

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35723
Docket No. MW-34778
01-3-98-3-488**

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

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (**
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company (Eastern Lines))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The ten (10) day suspension imposed upon Machine Operator R. E. McKinley for alleged violation of Rules 1.1, 1.1.2 and 1.6 on December 18, 1996 was arbitrary, capricious and on the basis of unproven charges (System File MW-97-173/1069488 SPE).**
- (2) The claim as presented by Second Vice Chairman E. Posas, Jr. on March 5, 1997 to Mr. D. W. Clark shall be allowed as presented because said claim was not disallowed by Mr. D. W. Clark in accordance with Article 15, Section I(a).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimant shall be allowed the remedy prescribed by the parties in Section 7 of Article 14.”**

FINDINGS:

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

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

Article 15 (Time Limits for Presenting and Progressing Claims or Grievances) provides, in pertinent part, that:

“Section 1 (a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier 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 Carrier shall, within sixty (60) days from the date same is tiled, notify whoever tiled 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 Carrier as to other similar claims or grievances.”

A careful review of the record indicates that the Director of Engineering Quality Management sent a denial letter, dated May 2, 1997, to the Second Vice Chairman of the Organization at the wrong address. Specifically, the letter contained an address in LaGrande, Texas, whereas the Second Vice Chairman of the Organization whose correspondence generated the May 2, 1997 letter had a mailing address in LaGrange, Texas. In the absence of any independent evidence from the Carrier to prove that the Organization had received the May 2, 1997 letter, the Carrier perforce failed to comply with the requirements of Article 15. The claim is therefore 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.

With respect to a remedy, Article 14, Section 7 limits any payment to the Claimant to the working hours that the Claimant “actually lost” as a result of the unsustained charge. In the present case, the record indicates that the Claimant apparently had sustained an injury to his right shoulder, hip, and knees. In the absence of any evidence in the record that the Claimant was physically able to work on the relevant days, Article 14, Section 7 precludes a monetary remedy to the Claimant.

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AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 24th day of October, 2001.

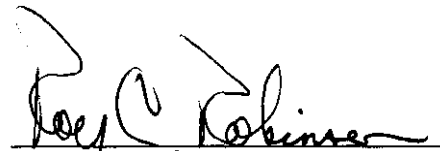
LABOR MEMBER'S CONCURRING AND DISSENTING OPINION
TO
AWARD 35123, DOCKET MW-34778
(Referee Douglas)

The handling of claims and grievances under the effective Agreement is governed by Article 15, Section 1(a). Like most claim and grievance handling rules in this industry, Article 15, Section 1(a) specifies that if a claim or grievance is to be disallowed, the Carrier must notify the person filing the claim of the reasons for such disallowance within the time limits and if not so notified, the claim or grievance shall be allowed as presented, without precedent as to the parties contentions on the merits of the claim or grievance. Hence, the Board was correct to sustain the claim based on the Carrier's violation of the time limits. In this case the Board held:

“*** In the absence of any independent evidence from the Carrier to prove that the Organization had received the May 2, 1997 letter, the Carrier perforce failed to comply with the requirements of Article 15. The claim is therefore 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.”

With that said the Board should have ended its findings and directed the Carrier to pay the claim as it was presented, which is in full compliance with the crystal clear language of the Agreement. Sadly, the Board did not do so and set out to dispense its own version of industrial justice. The last paragraph of the Award runs diametrically opposite to the clear and unambiguous language of Article 15 Section 1(a). The Majority's decision to limit the Carrier's liability is simply unconscionable and renders this award palpably *erroneous* insofar as the remedy is concerned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson", written over a horizontal line.

Roy C. Robinson
Labor Member