Award No. 9510

Docket No. MW-11448

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. Roadmaster Dangremond failed to comply with the procedural requirements outlined in Section 1 (a) of Article V of the August 21, 1954 Agreement in his handling of the claim "that the Carrier is holding Mr. Gooch out of service without just cause" which was presented to him in a letter dated January 10, 1958 by General Chairman Woods.

2. Because of the procedural defects referred to in Part (1) hereof, the Carrier now be required and directed to allow claim as it was presented in the above mentioned letter dated January 10, 1958.

EMPLOYES' STATEMENT OF FACTS: Under date of January 10, 1958, Roadmaster R. V. Dangremond was presented with a claim in a letter reading:

"January 10, 1958

Mr. R. V. Dangremond
Roadmaster
Elgin, Joliet & Easter Ry. Co. TG-1-58
Gary, Indiana

Dear Sir:

On or around September 18, 1957, the carrier removed from service Mr. I. V. Gooch, for so-called disability due to what they believed to be an eye condition of color-blindness. Mr. Gooch submitted himself to the carrier's doctor which revealed that his color vision was normal. But for some unknown reason to us the carrier still would not permit Mr. Gooch to return to work, merely claiming he had poor vision.

We are well aware of the fact that Mr. Gooch is unable to see with his right eye, and I understand it has been that way since a young man. However, the carrier knew this when they hired him

which was presented to him in a letter dated January 10, 1958. To the contrary, the Roadmaster left the claim open for further handling.

Consequently, it may not be properly held that the Roadmaster disallowed the claim or gave written reasons therefor within 60 days from the date (January 10, 1958) the claim was presented to him.

Thus, we submit the foregoing is convincing proof that the Roadmaster failed to comply with the procedural requirements outlined in the afore-cited Section 1 (a) of Article V of the August 21, 1954 Agreement. It is, therefore, the Employes' position that the carrier is contractually obligated, under the explicit and unequivocal provisions thereof, to allow the claim as presented.

In Award 4529, which involved a somewhat similar factual situation and rules, this Division held that:

> OPINION OF BOARD: "This claim is based on the contention that Carrier, when monetary claims were filed with it by the Claimants, failed to comply with the requirements of the rules of the parties' effective Agreement and, because thereof, is liable for the claim made.
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> The factual situation, out of which this claim arises, is as follows: Claimants, William Smith and Christian Lehr, were regularly assigned incumbents of positions of Weighers at the Port Richmond Grain Elevator. Because of sickness Smith was off duty March 25 to 29, 1947, inclusive, and Lehr, March 26 and 27, 1947. On April 1, 1947, each of these Claimants filed a claim with the Carrier asking to be paid for the time they were off. They addressed their separate claims to George Blankley, Superintendent, Grain Elevator. Therein, as a basis for their claims, they stated the Carrier had, while they were off duty because of illness, filled their positions with men not covered by the Clerk's Agreement and, as that resulted in no extra cost to the Carrier, they asked to be paid for these days.
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> On April 4, 1947 Superintendent Blankley replied to each of these claimants and included in said replies the following:
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> 'This matter was referred to Mr. E. F. Keene, Manager, Port Richmond Terminal, for consideration, and as a matter of information, he had advised me that your claims will be disallowed or * * * not be granted.'
>
> Thereafter, on May 10, 1947, the Brotherhood's Division Chairman, William Freeborn, advised Mr. E. F. Keene, Manager, to whom the original claims had been referred for decision, that Carrier had not, in acting on said claims, complied with Rules 22 and 44(c) of their Agreement and that, because thereof, both claims should be allowed. Manager Keene replied to this letter on May 14, 1947 advising the Division Chairman that the claim, as originally made, was without merit and that the Claimants had been advised thereof within the time limit set forth in the Rules for that purpose.
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> It is from this claim of the Division Chairman that this appeal was taken. The rules therein referred to are as follows:

Rule 44(c) 'When claims have been presented in accordance with paragraph (a) of this rule, the employe and the representative will be notified, in writing, of the decision of the Management within thirty days from the date claim was presented. When not so notified, the claim will be allowed.'

Rule 22—'When time is claimed in writing and such claim is not allowed, the employe making the claim and the representative shall be notified in writing and the reason for non-allowance given.'

