

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20900  
Docket Number MW-20844

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(Burlington Northern Inc.

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

The claim presented by Local Chairman J. H. White on June 2, 1973 that

"... Mr. McInturf should be placed back in service and compensated for lost time wages."

should and shall be allowed as thereby presented because of Superintendent Heimsjo's failure to disallow the claim in conformity with the procedural requirements of Rule 42A. (System File S-S-102C/MW-32(a) 9/24/73)

OPINION OF BOARD: Claimant was employed as a sectionman commencing April 2, 1973. His application for employment was disapproved by Carrier and his services terminated as of the "close of work" on May 31, 1973. On June 2, 1973 the Organization filed claim alleging violation of Rule 3(A) and Rule 40, and demanded that Claimant "be placed back in service and compensated for lost time wages." Carrier failed to respond to said claim. Accordingly, on August 29, 1973, Organization filed further claim as follows:

"August 29, 1973  
Spokane, Washington

Mr. J. G. Heimsjo, Supt.  
Burlington Northern, Inc.  
w. 221 First Avenue  
Spokane, Washington 99204

Dear Sir:

On June 2, 1973, I filed a claim with you on behalf of Mr. C. D. McInturf, Employee No. 044318.

As I have not received a reply regarding this claim, you have violated Rule #42.

So **therefor** according to Rule #42, I feel Mr. McInturf should be placed back in service, and again I feel should be compensated for lost time wages.

Sincerely,

/s/ J. H. White

J. H. White, Local Chairman  
Lodge 104  
9510 E. Seventh Avenue  
Spokane, Washington 92206

cc: Ray Richardson  
Duane Tulberg  
C.C. McInturf  
J. H. White"

Rule 40 of the controlling Agreement, and specifically the first sentence of subdivision "A", provides that "An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held." Obviously, this rule does not come into play unless an employe has been "in service sixty (60) days or more". This in turn involves construction of Rule 3(A), which provides as follows:

"A. An applicant for employment will be required to fill out and execute the Company's application forms and pass required physical and visual examinations, and his employment shall be considered temporary until application is approved. If application is not disapproved within sixty (60) calendar days from commencement of service, the application will be considered as having been approved unless it is found that false information has been given. In the event applicant gives false information, the Company will have the right to disapprove such application after the sixty (60) calendar day probationary period has expired."

Petitioner contends that Claimant actually completed 60 days of service and thus could not be dismissed without an investigation. Carrier, on the other hand, asserts that Claimant was a probationary employe and that it complied with Rule 3(A) by disapproving his application "within sixty (60) calendar days from commencement of service." Accordingly, Carrier maintains Claimant, having no status as an employe, did not come within the protective provisions of Rule 40.

We point out, however, that irrespective of the merits of the latter contentions, the appeal to this Board rests solely on the procedural issue presented in the Statement of Claim -- that the claim of June 2, 1973, "shall be allowed as thereby presented" because of Carrier's "failure to disallow the claim in conformity with the procedural requirements of Rule 42(A)."

**Rule** 42(A) provides as follows:

"A. All claims **or** grievances must be presented in **writing** by or on behalf of the **employee** involved, to the officer of the Company authorized to receive **same**, 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 company 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 Company as to other similar claims or grievances."

The record evidence indicates that the letter claim of June 2, 1973 was not in fact replied to within the 60 days period specified in **Rule** 42(A), and that it was not until **August 30**, 1973 (some 89 days later) that Carrier responded by "rejecting" the Organization's letter claim of **August 29, 1973**.

Carrier is consistent in its position, however, that since Claimant had no **employee** status, **Rule** 42(A), also, did not apply to him.

Procedurally, Carrier, citing precedent, contends that "rules" and "issues" are now asserted by Petitioner which were not raised on the property and that these, being new matters, are not properly before the Board at this level of the Appellate process.

This principle is well established and has been adhered to consistently by this Board. However, in reviewing the correspondence on the property we find it quite clear that issues were raised in respect to **Rules** 3(A), 8(A), 40 and 42(A). Moreover, it should be emphasized that the Statement of Claim is specifically limited to **Rule** 42(A). Accordingly, since we shall limit ourselves to consideration of these issues, and no others, we do not sustain Carrier's objection on the issue of "new **matter**" as bearing upon the merits of the claim.

The **gravamen** of this dispute rests on the specific language of the involved **Rules**, and these, unfortunately, are not identical. Thus:

(1) Rule 3(A) requires that the employment application must be disapproved "within sixty (60) calendar days from commencement of service."

(2) **Rule** 40(A) provides that "An **employee** in service sixty (60) days or more will not be . . . dismissed" until after investigation.

(3) Rule 42(A) states that claims must be disallowed by **Carrier** "within sixty (60) days from the date same is filed . . .". (**Emphasis** added in each case).

On Rule 3(A) there is sharp issue between the parties as to the meaning of the words "within . . . commencement of service". Carrier argues **that** the "first day" should not be counted and that "calendar days" refer to "24 hour days". Petitioner contends on this issue that the beginning of the "first day" represents the "commencement" of service and that, in fact, Claimant had completed 60 days of service prior to dismissal. With similar reasoning, Petitioner urges further that **Claimant** was actually "in service" for 60 days and thus came within the coverage of Rule 40(A).

