

Award No. 10438
Docket No. MW-11440

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS**

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

- (1) The Carrier violated the effective Agreement when, by letter dated November 14, 1958, it terminated Section Laborer L. P. Curry's employment relationship and seniority status.
- (2) Mr. L. P. Curry's employment relationship and seniority status as a section laborer be restored.

EMPLOYEES' STATEMENT OF FACTS: On June 11, 1958, the claimant, who has established and holds seniority rights as a section laborer and who was regularly assigned as such, was laid off account of force reduction.

The claimant filed his name and address to protect his accumulated seniority rights on June 16, 1958 and renewed same on August 12, 1958, September 23, 1958 and November 3, 1958.

The Carrier accepted the above-mentioned filings as being made within the time limits stipulated by the Agreement rules and recalled the claimant to service as an extra gang laborer as follows:

Date recalled	Date laid off account of reduction in forces
July 23, 1958	August 8, 1958
September 3, 1958	September 19, 1958
October 13, 1958	October 31, 1958

Nonetheless, under date of November 14, 1958, the Carrier advised the claimant that:

"Parsons, Kansas,
November 14, 1958, PR-S-9730

Mr. Leslie P. Curry
Hepler, Kansas

Dear Sir:

Records show that you were cut off account reduction in forces on 6-11-58. You filed your address on 6-16-58 and renewed same on

handling of the matter of termination of Mr. Curry's seniority, concerning which this purported claim has been appealed to the Third Division, was it ever charged that:

"The Carrier violated the effective Agreement when, by letter dated November 14, 1958 it terminated Section Laborer L. P. Curry's employment relationship and seniority status."

nor was any claim ever made that:

"Mr. L. P. Curry's employment relationship and seniority status as a section laborer be restored."

Mr. Crotty's letter of October 14, 1959 is therefore nothing but an abortive effort to appeal to the Third Division an alleged claim which the evidence of record clearly shows has never been handled with the Carrier, and since the Third Division is without jurisdiction to docket, hear and determine such claims, the Carrier respectfully requests the Third Division to dismiss this alleged claim for want of jurisdiction.

All data submitted in support of the Carrier's position have been heretofore submitted to the Employees or their duly accredited representatives.

The Carriers request ample time and opportunity to reply to any and all allegations contained in Employees' and Organization's submission and pleadings.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, deny each and every, all and singular, the allegations of the Organization and Employees in alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, respectfully request the Third Division, National Railroad Adjustment Board, deny said claim and grant said Railroad Companies, and each of them, such other relief to which they may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: Petitioner contends that the applicable agreement was violated because the Carrier terminated Claimant's employment by letter dated November 14, 1958 in which its Division Engineer wrote the Claimant as follows:

"Records show that you were cut off account reduction in forces on 6-11-58. You filed your address on 6-15-58 and renewed same on 8-12-58. The 60 day renewal was due on or before 8-10-58, therefore you failed to comply with Rules 25 and 26 of Article III in the Current Agreement and no longer have an employe relationship with this Company."

Carrier asserts that the claim was not handled in accordance with the mandatory provisions of Article V of the August 21, 1954 National Agreement. The alleged insufficiencies in this regard were asserted on the property in a letter dated January 16, 1959 from Carrier's Vice-President to the General Chairman as follows:

"No claim or grievance has been presented and appealed in this instance in accordance with the provisions of Article V — Carriers' proposal No. 7 of the August 21, 1954 Agreement. Your letter dated September 9, 1958 (evidently should have been dated December 9, 1958) to Mr. T. S. Carter, Chief Engineer, purporting to present certain vague and indefinite claims and counterclaims, "which refute and deny each other, does not conform to and meet the requirements of Article V — Carriers' Proposal No. 7, of the August 21, 1954 Agreement. The purported claims have not been presented to the officer of the Carrier authorized to receive same; they were not presented within sixty (60) days from the date of the occurrence on which they are based, and they have not been presented by or on behalf of the employees allegedly involved. Your purported appeal of these claims is therefore premature, null, void and of no force and effect, and the alleged claims are not subject to consideration and decision but are barred by Article V of August 21, 1954 Agreement and declined."

The Carrier also contends that this appeal is barred by the provisions of Section 1 (c) of Article V of the August 21, 1954 National Agreement.

Claimant's letter dated November 19, 1958 sufficiently indicates that he was claiming that the Division Engineer's letter of November 14, 1958 terminating his employment was incorrect. It was also timely, as indicated by the dates of the letters since the Division Engineer's letter was the occurrence on which the claim was based. For this reason, the General Chairman's letter, erroneously dated September 9, 1958 instead of December 9, 1958, to Chief Engineer Carter was also timely, and in this connection it is noteworthy that the Division Engineer's response to Claimant is dated November 28, 1958. Chief Engineer Carter's letter dated December 11, 1958 in response to the General Chairman does not assert that no claim was filed with the Carrier's officer authorized to receive claims. Neither that letter nor the letter dated January 16, 1959 from Carrier's Vice-President to the General Chairman assert that there was a failure to give 60 days notice of rejection of Carrier's decision. These were procedural matters which were waived by the failure to assert and interpose them on the property as they occurred. See Second Division Award 2178.

In addition, we regard as sufficient for claim purposes, the General Chairman's letter, which should have been dated December 9, 1958, to Chief Engineer Carter. It sets forth in full the Division Engineer's letter dated November 14, 1958, the Claimant's letter dated November 19, 1958, and the reply thereto of the Division Engineer dated November 28, 1958. It also indicates the contention that the Agreement was violated with respect to the Claimant as well as the basis for such view. Nothing in Article V, Section 1(a) and (b) of the August 21, 1954 National Agreement prescribes the language or a form which must be used for the presentation of a claim or grievance.

With respect to the timeliness of the appeal under the August 21, 1954 National Agreement, this Division has held that the controlling date is the date of the receipt of the Petitioner's Notice of Intention to File Ex Parte Submission. See Award 9059. On this basis, the docket shows that this appeal was timely.

With respect to the merits of the dispute, the record shows that since June 11, 1958, the date of his layoff, the Claimant filed address renewals on August 12, 1958, September 23, 1958 and November 3, 1958, and that although

the renewal on August 12, 1958 was two days late, the Carrier continued the Claimant in its employ thereafter from September 3, 1958 to September 19, 1958, and from October 13, 1958 to October 31, 1958, without reference to the late address renewal filing. By reason of these circumstances, the Carrier accepted and recognized the address renewal filed on August 12, 1958, and permitted Claimant to continue to report for work in reliance thereon during the periods mentioned, which were prior to November 14, 1958, as though his employment and seniority status as a section laborer continued. As a result of this situation, the Carrier was in no position, on its own account, to terminate the Claimant's employment on November 14, 1958.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of March 1962.