These rules are for the purpose of expediting procedure and preventing unnecessary delays on the property. Rule 44(c) contemplates and requires that a decision shall be made by the Carrier within 30 days and after a monetary claim is presented to it in accordance with Rule 44(a) and that the employe making the claim, and his representative, be notified thereof within that time and, if not notified, the claim to be allowed. Rule 22 requires that the Carrier, in making its decision, give its reasons therefor if the claim is disallowed. This, so Claimant may know Carrier's position and its reasons therefor in order to determine the relative merits of the parties' respective contentions and help determine whether or not an appeal is dsirable.

* * * Having failed to comply with Rule 44 (c) the claims, by the express provision thereof, must be allowed. Nor does the provision of the rule contemplate, when it is applicable, that the merits of the claim shall be considered. Consequently, we shall not do so."

See also Awards 7713 and 8101, wherein it was held that

Award 7713:

"Rules similar to the one here in question have been interpreted by this Board both with and without the assistance of a Referee. Awards 4529 and 3013. In Award 4529:

'* * * We think the rule requires that a decision actually has to be made by the officer of the Carrier on whom that responsibility has been placed, which in this case was Manager Keene, within the time as therein specified, that Rule 22 requires that he give his reasons for so doing if the claim is disallowed, and that the employe and his representative be notified thereof in writing within the time as required by Rule 44 (c). Having failed to comply with Rule 44 (c) the claims, by the express provision thereof, must be allowed. Nor does the provision of the rule contemplate, when it is applicable, that the merits of the Claim shall be considered. Consequently, we shall not do so.'

Here the Respondent could have limited the amount of its obligation but it having failed to do so this Board has no alternative but to find that this claim is meritorious from the date of its inception on April 1, 1952, until the date the parties reconciled their differences on June 1, 1954.

Having found that Rule 4-D-1 (c) is controlling and applicable here, no purpose can be served by a consideration of merits of the claim."

Award 8101: "The claim is not before the Board on its merits but rests entirely upon the alleged failure of Carrier to comply with the procedural requirements of Rule 54 (b) of the Agreement, which provides:

> 'Decisions on claims shall be rendered in writing, by subordinate officers stating the reasons for non-allowance, within thirty (30) days from the date such claim is served, or within thirty (30) days from conclusion of conference if one is held thereon. If a decision is not rendered within this time limit, the claim shall be allowed.'

* * * Assuming without deciding that this is factually correct, since it has been established that the 30 day limit applies to this claim and that no decision was rendered within that time, the claim must be regarded as allowed at the expiration of the time limit. Claimants have consistently taken that position and subsequent handling on the property did not change the clear intent of the rule to allow claims after thirty days if no decision is rendered."

"We make no findings on the merits of the claim but sustain it on the procedural grounds set forth in the opinion."

Please particularly note that in the Carrier Members' Dissent to Award 7713, they expressed concurrence in and agreement with the principles enunciated in and established by Awards 3013 and 4529.

For other Awards enunciating the principle that failure to comply with agreed to procedure eliminates the necessity of giving any consideration to the merits of the claim which was presented, see Awards 3502, 3697 and 6446, wherein it was held that:

Award 3502: **"It is clear that the above provision imposes the time within which a decision must be rendered upon both situations;** namely, whether the proceeding is originally instituted by the Carrier or at the request of the employe. Furthermore, Carrier has expressly indicated that it so understands the rule by its statement in the transcript of the hearing in this case referring to this rule. However, Carrier rendered its decision not within 15 days, but 28 days.

Thus the question arises whether the decision is of no effect because of Carrier's failure in rendering it to observe the time limit required by the rule. **It is our belief the decision must be held to be null and void.**

The general purpose of the rules governing the procedure of imposing disciplinary measures by the Carrier is to protect the rights of the employes. **We must assume the provision in question was agreed to for a definite reason as it would not be a part of the Agreement.** Some limitation on the time in which disciplinary action should reach a final determination is a reasonable requirement and in harmony with fair play. **It must have been the intention of the parties that under Rule 50, a decision to be valid should be rendered within the time prescribed or otherwise the decision would have no force.**

* * * * *

Because of Carrier's failure to comply with Rule 50, Carrier's decision was void, and any ruling by us on whether or not the charges

were proved would amount to a nullity. Accordingly that part of the claim must be sustained which seeks to clear the employe's record of the charge, and employe is entitled to be compensated for his wage loss, less any compensation received in other employment."

