

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13302

Docket No. 13105

98-2-96-2-4

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

**(Brotherhood Railway Carmen, Division of
(Transportation Communications International Union**
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Louisville and
(Nashville Railroad Company)

STATEMENT OF CLAIM:

- "1. That the Louisville and Nashville Railroad Company, (now a part of CSX Transportation) violated the controlling agreement rights under Rule 27, of Nashville, TN Carman C. Howard, when Carrier denied claimant, a journeyman carman, his transfer rights under said rule, to a carman's vacancy at New Orleans, LA, and instead allowed Nashville, TN Carman Apprentice, M. D. Williams to transfer to New Orleans, LA on January 18, 1993 through March 12, 1993.**
- 2. That the Louisville and Nashville Railroad Company, (now a part of CSX Transportation) violated the controlling agreement rights under Rule 32 and Appendix 'D', of Nashville, TN Carman C. Howard, when Carrier failed to respond in a timely manner to local chairman's initial claim dated March 12, 1993.**
- 3. Carrier should now be ordered to compensate claimant for all lost pay from January 18, 1993 through March 12, 1993."**

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 were given due notice of hearing thereon.

On December 21, 1992, the Carrier's Mechanical Superintendent met with the Claimant and two Carmen Apprentices for the purpose of filling two Carmen vacancies at the Carrier's New Orleans, Louisiana, Car Shop. The Superintendent selected the two apprentices to fill the vacancies.

On March 12, 1993, the Local Chairman filed a claim asserting that the Claimant should have been selected to fill one of the vacancies. The Organization claimed that the Carrier violated a portion of Rule 118, Paragraph D which reads "after all carmen in good seniority standing at all points have been restored to service, in accordance with Rule 26, and additional carmen are needed, apprentices shall be handled in the following order." Here the Organization submits the Claimant had Agreement rights beyond the apprentices.

In its letter dated April 9, 1993, the Carrier denied the claim, because the Claimant did not follow the "established procedure for requesting a transfer" and because the Claimant did not have a good safety record.

On July 2, 1993, the Organization requested that the claim be paid because it had not received the Carrier's denial letter, dated April 9, until June 21, 1993, when it was hand delivered to the Organization. The Organization notes that the Carrier had 60 days from the time the claim was filed to deny it. In this case, because the Organization did not receive the denial letter until June 21 (well beyond the 60 days imposed by Agreement) the Carrier breeched the Agreement and, therefore, must pay the claim.

On July 14, 1993, the Carrier asserted to the Organization that it had mailed its denial letter on April 9. It provided a "screen print" that showed the date the letter was created to support its contention of having mailed the letter on April 9.

By letter dated August 11, 1993, the Organization reiterated its position that the claim should be allowed because of the time limit violation.

The Carrier's response, dated October 1, 1993, again rejected the claim when it, in particular part, stated as follows:

"It is noted that you have substantially amended the claim appeal. The claim submitted by Local Chairman Long was for the difference between the Carman rate of pay earned by Carman Apprentice M.D. Williams (whose request for transfer to New Orleans was honored by the Carrier) and the pay received by Claimant working reduced rate at the Nashville Project Shop for the period January 18, 1993 until March 12, 1993. The claim you have appealed is that Claimant be given full seniority rights to one of the Carman positions he requested on December 21, 1992. Since the claim you are appealing was never handled on the property, it is barred by the Time Limit on Claims Rule of the Agreement. Furthermore, Local Chairman Long's initial letter of claim dated March 12, 1993 was dated and received substantially beyond sixty days from December 21, 1992, the true date of the occurrence on which you are basing this appeal. Accordingly, even had the initial claim been made in the form you are now appealing, it would have been barred by the Time Limit on Claims Rule of the Agreement.

The Organization's own violation of the Time Limit Rule both on the original presentation of this claim and on appeal is particularly important in this case, since the claim is being progressed solely on the basis of an alleged violation of the Time Limit Rule by the Carrier. The Carrier denies any violation of the Time Limit Rule. Mechanical Superintendent Jones did respond to Local Chairman Long's claim in a timely manner on April 9, 1993. When Mr. Long inquired about the reply, he was furnished another facsimile copy which he admitted receiving on June 21, 1993. Mr. Jones furnished as proof of sending his original reply in the form of the computer print screen which shows the date the letter was created.

Although you have not addressed the merits of the claim on appeal, it is without merit under the Agreement Rules. The Transfer Rule, Rule

20, requires an active employee desiring transfer to another location to make application to transfer so that applications can be considered in seniority order. Mr. Howard did not make a written application to transfer to New Orleans, nor did he file such a transfer request with the Carrier as is required. Accordingly, Mr. Howard was not in compliance with Agreement requirements for consideration for transfer to another position at New Orleans."

In its reply to the Carrier, dated April 14, 1994, the Organization, in pertinent part, stated:

"In response to these allegations, first of all I would point out that this claim was indeed handled on the property by Local Chairman R.E. Long on March 12, 1993 and no time is being claimed for December 21, 1992. This was merely a date that Mechanical Superintendent Jones met with Carman Apprentice M.D. Williams and Claimant C. Howard, III and a claim could not be filed in behalf of Carman Howard until his agreement rights were violated when Carman Apprentice Williams was allowed to work at New Orleans, Louisiana on January 18, 1993. Therefore, no time limit was expired on March 12, 1993 when the Local Chairman filed this claim.

* * *

The Organization does indeed take exception to Carrier violation of Time Limit Rule but the fact of the matter is, Carman Howard's Agreement Rights were violated when he wasn't allowed to work at New Orleans, LA as a Bonafide Carman.

* * *

I would point out that, first of all, at no time did Mr. Jones furnish as proof of sending his original reply in the form of a computer print screen that showed the date the letter was created and even if he did, that still would not be substantial proof that Local Chairman Long was sent a copy of alleged letter. As previously stated, the Mechanical Superintendent's alleged April 9, 1993 letter was not received by the Local

Chairman until June 17, 1993, which was a facsimile copy dated June 17, 1993, and it is totally rejected.

* * *

In response to this allegation and as you well know the transfer request list had been exhausted for filling carman positions at New Orleans in December, 1992, when I met personally with Mechanical Superintendent Jones at the Nashville, Tennessee Project Shop to assist in filling vacancies at New Orleans, Louisiana. Mr. Jones took it upon himself and chose the two (2) apprentices to work in New Orleans in January, 1993, over Carman Howard, denying Carman Howard his rights under the controlling Agreement, as outlined in Local Chairman's initial claim dated March 12, 1993. Therefore, your allegations are not supported."

Following further correspondence on the property, the claim was progressed to the Board for resolution.

Based on the record developed on the property, the Board finds that the claim must be sustained because of procedural error by the Carrier on the property.

As a threshold procedural matter, the key issue is the proper construction of Article V - Carrier's Proposal No. 7, Paragraph (a) which reads as follows:

"All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same (see No. 7 at end of Article V), within 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 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."
(Emphasis added)

The question is whether the Organization was "notified" in writing within the meaning of the above-cited Rule. Absent other conditions or explanations by either party, the Board concludes that "notify" as used in the above-cited Rule means "sent", i.e. that the Carrier's decision was dispatched. The Carrier provided no evidence of substance that it "sent" the denial letter. For example, no certified or registered mail receipt was introduced into evidence.

With respect to the question of damages, the Board concludes that this matter is best resolved by the payment of \$1,179.65 to the Claimant as discussed by the parties during conference on December 13, 1995.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 6th day of August 1998.