe in the veracity of the parties.

As to the claim of a violation of the assignment rules and Memoranda of Agreement, the Carrier set forth that the actual repairs were being performed on a refrigerator car loaded with perishables at Santa Barbara, California. An emergency road crew composed of three Los Angeles Division Carmen were dispatched to the site of the disabled equipment. They were told to bring with them a pair of 40 ton, 5 x 9 plain bearing wheels which were needed to replace those on the refrigerator car before it could be moved. A search by the crew of the stock of wheels and axles at the Car Repair Plant and the one-spot car repair facility failed to turn up the needed wheels. However, a badly damaged tank car awaiting disposal to a scrap dealer was standing in the Car Repair Plant. It had the correct size parts

needed for the repair. The road repair crew removed the wheels therefrom, transported them to Santa Barbara and repaired the disabled refrigerator car. Because of the nature of the contents, it was essential that the work be done promptly and expeditiously. There were no Carmen on duty on Sunday, October 4, at the Car Repair Plant. Delay would have jeopardized the entire load which warranted emergency treatment.

The record discloses that all of the above was before the Petitioner throughout the processing of its claim on the property. Neither in its submission or rebuttal, did it endeavor to controvert the assertions of the Carrier summarized hereinabove.

In numerous Awards, we have sustained the right of Management to use their best judgement to overcome emergency situations similar to that faced by the Carrier herein on October 4. The need to protect the products placed in the railroad's care for shipment is essential if the industry is to survive against competitive modes of transportation, a concern not only to the Management, but to the employees whose livelihood is dependent upon continued use of rail. To have held up the road crew while seeking out the claimants and get them to leave their rest day activities would have caused undue delay and possibly substantial losses. We cannot find anything in the Petitioner's presentation which would warrant ordering such an approach to its responsibilities by the Carrier.

A W A R D

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July, 1972.