

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23452
Docket Number MW-23402

A. Robert Lowry, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ Missouri Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Trackman D. H. Smith was without just and sufficient cause and on the basis of unproven charges (Carrier's File S 310-262).

(2) General Manager G. T. Graham failed to disallow the claim (appealed to him under date of December 26, 1978) as contractually stipulated within Agreement Rule 12, Sections 2(a) and 2(c).

(3) As a consequence of either or both (1) and/or (2) above, Claimant D. H. Smith shall be allowed

'8 hours each work day at trackman's straight time rate of pay beginning October 6, 1978, including any holidays falling therein, and continuing until reinstated to service with seniority, pass and vacation rights unimpaired.'"

OPINION OF BOARD: This dispute will be resolved on the basis of a procedural defect and for this reason we will not burden the record with a discussion of the merits.

On December 26, 1978, the General Chairman appealed the denial decision of Superintendent King to General Manager Graham, the second level of appeal, requesting reinstatement of Claimant Smith with back pay. By March 22, 1979, the General Chairman had not received a response from his appeal to Graham and on that date he addressed a letter to the Director of Labor Relations, the third and final level of appeal, advising that Graham had failed to respond to the appeal within 60 days and the claim should be allowed as presented in accordance with the provisions of Rule 12, Section 2, of the Agreement, reading as follows:

"Rule 12, Section 2, (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 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 60 days from the date same is filed, notify whoever filed 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."

"(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property extend the 60-day period for either a decision or appeal, up to and including the highest officer of the carrier designated for that purpose."

"(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the carrier to handle such disputes. ***"

The Carrier argues that the General Manager had complied with the time limits of Rule 12 by responding to the December 26, 1978, appeal on February 8, 1979, but the letter was never received by the General Chairman. The Carrier produced a copy of the letter of February 8, 1979, which had been received by the Superintendent on February 14, 1979. However, that letter gives rise to suspect, as the impression of the date stamp shows evidence of having been changed. Irrespective, evidence of receipt of the letter by the Superintendent does not constitute notification to the sender as required by the rule. The record reveals that these parties elected to use regular mail service for transmitting their correspondence involving claims and grievances and inasmuch as both are subject to the same time limits under the Rule they are both knowingly subjecting themselves to the same jeopardy.

The rule governing the progression of claims and appeals to have any meaning demands the sustaining of this claim as presented.

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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: _____



Executive Secretary

Dated at Chicago, Illinois, this 8th day of December 1981.