

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44785
Docket No. SG-45827
22-3-NRAB-0003-200141**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim on behalf of J.J. Cunningham, for compensation of 40 hours of straight time, account Carrier violated the Signalmen's Agreement, particularly Rules 5 and 65, when it improperly released and recalled the Claimant to his former position on Gang 8700 after he was awarded a position on Gang 2347, causing lost wages on October 8–12, 2018. Carrier's File No. 1713274. General Chairman's File No. S5, 65-1758. BRS File Case No. 16117-UP. NMB Code No. 32.”

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 was working a position on Signal Gang #8700 and was awarded a position on Signal Gang #2347, with an effective date of September 21, 2018. The Organization alleged that on September 20, 2018, the Claimant made a request to his manager about being released and was told that he would be held a couple weeks.

By letter dated October 30, 2018, the Organization submitted a claim on behalf of the Claimant alleging a violation of Rules 5 and 65 when the Carrier denied the Claimant a 40-hour work week by recalling him to his former position one week after he had been released from the position.

By letter dated December 14, 2018, the Carrier denied the claim with a form letter response. The Carrier found the claim to be without merit. The Carrier's response informed the Organization that it must provide documentation to support its claims, must cite specific agreement provisions and /or arbitral authority, and demonstrate the necessity of payment. The Carrier concluded that the Organization failed to meet its burden of proof and denied the claim.

By letter dated January 8, 2019, the Organization submitted an appeal to the Carrier's denial letter dated December 14, 2018. The Organization additionally asserted a violation of Rule 56. The Organization stated that the letters did not specify the reasons for disallowance of the claim as required by Rule 56. The Organization asserted that the form letter did not address any of the facts in the case, nor give any information as to why the claim was denied, how to reply, or what additional required evidence was needed. The Organization further stated that the Carrier was outside of the 60-day time limit to respond and the claim should be allowed as presented.

Rule 5, 56, and 65 are incorporated herein as if fully rewritten. Selected provisions of said rules read as follows:

RULE 5 – 40-HOUR WORK WEEK
GENERAL

There is established for all employees, subject to the exceptions contained in this agreement, a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the Carrier's operational requirements, so far as practicable the days off will be Saturday and Sunday...

D. Regular Relief Assignments

All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven-day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned under the agreement. Assignments for

regular relief positions may on different days include different starting times, duties and work locations for employees of the same class in the same seniority district, provided they take the starting time, duties, rates of pay, and work locations of the employee or employees whom they are relieving.

E. Deviation from Monday-Friday Week

If in positions or work extending over a period of five days per week, an operational problem arises which the carrier contends cannot be met under the provisions of Section A of this Rule, and requires that some of such employees work Tuesday to Saturday instead of Monday to Friday, and the employees contend the contrary, and if the parties fail to agree thereon, then if the carrier nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under the agreement.”

RULE 56 – CLAIMS AND GRIEVANCES

“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 be disallowed, the Carrier will, 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 will be allowed as presented, but this will not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

RULE 65 – LOSS OF EARNINGS

“An employee covered by this agreement who suffers loss of earnings because of violation or misapplication of any portion of this agreement will be reimbursed for such loss.”

By letter dated February 21, 2019, the Carrier denied the Organization’s appeal letter dated January 8, 2019. The Carrier stated that the Organization had not provided any evidence to support its claim and the manager statement’s and payroll records demonstrated that the Claimant was not released. The Carrier also stated that its initial letter was proper under Rule 56 and denied the claim.

On April 23, 2019, the parties conferenced the claim without resolution. By letter dated May 9, 2019, the Organization submitted a rebuttal to the Carrier's letter dated February 21, 2019. The positions of the parties remained unchanged and the dispute is now properly before the Board for adjudication.

Position of the Organization

The Organization contends that the Carrier violated Rule 56 when it failed to specify reasons for the denial of this claim. The Organization argues that all the denial letters of record contained the same language and there was no specific reasons given for the denial of this claim. The Organization opines that Carrier's standard form response is not within the spirit nor intent of Rule 56 as a mechanism to resolve disputes. The Organization also contends that the record establishes that the Claimant was released. The Organization argues that the Carrier violated Rule 5 when it denied him a 40- hour work week by releasing and then recalling the Claimant to his former position. The Organization maintains that the claim should be sustained.

Position of the Carrier

The Carrier contends that its first level response was sufficient and gave reasons for the claim denial. The Carrier argues that an objective review of the on-property record demonstrates that the Carrier provided a valid basis ("reason") for denying the Organization's claims. The Carrier asserts that in each instance the Carrier: (1) identified and reviewed the Organization's claim, (2) advised that the claim lacked merit and that the Agreement was not violated, (3) that the claim failed to present sufficient evidence to satisfy the Organization's fundamental "burden of proof" obligation, and (4) that the demanded remedy lacked specific factual, agreement, and arbitral support. The Carrier also contends that the Claimant voluntarily elected to hold himself out of service. The Carrier also contends that the Organization failed to satisfy its burden of proving a violation of the parties' Agreement or that a violation would result in the remedy requested. The Carrier maintains that the claim should be denied.

After review of the record and reflection on the Advocates' arguments, this Board finds that Article 56 requires the Carrier to notify the Organization in writing of the reasons for such disallowance. The evidence of record establishes that the Organization provided sufficient notice of the claim. A review of the denial letters indicate that the Carrier is using a general form letter to advance claims to the next step, and does not set forth the reasons for the denial as prescribed by Rule 56. The

Organization is on point with its argument that the contract language requires case-specific reasons for the denial to promote resolution at the earliest level of the grievance process. The Board finds that the use of a form letter at the first level response fails to refine the issue for the next level response. In addition, the lack of reasons for denial of the claim negates the Organization's opportunity to assess whether or not the claim should proceed to the next level. If the requirement for reasons is to have any meaningful construction, the reasons should be stated at the first level response rather than the second level response as shown here and further makes the first level response a vain and futile act in this process. Thus, the Board finds a violation of Rule 56.

While it is generally agreed among Arbitrators that a case should be heard on the merits rather than make a decision based on procedural objections, the negotiated language of the Agreement is clear as to the remedy for the improper response by the Carrier, and obligates the Board to allow the claim as presented.

AWARD

Claim sustained.

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 19th day of September 2022.