

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 27793
Docket No. MW-27505
89-3-86-3-764

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

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

(1) The Agreement was violated when the Carrier improperly terminated the employment of B&B Carpenter B. K. Anderson [System File D-48/013-210-48(N)].

(2) The claim as presented by Assistant Chairman R. Wehrli on October 29, 1985 to District Engineer J. M. Sundberg shall be allowed as presented because said claim was not disallowed by District Engineer J. M. Sundberg in accordance with Rule 49(a)1.

(3) As a consequence of either or both (1) and/or (2) above, the claimant's

'*** seniority and employment relationship with the Union Pacific Railroad Company and all other benefits connected thereto must be restored unimpaired immediately; and he must be returned to service as his seniority will allow and paid for all time lost which is directly attributed to the Carrier's violation of the Agreement.'"

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.

Claimant entered service of the Carrier in August 1977, and was promoted to B&B Carpenter in March 1979. While working on a B&B Gang at Marysville on August 7, 1985, Claimant marked off sick. On August 8, 1985, he requested a medical leave of absence from the B&B Clerk. Claimant was granted a leave on condition that he file a written request for leave of absence and provide medical certification of illness from his physician by August 13, 1985. For the next month, Carrier heard nothing further from Claimant and on September 5, 1985, the Division Engineer sent Claimant the following notice, addressed to his last known address, certified mail, return receipt requested:

"CERTIFIED U. S. MAIL
RETURN RECEIPT REQUESTED

B. K. Anderson
856 Troup
Kansas City, Kansas 66104

Dear Sir:

Regarding your failure to make application for Leave of Absence. You have failed to comply with Rule 25(B) of the current Maintenance of Way Agreement which states:

RULE 25. LEAVE OF ABSENCE

(b) Employees given leave of absence in writing by the proper authority of the Company will retain their seniority. Employees failing to return before the expiration of their leave of absence will lose their seniority rights unless an extension has been obtained. An employee who while on leave of absence engages in other employment without the approval of the Chief Engineer and General Chairman will forfeit his seniority. When leave of absence or extension has been requested and is denied, employee will be so advised with the understanding that he will return to service within five (5) calendar days after being advised or will forfeit all seniority rights.

This is to advise that as of this date under these circumstances, I have no alternative but to inform you that you have relinquished your seniority with the Maintenance of Way Department of the Union Pacific Railroad. Please arrange to return all Company property in your possession as soon as possible.

Yours truly,

D. C. GRIFFIN
Division Engineer"

Claimant made no response until September 19, 1985, when he telephoned and announced he would return to work on September 23, 1985. At that time, he was told he was no longer considered an employee by Carrier.

Under date of September 30, 1985, the Organization requested a Rule 48 "Unjust Treatment" hearing for Claimant, which Carrier granted and scheduled for November 4, 1985. While this hearing was pending, the Organization filed on October 29, 1985, the instant claim alleging "improper termination" in violation of Rules 1, 25 and 48. That October 29, 1985, claim letter stated that it was conditional upon the matter being satisfactorily resolved at the November 4, 1985, Unjust Treatment hearing, in which case the claim would be withdrawn. Claimant failed to appear at the November 4, 1985, hearing, but called in to report "car trouble." At the Organization's request, Carrier rescheduled the Rule 48 hearing for November 8, 1985, but Claimant again failed to appear for that meeting, calling in to report that he had no gas for his car. Carrier declined to reschedule another hearing and held the Rule 48 hearing on November 8, 1985, in Claimant's absence. Thereafter, on November 26, 1985, the District Engineer wrote to the Organization with specific reference to the earlier letters of the Organization dated September 30, 1985, November 4, 1985, and November 18, 1985, denying the claim that Claimant had been unjustly treated.

On January 3, 1986, the Organization wrote Carrier requesting payment of the claim under the Time Limits Rule, on grounds that the October 29, 1985, claim letter never had been specifically denied. The Division Engineer responded to the Organization by letter of January 10, 1986, reading as follows:

"Dear Sir:

Referring to your letter of January 3, 1986 in favor of Nebraska (Kansas) Division Bridge and Building Subdepartment Carpenter B. K. Anderson, Social Security No.: 510-66-5423, alleging that he was unjustly treated when he failed to secure a Leave of Absence which resulted in the forfeiture of his seniority.

Your statement in your letter that 'Mr. Anderson's seniority and employment relationship with the Union Pacific Railroad and all other benefits connected thereto must be restored unimpaired immediately; and he must be returned to service as his seniority will allow and paid for all time lost which is directly attributed to the Carrier's violation of the Agreement,' is totally unfounded.

The Carrier responded to this claim on November 26, 1985, which is attached. The same day we also sent you a declination in favor of System Gang Laborer J. Hurley. Is it a possibility that this letter was misfiled?

This letter of January 3, 1986 is declined in its entirety."

Thereafter the Organization appealed this claim to our Board on the merits and time limits grounds.