Award 3697: "The Carrier, in this case, admits violation of Rule 24 of its agreement with the Organization in that it failed to notify a baggage department employe, Isadore Weinshelbaum, within the specified time after a hearing that he had been dismissed for insubordination. The Carrier pleads that it rehired Weinshelbaum after this proceedings had been originated on the property; that Weinshelbaum had received more than his just due in getting his job back; and that the Carrier had been penalized sufficiently by re-hiring him. We cannot agree Although some of us may sympathize with the Carrier when we read all the background of the case, we must find that the agreement was violated (technical as the violation may have been) and the Weinshelbaum is entitled to the full restitution claimed."

Award 6446: "Express time limitations in grievance procedure have been many times held to be enforceable; primarily because the parties by including them in their agreements intended thereby to expedite the orderly handling or claims. Application of such rules is sometimes harsh but in the interests of efficient, proper procedure they must be applied. We are not granted any discretion to extend such statutes of limitation as the parties have fixed on themselves. We can only apply their own rules. It follows that in so doing we are precluded from judging the merits of the basic dispute. The rule having been violated the claim must be sustained."

For other Awards dealing with rules of similar import and enunciating the principle that failure to comply with agreed to procedure eliminates the necessity of giving any consideration to the merits of the claim which was presented, see Awards 6244, 6361, 6789 of this Division, and Awards 14905, 15372, and 15498 of the First Division. Kindly note that Award 15372 of the First Division was rendered without the assistance of a referee.

We respectfully request that our claim be allowed:

It is hereby affirmed that all data herein submitted in support of our position have heretofore been presented to the Carrier and are hereby made a part of the question in dispute.

CARRIER'S STATEMENT OF FACTS: In this submission, the Elgin, Joliet and Eastern Railway Company will hereinafter be referred to as the Carrier; the Brotherhood of Maintenance of Way Employes will hereinafter be referred to as the Organization; and Track Laborer Ivan Gooch will hereinafter be referred to as the Claimant. Underlining will be by the Carrier unless otherwise indicated.

The Claimant was employed by the Carrier as a Track Laborer on its Gary Division on February 11, 1957. It is the Carrier's policy to physically examine all new employes and require that they meet the minimum physical standards for entry into the service. The only exception to this policy are those persons employed as track laborers. For this reason the Claimant was not physically examined at the time of his employment in 1957. The Carrier's track laborers are required to submit to physical examination only when they

appear to have an ailment or disability which would prevent them from safely discharging their duties or when they are the successful applicant for promotion. The Carrier has adopted and follows the physical standards as adopted by the Medical Section of the Association of American Railroads.

On or about September 13, 1957, Claimant was observed operating a motor car by his Supervisor of Track, Mr. C. E. McEntee. The motor car narrowly missed striking a locomotive. From his observation of the conditions surrounding the movement of the motor car, Supervisor of Track McEntee concluded that a person operating the motor car under such circumstances could not have missed seeing the approaching locomotive unless such person had extremely poor eyesight. Supervisor of Track McEntee immediately ordered the Claimant to submit to a physical examination by the Carrier's physician in Gary, Indiana. The Claimant was examined by the Carrier's Chief Surgeon, who was in Gary on that date, and was found to be totally blind in his right eye and to have 20/30 in his left eye without glasses. The Claimant was disqualified from the service by the Carrier's Chief Surgeon as of September13, 1957, for the reason that he was blind in one eye. The Claimant was immediately notified of this disqualification and has been withheld from the service since that date.

