

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40594
Docket No. MS-40580
10-3-NRAB-00003-080481**

The Third Division consisted of the regular members and in addition Referee Martin W. Fingerhut when award was rendered.

PARTIES TO DISPUTE: (James E. Stephenson
(Illinois Central Railroad

STATEMENT OF CLAIM:

“I received an occupational disability last October. All I am asking for is to be shown as such on the seniority rosters.”

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.

On March 13, 2007, the Carrier sent the Petitioner the following letter:

“Reference Rule 38(a) Unauthorized Absences of the current work agreement between the CN/IC Railroad and the Brotherhood of Maintenance of Way Employees that states: ‘Employees who are absent from their assigned position without permission for seven (7) consecutive

workdays, will be considered as having abandoned their position and resigned from the service.'

'Information received from the Medical Department indicates that your Medical Leave of Absence expired on Wednesday, February 28, 2007. You therefore are considered as having abandoned your position and resigned from the service.'"

The facts show that the Petitioner had been on medical leave of absence for several months due to a work-related injury. Each leave was for a period of 30 days, and provided that an additional leave would be granted if necessary documentation from his treating medical provider showed that additional medical leave was required.

The latest leave of absence expired on February 28, 2007. No request for an additional leave was made for a period subsequent to that day. After seven consecutive workdays had elapsed, the Carrier terminated the Petitioner's seniority relying on the above-quoted Rule 38(a).

The Petitioner takes the position that the Carrier was aware that he was unable to return to work and that Rule 38(a) was not applicable. The Carrier argues that Rule 38(a) is an automatic forfeiture provision, which comes into play whenever a seven workday absence without permission occurs.

The Carrier further contends, however, that because of improper handling of the dispute as required by the Agreement, the Board must dismiss the claim without reaching its merits. The Carrier sets forth several bases for its dismissal contention. The Board need consider only two.

The first argument is that the Petitioner never complied with the provisions of the Agreement dealing with the filing of claims. In this connection, it points out that the entire handling of the dispute on the property was undertaken on the Petitioner's behalf by the law firm of Rathmann & O'Brien, L.L.C. In response to the initial letter from the law firm, the Carrier pointed out that the claim was improperly submitted because the law firm was not the duly authorized representative of the Petitioner designated to handle claims under the labor Agreement covering the Petitioner. In

support of that position, the Carrier cited Rule 34(e) of the Agreement entitled "Claims and Grievances" which provides, in pertinent part:

"(e) This rule recognizes the right of the Brotherhood of Maintenance of Way Employees to file and prosecute claims and grievances for and on behalf of the employees it represents."

The Carrier argues that a claim was not presented by an entity authorized to represent the Petitioner as set forth in Rule 34(e) and there was never any valid claim presented.

In support of its position it cites Third Division Award 32292, involving a factual situation closely akin to that involved here. Therein the Board held:

"The case cannot be decided on the merits. The appeal is procedurally defective because Petitioner's attorney is not his duly authorized representative as designated by the governing collective bargaining Agreement and the Railway Labor Act."

The Carrier also relies upon Third Division Award 26749, which cited eight additional Awards to the same effect.

The Board finds merit in the Carrier's position. While Section 3, First (j) of the Railway Labor Act provides that the parties to the dispute "may be heard . . . by counsel," that provision pertains to the right of a party to select who will represent the party before the Board. It does not deal with the question of representation rights under the claims handling provisions of the Agreement. The Board finds that because no valid claim was filed under the Agreement, we have no alternative but to dismiss the claim.

The Carrier further argues that even assuming a valid claim had been filed, the Board would be required to dismiss the claim because the appeal to the Board was untimely under the Agreement. Again, there is merit in the Carrier's position. The facts show that the final declination by the highest designated officer of the Carrier was made on August 15, 2007. Under Section 34(c) of the Agreement, a claim:

“ . . . shall be barred unless within nine (9) months from the date of said officer’s decision, proceedings [are] instituted by the employee before the appropriate division of the National Railroad Adjustment Board. . . .”

The nine-month period expired on May 15, 2008. While the Notice of Intent letter addressed to the Board shows a date of May 14, the Board’s records show that the notice was received by the Board on May 20, 2008. Thus, the Notice of Intent was untimely and, pursuant to the express terms of Rule 34(c) the claim, even if otherwise perfected, would be barred.

The claim must be dismissed.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of August 2010.