

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company
(Former Missouri 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 Trackman D. S. Cyrus' employment without benefit of an investigation (Carrier's File No. 870630).

(2) The claim as presented by Assistant General Chairman G. L. Barker on July 29, 1987 to Regional Engineer G. R. Lily, shall be allowed because said claim was not disallowed by Regional Engineer G. R. Lilly in accordance with Rule 12, Section 2 (a).

(3) As a consequence of Parts (1) and/or (2) above, the Claimant shall be allowed the benefits prescribed in Rule 12, Section 1 (e) including but not limited to:

'... 8 hours pay per day, at the Trackman rate of pay, from Monday June 1, 1987, to continue, until such time that claimant is allowed to return to his position with the EDTG.'

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 Claimant began a lengthy absence for a variety of medical reasons on January 26, 1987. Because the Claimant had not obtained a leave of absence, his Supervisor sent him a letter by certified mail on March 24, 1987, which read as follows:

"This is your notice to report for work within five (5) days of receipt of this letter or show medical cause or reason why you are unable to do so. Failure to comply with these instructions will result in your name being removed from the Seniority Roster."

This letter was received at Claimant's residence as evidenced by the receipt returned by the Postal Service. The Claimant did not return to work within the time limit specified in the letter nor did he personally provide any explanation for his inability to do so. Nevertheless, on May 31, 1987, the Claimant contacted his Supervisor to advise that he had been released from the hospital and was ready to return to work. The Supervisor advised the Claimant he was no longer employed by the Carrier.

The Organization filed this Claim on the Claimant's behalf on July 29, 1987. According to the Carrier, the Claim was received in its office on July 31, 1987. It responded by letter dated September 26, 1987, but the Organization asserts the letter was postmarked on October 5, 1987, and received on October 7, 1987. This assertion has not been refuted by the Carrier.

At the outset, we must resolve the time limit arguments raised by both parties. The Carrier asserts the Claim is barred because it was not filed within sixty (60) days of the date of the occurrence on which it is based. The occurrence, argues the Carrier, is the Claimant's receipt of the March 24, 1987, letter and his failure to return to service. The Organization, on the other hand, submits that the Claim is valid without regard to its merits because the mailing of the Carrier's denial letter on October 5, 1987, was beyond the sixty (60) day time limit.

We do not agree with the Carrier's argument that the Claim is barred. The Carrier's letter of March 24, 1987, was not self-executing and did not give rise to the Claim. Rather, its subsequent action did. The record does not disclose that the Carrier took any steps to either remove the Claimant from the Roster or notify him or the Organization that such action was taken until the Claimant called his Supervisor on May 31, 1987. Accordingly, that must be the date from which the time limit is measured. The Organization's Claim, therefore, was timely.

The record, however, requires a finding that the Carrier's denial of the Claim was untimely. As noted above, the Carrier never refuted the Organization's assertion that the denial was mailed on October 5, 1987. The Organization has supported its position with a copy of the envelope which it says contained the letter. Under the circumstances, we must consider the date of mailing rather than the date of the letter in determining whether or not the Claim was denied within sixty (60) days of the Carrier's receipt of the Claim. We find that it was not.

While the Carrier's liability for its time limit violation might arguably be limited to the date when its denial was made, we find that this question is moot as the Claim has merit. The Organization has charged that the Carrier violated Rule 12 (Discipline and Investigations), which states in relevant part:

"(a)n employe who has been in service more than sixty (60) days shall not be disciplined or dismissed without investigation."

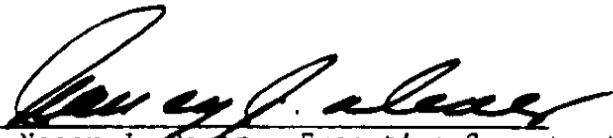
While the Carrier has argued that the Claimant "merely forfeited his District Tie Gang seniority" and was not terminated, the record shows the Carrier took the position on the property that the Claimant "forfeited his seniority and employment relationship with the Carrier." (emphasis added) The Carrier has cited no Rule which would either require the Claimant to forfeit his employment or permit the Carrier to terminate it. Unless the Carrier were privileged to terminate an employee for absence without leave under a special rule, the Carrier is limited to compliance with Rule 12. Furthermore, there is no evidence the Claimant was directed back to work under a recall of force rule which might include a time limit. Accordingly, we find the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1991.