Under date of January 10, 1958, the General Chairman of the Organization wrote to Roadmaster A. V. Dangremond contending that the Carrier was holding the Claimant out of service without just cause. A copy of that letter is attached hereto and marked for identification, Carrier's Exhibit "A". It will be noted that in this letter the General Chairman requested that the Carrier call the Claimant back to work and compensate him for all wage loss suffered retroactive to sixty (60) days from the date of the claim contained in Carrier's Exhibit "A". The Organization's General Chairman refers to the hiring of the Claimant on September 11, 1948, in Carrier's Exhibit "A", but the Claimant subsequently had resigned from the service and was rehired on February 11, 1957. His current seniority date is the date of his last entry to the service, February 11, 1957. The letter identified as Exhibit "A" was received by the Carrier's Roadmaster on January 13, 1958

Under date of March 11, 1958, the Carrier's Roadmaster replied to General Chairman D. L. Woods disallowing the claim contained in the letter of January 10, 1958. Roadmaster Dangremond's letter was delivered to the General Chairman's residence on March 11, 1958. A copy of this letter is attached hereto and identified as Carrier's Exhibit "B".

Under date of March 14, 1958, General Chairman D. L. Woods wrote to Roadmaster R. V. Dangremond contending that Roadmaster Dangremond failed in his letter of March 11, 1958, (1) to deny the claim as set forth in General Chairman D. L. Woods' letter of January 10, 1958, and (2) failed to set forth any reasons for not allowing the claim as required by Article V, Section 1(a), of the Agreement of August 21, 1954. A copy of the letter of March 14, 1958, is attached hereto and marked for identification, Carrier's Exhibit "C".

Under date of May 6, Roadmaster R. V. Dangremond replied to General Chairman Wodds denying the position taken by General Chairman Wodds in his letter of March 14, 1958. A copy of the letter of May 6, 1958, is attached hereto and marked for identification, Carrier's Exhibit "D".

While discussing this case with the highest officer of the Carrier desig-Chairman Woods denying the position taken by General Chairman Woods advised that the Claimant was ill during the period between the time he was

given his physical examination (September 13, 1958), and the date on which the initial claim was made (January 10, 1959), and was not able to work during this period. The General Chairman did not have specific information as to the exact period of this disability caused by illness.

Among the rules of the basic agreement and supplements thereto between the Organization and the Carrier, the following are considered particularly applicable to this case:

In the basic agreement of the Maintenance of Way Employes, Rule 54, entitled "PHYSICAL EXAMINATIONS":

> "Should employes coming within the scope of this agreement be required to take physical examinations, such examinations will not be more frequent than once each year, except when more frequent physical examinations are required by law, unless it is apparent to the employing officer that employe's health or physical condition is such that an examination should be made. If an employe should be disqualified upon examination by the railroad's physician and feels that such disqualification is not warranted, the matter may be handled in the same manner prescribed in these rules for the handling of grievances. If the matter is not disposed of by such handling, the following rules will apply:
>
> (a) The employe involved or his representative will select a physician to represent him, at the expense of the employe, and the railroad will select a physician to represent it, in conducting a further physical examination. If the two physicians thus selected shall agree, the conclusions reached by them will be final.
>
> (b) If the two physicians selected in accordance with paragraph (a) should disagree as to the physical condition of such employe, they will select a third physician to be agreed upon by them.
>
> The board of medical examiners thus selected will examine the employe and render a report within a reasonable time, not exceeding fifteen (15) calendar days after examination. Should the examination be adverse to the employe and it later appears that his physical condition has improved, a re-examination will be arranged after a reasonable interval, upon request of the employe.
>
> (c) Any and all expense involved in the application of paragraph (b) of this rule will be borne equally by the railroad and the employe."

From the National Agreement dated August 21, 1954, between the Western Carriers' Conference Committee, representing the Carrier, and the Employes' National Conference Committee, representing the Organization:

> "ARTICLE V — CARRIER'S PROPOSAL NO. 7
>
> Established a rule or amend existing rules so as to provide time limits for presenting and progressing claims or grievances

This proposal is disposed of by adoption of the following:

The following rule shall become effective January 1, 1955:

1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

(a) All claims or grievances must be presented in writting by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, 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 employe 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.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employe and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to.

