

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 36072  
Docket No. MW-35673  
02-3-99-3-606**

**The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.**

**PARTIES TO DISPUTE: (**  
**(Brotherhood of Maintenance of Way Employees**  
**(Burlington Northern Santa Fe (former Burlington**  
**( Northern Railroad Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier removed and withheld Mr. R. L. Dean from service beginning July 7 through 28, 1997 for alleged violation of Carrier Rule 1.5 and entered the allegation on his personal record (System File T-D-1433-H/MWB 97-12-09AJ BNR).**
- (2) The claim as presented by Vice General Chairman A. R. Hohbein on August 27, 1997 to Dakota Division Superintendent R. E. Mackenroth shall be allowed as presented because said claim was not disallowed by Superintendent Mackenroth in accordance with Rule 42A.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. Dean shall now ‘ . . . be reimbursed for any and all losses. We request that Claimant receive 120 hours at his truck driver’s rate of pay, and pay equal to any and all overtime paid the employe that performed his duties as truck driver from July 7 through July 28, 1997. We request that any and all of this improper and unwarranted assessment of discipline, removal from service or any mention of alleged rule violation, alcohol or drug testing stemming from July 7, 1997 be stricken from Claimant’s record, including any secondary file maintained by the Carrier. We further request copies of Claimant’s personal record as assurance such record has been expunged.’”**

**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.

The Claimant holds seniority as an Interstate Truck Driver on the Dakota Division. On July 7, 1997, he was removed from service by the Carrier after testing positive for alcohol on a federally mandated random test. The Claimant was informed that he was medically disqualified from service until he complied with the requirements set forth by the Carrier's medical department. After complying with the requirements, including retesting, the Claimant was permitted on July 24, 1997 to return to his job.

In a certified letter dated August 27, 1997, the Organization filed the instant claim with Dakota Division Superintendent R. E. Mackenroth, contending that the Claimant's removal from service was a violation of Rule 1.5 and that he should have been afforded a fair and impartial Investigation. The Organization alleged that the Claimant's removal was disciplinary in nature because the occurrence would subject him to discharge if a second violation occurred within a ten-year period.

The Organization did not receive a response to the claim nor was there a reply from the Carrier to a subsequent letter from the Organization dated November 12, 1997 requesting payment of the claim on a default basis. Accordingly, the Organization sent another letter, this time to D. Merrell, the Carrier's Director Labor Relations on December 9, 1997, requesting payment on the claim. He denied the claim on three grounds: 1) the Organization failed to file the claim with the officer of the Carrier authorized to receive same within 60 days of the occurrence; 2) even if the Carrier's local declination was late, this only tolls the Carrier's liability; and 3) in any event, the Claimant was not subjected to any discipline.

Based on this record, we find at the outset that the Organization's claim is not barred for failure to be timely presented to the Officer of the Carrier authorized to receive the claim. One of the central disputes in this case is whether the Carrier's actions amounted to discipline, as the Organization asserts, or whether there was a medical disqualification for which the discipline Rule would not have applied, as the Carrier argues. The Carrier's contention that the Organization was required to file the claim with the Carrier Officer authorized to handle non-discipline cases presupposes that the Carrier's position is meritorious and that it could, as a threshold matter, make a determination about the merits for purposes of ascertaining whether to respond to the claim. That is a mistaken viewpoint.

Where the Organization has presented a colorable claim, the Carrier is required to respond regardless of whether the Organization is ultimately successful on the merits. The Carrier is not privileged to ignore claims it believes are frivolous or arguably incorrect. Unlike the Awards cited by the Carrier, it cannot be said with positive assurance as a threshold matter that the instant claim is not susceptible of an interpretation that supports the Organization's position. Therefore, the filing of the claim with Superintendent Mackenroth was arguably correct. (Compare Third Division Awards 22601, 22399, 21344) The Carrier proceeds at its peril if it predetermines the case on the merits and fails, as it did here, to respond to the claim in accordance with the time limits of the Agreement.

So stating, it does not necessarily follow that the claim must be sustained as presented or that the Claimant is entitled to the remedy sought. Generally, the untimely denial of a claim tolls the Carrier's liability for the procedural violation, but it does not prevent consideration on the merits. The Organization has strongly urged on the merits that the period of the Claimant's removal must be considered disciplinary in nature because it can lead to the Claimant's dismissal in the event there is a second occurrence within ten years. However, as the Board noted in Third Division Award 35746, the opportunity for medical disqualification subject to retesting afforded the Claimant the opportunity to avoid discipline. No Investigative Hearing was held under the circumstances and no discipline was imposed.

Moreover, even if liability were not tolled, the Claimant would be ineligible for any monetary relief because he was unable to work as a Truck Driver during the period he was medically disqualified. Thus, while the second paragraph of the claim is sustained, paragraphs one and three are denied and no remedy shall be awarded.

**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 18th day of June, 2002.**