

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21344
Docket Number MS-21548

William G. Caples, Referee

PARTIES TO DISPUTE: (Virgil O. Kuhn
(The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of my intention to file an ex parte submission on 30 days from date of this notice covering an unadjusted dispute between me and the Chesapeake & Ohio Railway Company involving the question:

(Time Claim of May 21, 1973, was not acted on by the Carrier according to Rule 21-A of the C & O Form PL-13.)

OPINION OF BOARD: The facts of this case are clear. They reflect that petitioner was unable to perform service for the Carrier from May 19, 1972 until May 2, 1973. During that period he underwent a surgical procedure to correct a back malady. His personal physician indicated that he was able to resume duty on April 2, 1973. Carrier's physician, after examining claimant on April 24, 1973, approved him for return to service effective May 2, 1973. The issue involved in this case is the period from April 2, 1973 to May 2, 1973.

Before any comment can be made relative to the merit issue, we must address ourselves to a jurisdictional issue which is involved in this case. Petitioner contends that his claim was not answered by Carrier in a timely manner. Carrier contends that petitioner's claim was not handled in the usual manner on the property as required by Section 3 First (i) of the Railway Labor Act. Carrier further contends that petitioner's presentation of this case to our Board was not made within the time period required by Rule 21(g) 1. C. of the Collective Bargaining Agreement.

The facts in the record as they relate to the initial presentation of this claim indicate that by letter dated April 25, 1973, addressed to his General Chairman, claimant wrote: "This is to request my past wages from April 2, 1973, * * *." He also asked for reimbursement of 360 auto miles resulting from reporting for examination by Carrier's physician. The General Chairman handled the matter directly with the Carrier's highest Labor Relations Officer who on May 16, 1973, denied the request in its entirety. The General Chairman notified Claimant Kuhn on May 21, 1973 of the Carrier's rejection of his claim.

Thereupon, by letter dated May 21, 1973, Claimant Kuhn wrote his local chairman, again requesting "my past wages as a Time Claim for the following days: * * *." He listed the work days embraced within the period April 2 to May 1, 1973 inclusive. He did not include the 360 miles claim.

The local chairman simply marked claimant's May 21, 1973 letter "approved" and gave it to a Track Supervisor who was not the officer of the Carrier designated to receive or handle claims. Subsequently, on September 26, 1973, Claimant Kuhn again wrote to the local chairman requesting further advice concerning his May 21, 1973 letter. The local chairman took this September 26th letter to the Division Engineer (the Carrier's official designated to receive and handle initial claims) who in turn - on September 28, 1973 - advised Claimant Kuhn that his claim had already been denied by the Carrier's highest appeals officer to the General Chairman.

As time went on, the General Chairman - on claimant's behalf - pursued this matter with Carrier's Labor Relations Officer who on October 29, 1973, verbally offered to allow claimant 10 days pay to dispose of the matter. Claimant rejected Carrier's offer. No further handling of the claim occurred until March 15, 1974 when the General Chairman again wrote to Carrier's Labor Relations Officer. In reply to that letter, Carrier again offered to allow 10 days pay without prejudice to either parties' positions. No response was made to this repeated offer.

The next chapter in this saga opened on August 15, 1974 when, in a telephone conversation with the General Chairman, Carrier's Labor Relations Officer offered - and the General Chairman accepted - settlement of this matter on the basis of payment by Carrier of 15 days' pay. This payment was incorporated into claimant's pay for the payroll period ending September 6, 1974, received by claimant on September 20, 1974. When the pay check was received, claimant refused to accept it.

Subsequently, by letter dated January 26, 1976, petitioner presented the instant dispute to our Board.

From this record, it is obvious that if we consider petitioner's letter of May 21, 1973 as his "legitimate claim" as he has characterized it, then the entire matter must be dismissed because of the failure to present it to the officer of the Carrier authorized to receive it as required by the applicable Rule of the Agreement. (See Award Nos. 20977 (Norris), 20282, 20281 (Lieberman), 20170 (Blackwell), 20076 (Lieberman) of this Division.)

Assuming, arguendo, that the claim in this case is the letter dated April 25, 1973 addressed to the General Chairman, and further assuming that Carrier waived the initial level of handling by accepting and replying to the General Chairman's handling as it did by its denial letter of May 16, 1973, then we are compelled to dismiss the instant claim because of the fatal defect of not appealing the decision of the Carrier's highest official to this Board within the nine (9) month period demanded by Rule 21 (g) I. C. (See Award Nos. 20253 (Sickles), 19983 (Blackwell), 19164 (Hayes), 17977 (Dorsey) of this Division.)

It is a well settled principle in this industry that a Carrier has not only the right but also the obligation " * * * to assure that individuals in its active employ are both physically and mentally competent. * * *" (Award No. 20344 (Sickles)) See also Award Nos. 20652 (Quinn), 15367 (Lynch), 14127 (Weston), of this Division. The Carrier also has the right to obtain this information from a doctor of its own choosing and a reasonable delay in obtaining this information is entirely proper. (See Third Division Award Nos. 20344 (Sickles), 14761 (Ritter), 10907 (Moore) as well as Second Division Award Nos. 7151 (Sickles), 7089 (Twomey), and 6850 (O'Brien).)

Therefore, in view of the fatal procedural defects which exist in this case, we will dismiss the claim as presented.

We do, however, recommend to the parties that the offer of 15 days' pay as made by the Carrier, both on the property and before this Board, be accepted as an equitable settlement of this dispute.

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 approved June 21, 1934;

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

That the Claim is barred.

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Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1976.