" 2. With respect to all claims or grievances which arose or arise out of occurrences prior to the effective date of this rule, and which have not been filed by that date, such claims or grievances must be filed in writing within 60 days after the effective date of this rule in the manner provided for in paragraph (a) of Section 1 hereof, and shall be handled in accordance with the requirements of said paragraphs (a), (b) and (c) of Section 1 hereof. With the respect to claims or grievances filed prior to the effective date of this rule the claims or grievances must be ruled on or appealed, as the case may be, within 60 days after the effective date of this rule and if not thereafter handled pursuant to paragraphs (b) and (c) of Section 1 of this rule the claims or grievances shall be barred or allowed as

presented, as the case may be, except that in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date of this rule for appeal to be taken to the appropriate board of adjustment as provided in paragraph (c) of Section 1 hereof before the claim or grievance is barred.

3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

4. This rule recognizes the right of representatives of the Organizations, parties hereto, to file and prosecute claims and grievances for and on behalf of the employes they represent.

5. This agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier.

6. This rule shall not apply to request for leniency."

POSITION OF THE CARRIER: This is a case involving the physical disqualification of the Claimant after examination by the Carrier's Chief Surgeon. The specific claim brought before this Board by the Organization is that the Carrier failed to handle the time claim resulting from this physical disqualification in accordance with the terms and provisions of the National Time Limit on Claims Rule contained in the National Agreement dated August 21, 1954, (for convenience, this rule will hereinafter be referred to as the TLOC Rule). For this reason, the Carrier will in this submission discuss first the issues arising out of the application of the National TLOC Rule. Thereafter, the Carrier will set out its position regarding the merits of the claim.

The issues that are present under the application of the TLOC Rule involve the following questions:

1. Whether the initial claim submitted on behalf of the Claimant was filed with the Carrier within the time limit. As a corollary to this issue, there is also the question of whether the claim submitted in this case was one of a continuing nature. The Carrier will demonstrate that since the claim was not valid upon its initial presentation, there was no obligation upon the Carrier's official designated to handle this claim at the first level (Roadmaster R. V. Dangremond) to deny the claim or take any other action thereon.

2. Whether the letter of Roadmaster R. V. Dangremond dated March 11, 1958, (Carrier's Exhibit "B") constituted a disallowance of the claim setting out the reasons for such disallowance.

I. THE ORIGINAL FILING OF THE CLAIM.

The Claimant in this case was initially held out of service on September 13, 1957. Through a special request, the Claimant was allowed to come in and see the Carrier's Chief Surgeon on January 2, 1958. Examination on this date confirmed the results of the original examination on September 13, 1957, and the original findings were affirmed; i.e., the Claimant was found to be totally disqualified from performing service for the Carrier in the position of Track Laborer. Since this was the only category in which the Claimant held seniority with the Carrier, he was held out of service. Therefore, September 13, 1958, was the date of the occurrence giving rise to the claim or grievance involved in this case. The Carrier did one thing and one thing only; i.e., they found the Claimant to be physically disqualified for the position in which he was employed. Therefore, under Section 1(a) of the National TLOC Rule, any claim or grievance which was to be filed on behalf of the Claimant based upon this occurrence, which took place on September 13, 1957, had to be presented in writing by or on behalf of the employe involved to Roadmaster R. V. Dangremond, the officer of the Carrier authorized to receive same, within sixty (60) days from September 13, 1957. No claim on behalf of the Claimant was received by Mr. Dangremond within sixty (60) days of September 13, 1957. The Organization's General Chairman admits that the first claim filed on behalf of the Claimant was that contained in his letter dated January 10, 1958.

