

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43922
Docket No. MW-45488
20-3-NRAB-00003-190311**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(National Railroad Passenger Corporation (AMTRAK)
(- Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier’s failure to compensate Mr. R. Wilson for time he was held out of service pending a trial after his exoneration of all charges beginning on November 3, 2017 and continuing was arbitrary and in violation of the Agreement (System File NEC-BMWE-SD-5664 AMT).**
- (2) The claim* as presented by Vice General Chairman S. Stearn on February 12, 2018 to Division Engineer M. Moore shall now be allowed as presented because said claim was not disallowed by Division Engineer Moore in accordance with Rule 64.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. Wilson shall be compensated for all hours he would have earned had he not been improperly withheld from service and made whole for any losses suffered.**

***The initial letter of claim will be reproduced within our initial submission.”**

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.

The Claimant established and holds seniority within the Carrier's Maintenance of Way Department. On October 11, 2017, the Claimant was instructed to submit to a drug test. The Claimant's test results were characterized as a shy bladder test and he was referred for a medical evaluation. On November 3, 2017, the Claimant was removed from service and medically disqualified. The Carrier charged the Claimant with violating the Carrier's Drug and Alcohol policy. An investigation was undertaken and on January 29, 2018, the hearing officer determined that the charges against the Claimant were not proven. The Claimant was instructed to submit to a return to work physical on February 1, 2018 and was subsequently returned to service on February 12, 2018.

On February 12, 2018, the Organization filed a claim seeking compensation for the Claimant pursuant to Rule 64 of the parties' Agreement. Shortly after his return to work, the Claimant was compensated for the service he had performed from November 3 to November 15, 2017. On April 28, 2018, the Organization filed an appeal on the Claimant's behalf, pointing out that the Carrier had failed to respond to the claim within the specified time limits as required by Rule 64. Thereafter, the Carrier responded by denying the appeal and asserting that an alleged procedural violation does not require that the claim be paid. The parties were unable to resolve the claim on-property and it is now properly before this Board for final adjudication.

The Organization contends that it properly filed a Time Claim pursuant to Rule 64 and that the Carrier failed to disallow it within the contractual time frame, which requires a sustaining award. Rule 64 provides, in part:

“RULE 64 CLAIMS FOR COMPENSATION - TIME LIMITS FOR FILING

- (b) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the designated officer of AMTRAK authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim is based. Should any such claim or grievance be disallowed, AMTRAK shall, within sixty (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 AMTRAK as to other similar claims or grievances.”

The Organization contends that while the Carrier asserts that the claim is *void ab initio*, it has failed to show that the claim was untimely, too vague, or has no colorable basis in the Agreement, and thus, the clear language of Rule 64 must be applied.

The Organization contends that once the Claimant was exonerated of the charges against him, Rule 74(c)(1) provides that he must be compensated for the period he was held out of service. It states, in part, “When an employee has been held out of service pending trial and the decision exonerates him, he shall be compensated for the period of time so held out of service, the amount he would have earned had he not been held out of service.” The Organization contends that there is no basis in the record for the Carrier’s assertion that the Claimant was simultaneously medically disqualified while he was held out of service.

The Carrier contends that it has paid the Claimant for the time he actually worked, but that it was not required to compensate Claimant for the time he was held out of service because he was medically disqualified during that time. The Carrier contends that the Claimant was not cleared to return to work until a negative test result

was achieved. The Carrier contends that even if Rule 74 applied to the Claimant, he is not entitled to any remedy for the period while he was medically disqualified.

The Carrier does not deny that it failed to disallow the claim within the sixty days set forth in Rule 64 but contends that the Claimant is still not entitled to a sustaining award because the claim is *void ab initio*.

After careful review of the record, this Board has no doubt that the Carrier failed to notify the Organization that the claim had been disallowed within sixty days of the date that the claim was filed. Pursuant to Rule 64, the claim must be allowed as presented. Since the claim was timely filed and presents a colorable claim, there is no basis for disallowing the claim.

However, there is precedent supporting the Carrier's position that not every time limit violation must result in the award of a monetary remedy. In Third Division Award 36072, the Board found that despite the Carrier's failure to timely respond to the claim, the Claimant was not entitled to a monetary remedy for the period for which he was medically disqualified. See also, Public Law Board 4599, Award No. 117.

During the period of the claim, the Claimant was medically disqualified from working pursuant to a "failure to test" determination. So while the claim must be sustained due to the Carrier's failure to timely respond to the claim, there is no basis on which to award a monetary remedy. The Claimant was not fit for duty during the period he was medically disqualified. Once a negative drug test was produced, he was returned to work and the Carrier's payroll. The Claimant is not entitled to a back pay remedy.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 28th day of January 2020.