

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation
(Amtrak) - Northeast Corridor

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

(1) The Carrier violated the Agreement when, effective June 17, 1985, it terminated the seniority of Ms. Leslie Pelzer and refused to allow her to return to service (System Docket NEC-BMWE-SD-1386).

(2) The Agreement was further violated when Senior Director of Track J. J. Cunningham failed to timely disallow the claim presented to him by Ms. Pelzer on July 2, 1985 as contractually stipulated within Rule 64(b).

(3) As a consequence of (1) and/or (2) above, Ms. Pelzer shall:

'... have my seniority immediately reinstated and to be allowed to return to work under provisions of Rule 22. In addition I would request to be compensated for all lost time since my attempt to return to work on June 17, 1985. ***'"

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 employes 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 waived right of appearance at hearing thereon.

The Carrier advised the Claimant that she would be recalled from furlough for service as a Trackman effective March 18, 1985. The notification letter, sent by certified mail, was dated March 11, 1985, and the record of receipt shows that it was received by the Claimant (or someone on her behalf) on March 12, 1985. The letter stated: "Failure on your part to respond to this recall may subject you to loss of seniority under the terms of Rule No. 21."

Rule 21 reads in pertinent part as follows:

"FAILURE TO RETURN TO SERVICE AFTER NOTIFICATION

An employee who fails to return to service within ten (10) days from date notification has been mailed to his last recorded address (in accordance with Rules 19 and 20) for a position or vacancy of thirty (30) days or more duration will forfeit all seniority under this Agreement. Forfeiture of seniority under this Rule will not apply:

(1) When an employee, within thirty (30) days from date of notification of recall, furnishes evidence satisfactory to the officer signatory to notification that failure to respond within ten (10) days was due to conditions beyond his control. Such evidence will be made available to the representative."

The Organization states that the Claimant received the recall notification on March 24, 1985, although, as noted above, it appears that the notice was received on March 12, 1985. Nevertheless, on March 24, 1985, the Claimant called the Assignment Clerk to advise that she was unable to respond to the recall because of her son's illness. The Assignment Clerk advised her of the need to submit written documentation to the proper Carrier official, and the Claimant acknowledged that she would do so the following week.

The Carrier alleges that no such documentation was received, and at no time during the claims handling procedure did the Claimant produce evidence that such had been supplied in timely fashion -- that is, within 30 days of the recall notification. She did supply a letter from her physician dated July 9, 1985, in which the physician stated she was "again" writing on the Claimant's behalf, but no copy of a prior letter was produced.

As a result, the Carrier terminated the Claimant's seniority, as provided in Rule 21. When the Claimant, on June 17, 1985, stated she was then ready to return to duty, the Carrier advised her that her seniority had been terminated as of March 21, 1985.

On July 2, 1985, the Claimant initiated the claim here under review, stating in part:

". . . I was never informed that my seniority had been terminated until June 17, 1985 and I clearly complied with the applicable provisions of Rule 21 to protect my seniority. I feel that the termination of my seniority was a violation of Rule 21 and the refusal of the Carrier to allow me to return to work on June 17, 1985 was a violation of Rule 22."

The Carrier responded on September 6, 1985, stating in part as follows:

"By letter dated March 11, 1985, you were directed to return to service from furlough effective March 18, 1985. This letter was signed in receipt by you on March 12, 1985. In contrast to your stated contentions, the Carrier received no information to indicate that circumstances beyond your control prevented you from responding as directed, nor did you contact the proper Carrier officer regarding this matter at any time. Consequently, under the self-invoking provisions of Rule 21, you have forfeited your seniority and in effect, terminated yourself from the service of this Company. As a result, we cannot consider this case to be proper under the provisions of Rule 64 or any other rule of the current Agreement."

The Carrier argues, as to procedure, that the claim is deficient, and thus not reviewable by the Board, because it was filed more than 60 days after March 21, 1985, when the Claimant's termination of seniority was made effective. Rule 64 imposes a 60-day time limit on the filing of claims.

In like manner, the Organization notes that the Carrier's response was beyond the 60-day time limit imposed by Rule 64 for disallowance of claims. The Organization argues that when this occurs, Rule 64 provides that the "claim . . . shall be allowed as presented."

The Board finds that, in these particular circumstances, the date of the Carrier's response is without significance. Rule 21 is self-effectuating, as the Claimant was advised in the recall notification letter. Termination of seniority occurs after 10 days of recall notification, unless, as provided in certain circumstances, the employee takes specific action. No evidence was provided to demonstrate that the Claimant had furnished "evidence satisfactory to the officer signatory to notification" as to the reason for her failure to report within 10 days. Thus, the forfeiture of seniority as provided in the first paragraph of Rule 21 took effect, and the Claimant was without standing to initiate a claim more than 60 days after the effective date of her seniority termination. The record shows that she was not without experience in such matters, having sought and obtained leaves of absence in prior instances. The Claimant failed to act within the 30-day period and then failed to raise a timely claim.

As stated in Third Division Award 26549:

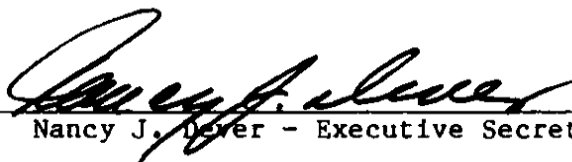
"It is a well-established principle that a claim should be considered filed on the date received by the Carrier. (See, as one example, Third Division Award 25208). In this dispute, the facts indicate that the letter of Claim was not received within the time frame specified in Rule 26(a). Since the Claim was not properly filed in the first instance we do not reach the question as to whether Carrier's response was timely nor do we reach the merits of this dispute. Numerous Awards have held that where, as here, no valid Claim existed ab initio, the Board may not consider Carrier's later procedural error or the merits of the Claim. See Third Division Awards 9684, 10532, and 16164. Accordingly, we must rule to dismiss this Claim."

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September 1988.