The Organization has taken the position that the claim filed on behalf of the Claimant under date of January 10, 1958, was for an alleged continuing violation of the agreement and, therefore, a claim of the nature which could be filed any time under Section 3 of the TLOC Rule. The Carrier emphatically denies that the claim on behalf of the Claimant is one of a continuing nature. This claim is based upon only one thing that the Carrier did, an action which took place on one day. It is true that had a valid claim been filed within the applicable time limits, there would be a continuing liability; this cannot, however, constitute a continuing violation of any agreement. A review of Section 3 of the National TLOC Rule will clearly evidence the fact that the first sentence of Section 3 was intended to apply only to cases where the Carrier took some positive action day after day which constituted a violation of an agreement. A reading of the last sentence of Section 3 of the TLOC Rule clearly shows that the drafters of that agreement intended to except discipline cases from the scope of continuing violations. The first sentence of Section 3 provides that claims for an alleged continuing violation of any agreement may be filed at any time and all rights of the claimant involved thereby shall be fully protected by the filing of one claim based thereon as long as such alleged violation, **if found to be such,** continues. After providing that claims cannot be allowed retroactively for more than sixty (60) days prior to the filing thereof, the rule approaches an entirely different subject, that is, claims or grievances involving an employe held out of service in discipline cases. The fact that an entirely different subject is embarked upon is evident when that portion of the rule was prefaced with the phrase "with respect to claims and grievances involving . . ." By starting a sentence in this manner, it is clear that the drafters of the agreement intended to provide something entirely different for claims and grievances involving an employe held out of service in discipline cases. In this instance, the drafters of the agreement provided that the original notice of request for reinstatement with pay for time loss shall be sufficient. This is the filing of one claim or grievance. However, the agreement does not provide, with respect to claims and grievances involving an employe held out of service in discipline cases, that the claim can be filed at any time, nor is the corollary provision of the

first portion of that rule added, i.e., that claims can be retroactive for only sixty (60) days prior to the filing thereof. A claim or grievance involving an employe held out of service in discipline cases is a case where the Carrier did one specific thing on one known date. It was not the intention to consider claims and grievances involving an employe held out of service in discipline cases to be a continuing claim any more than the case involved in this instant dispute is a continuing claim. Where the Carrier committed one act on one day, any claim or grievance resulting from that act must be filed within sixty (60) days of that date of occurrence or the claimant is barred from recovery by Section 1(a) of the TLOC Rule. To find otherwise would be to do a severe injustice to the intent of this rule. If the Board were to find that discipline cases or cases involving employes held out of service for any other reason constituted a continuing claim, then, as a result, the employe could lie back for years without losing the right to come in at a late date and file claim for his alleged mistreatment. It was the intent of the TLOC Rule to establish limits of time in which the Carriers and Organizations would discharge their responsibility to promptly settle claims and grievances. The Carrier respectfully submits that the claim filed under date of January 10, 1958, is not a claim of a continuing nature and that it is barred because it was not presented within sixty (60) days of September 13, 1958. This position of the Carrier should be sustained because it is the only interpretation of those provisions of the TLOC Rule that is in keeping with the basic intent of that rule.

In view of the foregoing, the Carrier submits that the Organization failed to file a valid claim in this case. Based upon the ruling of Referee Horace C. Voken in Third Division Award 8383, the Carrier submits that there was no obligation upon Roadmaster R. V. Dangremond to take any action whatsoever on this claim. It may be remembered that in Award 8383, the Board adopted the findings of Award No. 40 of Special Board of Adjustment No. 170, involving the Brotherhood of Railway Clerks and the Illinois Central Railroad, wherein the Board stated in the application of the National TLOC Rule:

> "We are of the opinion that the 60 day period mentioned in the above agreement is mandatory and not directory, but such provision does not come into existence unless and until a valid claim is filed."

II. CARRIER'S EXHIBIT "B" CONSTITUTES A DISALLOWANCE.

The claim submitted to this Board in the instant dispute is vague and indefinite in Section 1 hereof in that the Organization fails to identify the particular procedural requirements with which Roadmaster Dangremond failed to comply. While arguing this case on the property, the Organization took the position that the only procedural requirements with which Roadmaster Dangremond failed to comply were (1) that Roadmaster Dangremond's letter of March 11, 1958, failed to deny the claim as set out in the General Chairman's letter of January 10, 1958, and (2) Roadmaster Dangremond failed to set forth any reason for not allowing the claim. These specific charges are contained in General Chairman D. L. Woods' letter to Roadmaster Dangremond dated March 14, 1958, Carrier's Exhibit "C". This has been the Organization's consistent position throughout the handling of this claim on the property and at no time has the Organization charged that there were any other procedural defects in the handling of the claim by Roadmaster Dangremond.

In the foregoing section of this submission, the Carrier took the position that the Organization failed to file a valid claim in this case. In view of this,

there was no obligation upon Roadmaster Dangremond to make any reply (Third Division, NRAB, Award 8383). However, without prejudice to this position the Carrier will show that there were no procedural defects in the handling of the claim by Roadmaster Dangremond.