There is no support in the record for the claim on the merits and accordingly Part 1 of the claim is denied. The overwhelming evidence shows that Claimant failed to comply with specific instructions under Rule 25 and thereby self-terminated his employment. Nor is there any demonstrated violation of Rules 1 or 48. He was granted reasonable opportunity to attend the Rule 48 hearing and failed to do so. The record evidence supports a conclusion that he was not unjustly treated by Carrier.

With respect to the alleged time limit violations, a liberal, some might say realistic, reading of the November 26, 1985, letter would yield a conclusion that it was an appropriate denial of the October 29, 1985, claim. Carrier, however, asserted in handling on the property that it sent in addition, a separate November 26, 1985, letter specifically denying the October 29, 1985, claim. The burden of proof is upon Carrier to support that assertion and no hard copy evidence of any such separate declination letter appears on this record. Traditionally, this Board has required strict compliance with the time limit rule set forth in the Agreements for grievance handling on the property. On the other hand, this Board takes a dim view of sharp practices under these rules. In the peculiar circumstances of this case, Part 2 of the claim is sustained for the technical violation of Rule 49(a) but damages thereunder are cut off effective January 10, 1986, the date of Carrier's unequivocal denial letter.

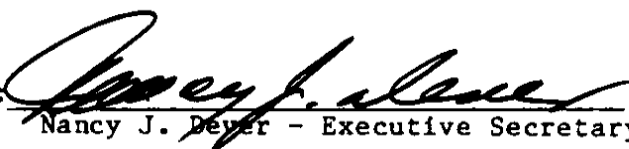
Part 3 of the claim is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1989.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 27793

DOCKET NO. MW-27505

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employees

NAME OF CARRIER: Union Pacific Railroad Company

In Docket MW-27505 we were presented with the following Claim:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly terminated the employment of B&B Carpenter B. K. Anderson [System File D-48/013-210-48(N)].

(2) The claim as presented by Assistant Chairman R. Wehrli on October 29, 1985 to District Engineer J. M. Sundberg shall be allowed as presented because said claim was not disallowed by District Engineer J. M. Sundberg in accordance with Rule 49(a)1.

(3) As a consequence of either or both (1) and/or (2) above, the claimant's

'*** seniority and employment relationship with the Union Pacific Railroad Company and all other benefits connected thereto must be restored unimpaired immediately; and he must be returned to service as his seniority will allow and paid for all time lost which is directly attributed to the Carrier's violation of the Agreement'"

With respect to the merits and time limits of that Claim, we found in Third Division Award 27793 as follows:

"There is no support in the record for the claim on the merits and accordingly Part 1 of the claim is denied. The overwhelming evidence shows that Claimant failed to comply with specific instructions under Rule 25 and thereby self-terminated his employment. Nor is there any demonstrated violation of Rules 1 or 48. He was granted reasonable opportunity to attend the Rule 48 hearing and failed to do so. The record evidence supports a conclusion that he was not unjustly treated by Carrier.

With respect to the alleged time limit violations, a liberal, some might say realistic, reading of the November 26, 1985, letter would yield a conclusion that it was an appropriate denial of the October 29, 1985, claim. Carrier, however, asserted in handling on the property that it sent in addition, a separate November 26, 1985, letter specifically denying the October 29, 1985, claim. The burden of proof is upon Carrier to support that assertion and no hard copy evidence of any such separate declination letter appears on this record. Traditionally, this Board has required strict compliance with the time limit rule set forth in the Agreements for grievance handling on the property. On the other hand, this Board takes a dim view of sharp practices under these rules. In the peculiar circumstances of this case, Part 2 of the claim is sustained for the technical violation of Rule 49(a) but damages thereunder are cut off effective January 10, 1986, the date of Carrier's unequivocal denial letter."

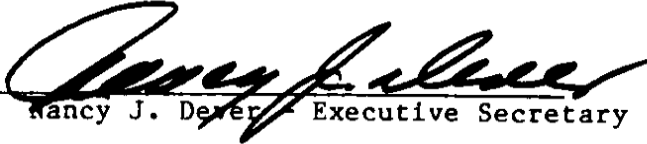
Based upon the finding of a time limit violation, but no merit whatsoever in the underlying Claim, we denied Parts 1 and 3 of the Claim but sustained Part 2 for monetary damages covering the period October 29, 1985, through January 10, 1986.

In this request for Interpretation, the Organization seeks a determination that our Award contemplated restoration of Claimant's seniority and employment relationship with the Carrier. We thought that the language of our Award was clear on this point, but lest there be any doubt we now state unequivocally that we did not award Claimant restoration of his seniority nor did we direct his reinstatement to service of the Carrier. We found that Claimant self-terminated his employment under Rule 25 and that he was not unjustly treated by Carrier. However, we awarded monetary damages for the technical violation of Rule 49(a) in order to maintain the integrity of the Agreement between Carrier and the Organization.

Referee Dana E. Eischen sat with the Division as a Member when Third Division Award 27793 was rendered, and also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1990.