

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12531
Docket No. 12494
93-2-92-2-54

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen
(Division of TCU
(
(The Atchison, Topeka and Santa Fe
(Railway Company

STATEMENT OF CLAIM:

- "1. That the Atchison, Topeka & Santa Fe Railway Company violated the controlling Agreement, specifically Rule 24(d), by arbitrarily and unilaterally removing Carman Robert H. Whitcomb's name from the Freight Carmen's seniority roster at Topeka, Kansas on March 4, 1991.
2. That accordingly, the Atchison, Topeka & Santa Fe Railway Company be ordered to restore and continue Carman Robert H. Whitcomb's name on the Topeka Freight Carmen's seniority roster with a date of September 1, 1981; and be returned with all rights and benefits such as, but not limited to vacation, personal leave, hospitalization for himself and his dependents and all health and welfare benefits for which he may have been deprived of due to the Carrier's violation of Rule 24(d).
3. That the Atchison, Topeka & Santa Fe Railway Company be ordered to compensate Carman Robert H. Whitcomb eight (8) hour per working day at the pro-rata rate retroactive to March 4, 1991."

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.

The Claimant was laid off April 1, 1990 during a force reduction. On December 14, 1990, he properly advised the Carrier of a change in his home address. On February 21, 1991, the Carrier served a notice of recall at the Claimant's prior address. When the Claimant did not respond, the Carrier removed him from the Freight Carman seniority roster effective March 4, 1991, pursuant to Rule 24(d) of the parties' Agreement.

Subsequently, on May 28, 1991, the Organization filed a claim on behalf of the Claimant. In essence, it stated that the Carrier had sent its letters to the wrong address even though the Claimant had properly filed notice of a change of address. It asked that a new recall notice be sent to the Claimant immediately and that he be returned to duty as soon as "the re-entrance physical" examination had been completed. Additionally, the Organization sought back pay and other benefits from March 4, 1991, the date the Carrier removed the Claimant from the seniority roster.

In a letter to the Claimant dated June 25, 1991, the Carrier acknowledged that it had not recorded the Claimant's current address. The Carrier also advised that he would be restored to the service, subject to a satisfactory physical examination, that he had ten days to reply and, finally, that failure to respond would result in forfeiture of seniority.

The next piece of evidence developed on the property is a letter dated July 17, 1991 addressed to the Local Chairman of the Organization. The letter contained the following relevant points:

- "(a) That after receipt of the Organization's letter of May 28, 1991 (which made it aware of its error), the Carrier's Representative spoke to representatives of the Organization about contacting the Claimant in order to return him to work. These efforts went for about thirty (30) days to no avail.
- (b) Because no response was forthcoming, the Carrier stated that it sent the letter of June 25 to the Claimant. On July 5, 1991, at 9:05, the Claimant called the Carrier to state he wanted to return to work. Although he called on the eleventh (11) day, the Carrier agreed to return him to work, subject to the completion of a satisfactory physical. (The Board notes here that the Claimant received the Carrier's letter on June 29, 1991, contrary to claim that

he had not received the letter until July 3, 1991.) The Carrier that same date scheduled an appointment for the physical examination for Monday, July 8, 1991. The Claimant was so advised and told that he was expected to return to work on July 9, 1991.

- (c) The Claimant did not appear at the physical examination appointment and, therefore, the Carrier denied the Organization's claim."

Also, on July 17, 1991, the Claimant was advised by certified letter that he had been removed from the seniority roster because he had failed to keep his appointment and made no effort to contact the Carrier.

On September 9, 1991, the local chairman filed a notice of intent to appeal the Carrier's decision of July 17, 1991. The following day the Organization filed its appeal which, in pertinent part, claimed that, while the Claimant could have returned to work on March 4, 1991 had the Carrier not erred, he could not comply with the Carrier's notice on June 25, 1991 because: "He was laid off and financially unable", and because: "His lease requirements called for a 30-day advance written notice." The substance of the Carrier's June 25, 1991, letter was not addressed by the Organization.

On October 28, 1991, the Carrier responded to the Organization's appeal. It summarized the key events and facts leading to the claim and advised the Organization that because the Organization had not filed its claim until May 28, 1991, eighty-five days after March 4, 1991, the claim was barred from further consideration, pursuant to Rule 39(a). That Rule, in pertinent part, required claims to be received "within 60 days from the date of occurrences on which the claim" is based. The Carrier contends that because the claim seeks lost wages retroactively to March 4, 1991, that date is considered to be the date of the "occurrence". The Carrier, in its reply also claims that the Claimant at no time during his July 5, 1991, phone conversation with the Carrier was any reason for not returning to work mentioned, as asserted by the Organization in its September 10, 1991, appeal.

On November 1, 1991, the Organization continued its appeal. It submits that the contractual time limits have not been violated because those limits were not triggered until July 17, 1991, the date the Claimant was removed from the seniority roster.

Following a conference on December 3, 1991, between the parties and further correspondence between the parties, mainly with respect to the time limits question, the case was progressed to the Board for final decision.

The Board agrees with the Carrier that the Claimant's actions are not those of a person who has a positive interest in employment. But, on the other hand, that is not the controlling issue. We find that the Organization has filed a proper claim before this Board. With respect to the claim, the Carrier clearly erred initially beginning on March 4, 1991 when it removed the Claimant from the Topeka Freight Carmen roster. Accordingly, the Carrier was liable from March 4, 1991, to July 17, 1991. It is not liable subsequent to July 17, 1991, because the record clearly and convincingly shows that the Claimant did not comply with the Carrier's instructions to appear for his physical examination appointment. There is no evidence that he did not understand the instructions that he was given. At the least, he should have called the Carrier to explain his failure to appear for his scheduled appointment. Therefore, while the Board understands the Organization's position in this matter, its arguments cannot overcome the Claimant's failure to properly protect his assignment.

The Claimant will be compensated for eight hours per working day at the pro-rata from March 4, 1991 to July 17, 1991. The remainder of the claim is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever, Secretary to the Board

Dated at Chicago, Illinois, this 28th day of April 1993.