Roadmaster Dangremond's letter of March 11, 1959, to General Chairman D. L. Woods should be examined in light of the requirements of the time limit of the TLOC Rule. The applicable portion of the rule is contained in Section 1(a) and provides:

> "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 employe or his representative) in writing of the reasons for such disallowance."

In the absence of a compromise settlement of a claim, a claim will either be allowed or disallowed after presentation to the officer of the Carrier authorized to receive same. It should be noted that this particular rule uses the term "allow" and the negatives of that term, "disallowed" and "disallowance". Section 1(a) of the TLOC Rule requires, in the section quoted immediately above, that in the event any claim is disallowed, the Carrier shall take certain action; i.e., it shall notify whoever filed the claim in writing of the reason for such disallowance. This is the only mandatory requirement upon the Carrier official; i.e., he need only notify the person filing the claim in writing of the reasons for such disallowance. Clearly, if the employe or his representative is notified of the reasons why his claim was not allowed, he is at the same time being notified of the fact that such disallowance did take place. In this light, a review of Roadmaster Dangremond's letter of March 11, 1958, makes it clear that the claim is not going to be allowed. Mr. Woods was notified:

> "There is no basis for a claim for retroactive pay since the agreement provides that disqualification will be handled as a grievance or through a review by physicians."

The letter of March 11 clearly did not allow the claim. The first two paragraphs of the letter set out Mr. Dangremond's opinion as to the manner in which Rule 54 of the basic agreement should apply; this was because of the observation contained in the second sentence of the first paragraph of that letter, that since the claim was not filed within the time limit provisions of the TLOC Rule and the Claimant and the Organization did not have any basis for handling the matter as a grievance, the only alternative left under Rule 54 was to arrange for the establishment of a Medical Board. Section 1(a) of the TLOC Rule does not make it obligatory that the Carrier official be absolutely correct in his reasons for disallowing of claim. The rule merely requires that he notify the employe or representative involved of his reasons for such disallowance. Right or wrong, Roadmaster Dangremond expressed the reasons he had for not allowing the Claimant's claim. For this reason, the Carrier submits that the Board should find in this case that the Carrier did comply with the procedural requirements of the TLOC Rule at the first level of handling the instant dispute.

In the event the Board rules in favor of the Organization and against the Carrier on this particular issue, the Carrier calls the Board's attention to Roadmaster Dangremond's letter of May 6, 1958, to the General Chairman, a copy of which is identified as Carrier's Exhibit "D" in this case. In that letter, Roadmaster Dangremond emphatically points out that his letter of

March 11 constituted a denial of the claim contained in the General Chairman's letter dated January 10, 1958, and he reiterates that earlier denial in the letter identified as Carrier's Exhibit "D". Therefore, in the event the Board finds that the claim dated January 10, 1958, was not disallowed in the letter dated March 11, 1958, then it must find that the claim was denied, specifically, in the letter dated May 6, 1958. In the event the Board finds that the instant claim was a continuing violation of an agreement and that the letter of March 11, 1958, did not constitute a proper disallowance of the claim, then the Carrier submits that its liability in the instant dispute should be disconinued as of May 6, 1958, the date on which the claim was emphatically denied. This position is based upon the findings of the Third Division in Award 8318, with the assistance of Referee Carroll R. Daugherty. A similar finding was made by the Second Division of the National Railroad Adjustment Board in its Award 3298, with the assistance of Referee D. Emmett Ferguson.

