

The Third Division consisted of the regular members and in addition Referee Ronald L. Miller when award was rendered.

(Lyle D. Howard  
PARTIES TO DISPUTE: (  
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"1. Consolidated Rail Corporation, hereinafter referred to as 'the Carrier', violated the Collective Bargaining Agreement in effect in July, 1984, between the Carrier and the Brotherhood of Maintenance of Way Employers (B.M.W.E), which Agreement was applicable to Lyle D. Howard in that:

(a) the Carrier erroneously and unlawfully refused to reinstate Mr. Lyle D. Howard to his position as a trackman with back pay due to an alleged violation of Rule 4, Section 3 of the applicable Collective Bargaining Agreement; and

(b) the Carrier erroneously caused Lyle D. Howard's seniority to be forfeited due to an alleged failure to keep his current address on file with the company when, in fact, Lyle D. Howard's correct address was on file with the company at the time alleged (November 3, 1983 through November 21, 1983), and even though Rule 4, Section 3 of the applicable Collective Bargaining Agreement was not german (sic) to Mr. Howard since he was off work due to disability, not furlough.

2. Wherefore claimant, Lyle D. Howard, respectfully requests that he be reinstated to his job as trackman with back pay from July 11, 1984."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes 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.

This Board, and other Boards, have properly dismissed claims where substantial and material changes have occurred in a Claim between its handling on the property and its presentation to a Board. In this case, the differences between the Claims are not substantial and/or material, rather than the later Statement of the Claim (Claimant's Ex-Parte Submission) more clearly states the issue and the remedy sought. Moreover, the earlier Statement of the Claim (Carrier's Ex-Parte Submission) is sufficiently clear as to the basis of the Claim, the alleged violation, and the remedy sought as to qualify as a Claim under the Railway Labor Act.

Turning to the merits of the case, the record is not clear as to the Claimant's employment status in November 1983, when he was sent a recall notice. The Carrier contends that Claimant was on furlough. The Claimant contends that he was off work because of a medical disability from December 1981, to July 1984. Neither the Carrier nor the Claimant have submitted persuasive evidence in support of their position. Lending support, but not convincingly, to the Claimant's contention that he was off work due to a disability is the unrefuted statements by the Claimant that he was excused by the Carrier from an alleged April 1982 recall, and that he was examined by several company doctors prior to returning to work in July 1984. There is no substantial evidence from which to conclude that in November 1983 the Claimant was on furlough. Therefore, the Claimant did not forfeit his seniority by not responding within the specified time period.

There is however a final and controlling issue in this case. Rule 26 of the BMW Agreement provides, in part, "A claim or grievance must be presented, in writing by an employee or on his behalf by his union representative . . ." In that Agreement, the term "union representative" is defined as ". . . as individual certified by the Brotherhood of Maintenance of Way Employees." The Notice of Appeal filed by an attorney on February 6, 1985, is not signed by the Claimant and therefore is properly considered as being filed on behalf of the Claimant. The Carrier had the right to refuse to accept the appeal. The subsequent appeal signed by the Claimant (dated April 5, 1985) was outside the time limit provided by Rule 26. This Board is bound by the language of Rule 26. The appeal is procedurally defective and therefore the Claim must be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1988.

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Chicago Office