Carrier cites many prior Awards as **precedent**, most of which do not involve interpretation of any rule similar to Rule 42(A) here involved. **Some** are not germane, being based on dissimilar **factual** situations. For example, Award 3152 related to definition of "reasonable time," 3520 concerned seniority **rights** on reemployment, 13301 dealt with "furloughs" on less than five days notice, 14274 and 4391 related to false information on the application as extending Carrier's time to dismiss, and 8536 related solely to whether "oral notice" was adequate.

Additionally, Awards **15026**, 19117, 19674 and 19968, some of which did involve language similar to Rule 42(A), dealt with situations in which **there was** no question but that the application had been disapproved well within the specified time limitation. This is not the situation here, for the instant dismissal occurred precisely on the 60th day, after the "close of work".

Awards 19177 and 3545 (2nd Div.) deal with the legal principle of **excluding** the first day in measuring time, but the language of the rules in those cases differs from the language of the rules here involved. relative to the words "after" the applicant begins work or "from date". Emphasis is placed on the **precise** meaning of these specific words, the Referee concluding that "This language shows that the parties intended the period to exclude the first day of employment" See Award 19177, *supra*. **Rule 3(A)** and **Rule 40(A)**, with which we are involved, respectively contain the phrases "within . . . commencement of service" and "in service sixty (60) days or more". Such language is not involved in the Awards cited **above**.

Standard Dictionary references define "within" as being "inside the limits of, not beyond". And "after" is defined **as** "subsequent to in time or order". It would **appear, therefore**, that differences in interpretation hinge on the narrow issue of **how** these words are used in the confronting Rules.

We have gone **into** this **matter** at some length, and have **analysed** in depth the pertinent **Rules** and cited precedents, to demonstrate that serious dispute existed as **between** Carrier and Organization on precise interpretation

of the stated Rules and their applicability specifically to this Claimant and the confronting facts. The correspondence between the parties on the property evidences that these matters were pointedly placed in issue.

Carrier urges, in connection with the foregoing **Rules**, that the Agreement **must** be interpreted as written, and that its provisions and Rules must be read together to determine the intent of the parties in context.

We agree, but that is not the issue before us. It should have been, but it is not. The simple issue before us is compliance by Carrier with **Rule 42(A)**. A valid claim had been presented by **Organization** letter of June 2, 1973. Carrier's obligation was clear; i.e., to disallow the claim "within sixty (60) days from the date same is filed" by appropriate notice to Organization. Carrier failed to do so and the consequence of such failure is clearly stated in the **Rule**: "If not so notified, the claim or grievance shall be allowed **as** presented . . ."

See Awards 9931 (Bailer), 15788 (McGovern), 10138 (Daly), 11174 (**Dolnick**), 12473 (Kane), 16564 (**Dorsey**), and 19946 (Blackwell), among many others.

We acknowledge and agree with Carrier's position and supporting Awards on the principle that specific rules take precedence over general rules. We apply this principle to the instant dispute, for there appears to be no question that **Rule 42(A)** is precise and specific, and mandatory upon the negotiating principals to the Agreement.

Nor do we feel that Carrier **can** evade the issue by contending that since Claimant "had no **employee** status" he was not covered by **Rule 40** or by **Rule 42(A)**. In essence this position begs the question. For, the precise thrust of the claim relates to Claimant's status as an **employee**. Certainly, carrier could not unilaterally demolish the claim by virtue of the discharge; the discharge itself having been specifically placed in issue by the claim.

Additionally, we have held repeatedly that even where the claim is deemed "fanciful" or "without merit", Carrier is required to reject within the time limit set forth in the Rule.

"This requirement is mandatory, not a matter of choice or dependent upon the type or quality of the claim." See Awards 10138 (Daly), 12473 (Kane), 14759 (**Ritter**), 19422 (Edgett), 6383 (2nd Division - **Lieberman**) and 6627 (2nd Division - O'Brien).

In Award 19422, supra, we stated:

". . . we have firmly established that a Carrier is not permitted to prejudge the merits of a claim **and** fail to answer **because, in** its opinion, the claim lacks '**substance**'.  
**Awards** 9760, 10138, 10500, 11174, 12233, 12472, 12473, 12474, 14759, 16564, 19361."

Finally, "Carrier's obligation to deny any claim filed within 60 days of filing, giving its reasons for disallowance in **writing**, is , . . absolute. **Since** Carrier failed in this contractual obligation we **are** compelled . . . to sustain the instant claim as presented." See Awards 16564 (**Dorsey**) and 19361 (**Devine**), among **many** others.

Accordingly, based on the foregoing findings and controlling authority, we sustain the claim es presented.

**FINDINGS**: The Third Division of the Adjustment **Board**, upon the **whole record** and all the evidence, finds **and** holds:

That the parties waived oral hearing;

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

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

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 12th      day of December 1975.