III. THE MERITS OF THE INITIAL CLAIM.

As was set out in the Carrier's Statement of Facts, the Claimant was found to be blind in one eye. The Carrier's physical standards are identical with the physical standards for railway service recommended by the Medical Section of the Association of American Railroads. In its bulletin, M&S-300, the Medical Section of the AAR established as a recommended standard that no person whose vision could not be corrected to 20/40 in one eye and 20/50 in the other eye, with or without glasses, should be considered qualified for railway service near train and/or yard movements. These standards were established by a committee of eminent railroad physicians for the purpose of guiding the many railroads in this country in establishing physical standards which would assure the American railroads of being able to afford the public the safe transportation of their persons and their property required by the Interstate Commerce Act. In addition, railroads have a duty regarding the safe transportation of persons and property and the maintenance of its property to the non-traveling public and its other employes as well. The safety hazard of having a track laborer who is blind in one eye, insofar as the other people in his immediate gang are concerned, is so obvious that time need not be taken to review it here. It is because the railroads have this obligation to the public, as well as to its employes, that they have retained the right to establish the physical standards which must be met by its employes if they are to remain in the railroad service. In cases where an employe has had many continuous years of faithful service and through an ailment or injury is no longer capable of safely discharging the duty of his position, it has always been a policy of this Carrier to attempt to find work for such employe in another position where his physical disqualification will not create a hazard. In the instant case, the Claimant had only seven months of seniority. The General Chairman of the Organization submits that the employe involved had the particular ailment prior to his entering the service of the railroad. In this case, the Carrier did not consider that it had the same obligation that it had to an employe, for instance, who had twenty-five, thirty, or thirty-five years of continuous service. Thus after the Claimant was found disqualified he was withheld from the service of the Carrier.

A review of the agreement between the Organization and the Carrier demonstrates that there has been no restriction whatsoever placed upon this basic and fundamental right of the Carrier to establish physical standards for its employes. Rule 54 of the basic agreement establishes a procedure to be followed in the event an employe is found to be disqualified as a result of a physical examination. This rule provides for the creation of the Medical

Board, including an impartial neutral. The function of a board of this type is to determine whether the employe involved meets the minimum physical standards established by the Carrier.

In the instant case, the Organization admits that the Claimant is blind in one eye. Since this admission establishes that the employe does not meet the minimum physical standards, it is clearly evident that the Carrier properly withheld him from service. On its merits, there is no showing in this case that the Carrier violated the basic agreement.

IV. CONCLUSION.

In the foregoing, the Carrier has established that the Claimant was properly removed from the service due to his inability to meet the minimum physical standards enforced for track laborers. The Claimant was removed from the service following a medical examination by the Carrier's physician. The Organization has never established that the Claimant was improperly removed from the service or that any of his rights under the basic agreement were violated by this action. Thus, there is no claim involved in this case which is fully protected by the filing of one claim under Section 3 of the TLOC Rule, because the Organization has never established that there was an alleged violation **found to be such** continuing during this period of time. As was observed by Referee D. Emmett Ferguson in Second Division Award 3298, the Carrier can be called upon to pay a claim under the TLOC Rule only **after** it has been determined that there was, in fact, **an actual violation of the agreement.** Since the Carrier did not in any manner violate any of the rights held by the Claimant under the agreement in removing him from the service because of his physical defect, there can be no liability on the part of the Carrier following the date on which the claim was disallowed.

The Carrier has also shown in this submission that the action complained of does not constitute a continuing violation of the agreement as referred to in Section 3 of the TLOC Rule, but was in fact a singular act which was completed on one day. In view of this, the Organization failed to submit a claim on behalf of the Claimant within the sixty (60) day time limit as required by Section 1(a) of the TLOC Rule and for that reason, there is no valid claim involved in this dispute. In the absence of any valid claim, there was no obligation upon the Carrier's Roadmaster to act within the time or perform the functions called for by that Section 1(a).

Further, the Carrier has shown that even if the claim as contained in the General Chairman's letter of January 10, 1958, was a valid claim under this rule, such claim was disallowed by the Roadmaster in the manner called for by the TLOC Rule. In view of the foregoing, the Carrier respectfully submits that the claim brought before this Board should be denied.

All material data contained in this submission has been discussed with the Organization in conference or in correspondence.
(Exhibits Not Reproduced)

OPINION OF BOARD: Claimant I. V. Gooch was permanently removed from service on the basis of alleged defective vision. Under Article V, Section 1(a), of the August 21, 1954, National Agreement, a claim protesting permanent disqualification from service must be filed, to be timely, within 60 days from the date of the permanent disqualification. Under the condition of the Record herein it is impossible to determine with reasonable assurance precisely when Claimant was permanently disqualified from service; accord-

ingly, it is not possible to determine whether the claim herein was timely filed and the claim must be dismissed.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claim should be dismissed in accordance with Opinion.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 21st day of July, 1960.