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NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6436
Docket No. 6297
2-N&W-SM-'73

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: { System Federation No. 16, Railway Employees'
{ Department, A. F. of L. - C. I. O.
{ (Sheet Metal Workers)
{
{ Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That under the rules of the current agreement the Carrier improperly established a fourth shift of Sheet Metal Workers in the Carriers Roanoke Shops at Roanoke, Virginia on December 1, 1970.
2. That accordingly the Carrier be ordered to assign the herein named claimants as per Rule 4 to a 7:00 A.M. to 3:00 P.M. Shift, and that the Carrier be ordered to additionally compensate the claimants for one hour each at the pro rata rate for December 2, 1970, and one hour each for each day the violation continues to exist subsequent to December 2, 1970.

CLAIMANTS:

C. R. Shifflett	C. L. Minnix
J. E. Minnix	C. L. McDaniel
E. E. Sink	K. R. Harper
D. M. Hendrick	G. M. Sink
B. J. Rumburg	F. S. Muse
E. M. Hairfield, Jr.	W. H. Carr
R. T. Sprouse	T. A. Garrison
G. A. Updike	M. L. Freese

Findings:

The Second 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 waived right of appearance at hearing thereon.

At the Roanoke Shops, carrier operates a large locomotive maintenance facility. Many departments are operated in the shops such as foundry, wheel, blacksmith, electrical, automotive, machine and including the diesel department which is in question. The diesel department is divided into the pipe shop, boiler shop, valve gang, truck patch, radiator shop, and the erecting shop which is the working place where the dispute arose. Prior to December 1, there were two shifts; 7:00 A.M.-3:30 P.M., and 3:30 P.M. to 11:30 P.M. On December 1, the carrier started a three shift operation in the erecting shop; 7:00 A.M.-3:00 P.M., 3 P.M.-11 P.M., 11 P.M.-7:00 A.M. Also, the carrier continued one shift from 7:00 A.M.-3:30 P.M. for various shop craft employees.

The claim is made that under the rules of the current agreement, the carrier has improperly established a fourth shift. The Organization relies upon Rule 4 of the Agreement for its claim.

The carrier has, on the merits, argued that the change of shifts was made to obtain economic advantage and better utilization of space and tools required by demands of the operation to reduce down time in the repair of locomotives. It claims that interpretation of Rules 2 through 5 of the Agreement support its action; that petitioner has not met the burden of proof required for its claim; that sustaining the claim would, in effect, be establishing a new rule which the Board has no right to do; that the carrier can exercise any management prerogative not limited by the Agreement; that this is not a continuing claim.

As a first defense, however, the carrier has argued that this claim must be dismissed because the Organization has failed to process the claim pursuant to Article V of the 1954 Agreement between the Carriers Conference Committee and the Employees National Conference Committee, which included these parties. This argument is drawn from Article V. 1, (b) which states in part: "If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed,---." The Carrier also relies for this position upon the Railway Labor Act, Section 3, First, (i), the relevant part of which states: The disputes between an employee or group of employees and a carrier growing out of grievances or out of the interpretation or application of agreements---shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes;---."

In handling the claim, the Organization wrote to S. C. McKinney, the pipe shop foreman by letter dated January 18. He declined the claim in a letter dated March 17, The Organization then wrote to G. A. Minnix the General Foreman by letter dated March 31. At the bottom of this letter there is typed "cc: S. C. McKinney, enclosure". The enclosure was a copy of the posted notice for the shifts established after December 1. Mr. Minnix declined the claim in a letter dated May 27. The next letter from the Organization, dated June 9, was addressed to W. R. Kinsey, Superintendent of shops. At the bottom of this letter there is typed, "cc: G. A. Minnix". Mr. Kinsey answered by letter dated August 3, in which, without prejudice to argument on the merits, the claim was declined, "---as it has not been handled in accordance with the rules of the current agreement in that General Foreman Minnix did not receive a formal rejection to his denial of May 27." The Organization answered

this by letter dated August 20, referring to the letter dated June 9, to Mr. Kinsey which said in the first paragraph, "The following claim is presented to you---, account, not having been satisfactorily settled with Mr. G. A. Minnix, General Foreman, whose decision is respectfully rejected." In addition, it is claimed that Mr. Minnix was sent a copy of the June 9, letter and that this was sufficient to put him on notice that his decision was rejected. The carrier claims that Mr. Minnix was not notified in writing that his decision was rejected; that Mr. Minnix never received the copy of the June 9, letter which was mailed to Mr. Kinsey.

The conclusion to be reached from the controversy over the procedural requirements has been considered and decided in prior Awards. Third Division Award No. 8564 stated: "It is uncontroverted that the Petitioner failed to notify the Carrier's Superintendent of the rejection of his decision, although it did otherwise comply with Article V in appealing the Superintendent's decision to the Carrier's Director of Personnel. That appeal was not the equivalent of the required notice of rejection to the Carrier's representative who made the decision----. Article V is definite and clear in its language and conditions regarding the point in question---. "The Carrier at no time expressly agreed to waive the requirement and the only question that remains---is whether the fact the Carrier processed the claims one further step in the grievance procedure before raising the procedural objections constitutes a waiver of that defense. "This question must,---, be answered in the negative----. We are not disposed to strain interpretations in order to escape the technicalities of a plain meaning." The claim was dismissed.

Third Division Award No. 19078, covers the matter of delivery of the required notice of rejection of the decision to carrier's representative before proceeding to the next step as follows: Ordinarily, there is a presumption of delivery when mail is entrusted to the United States Post Office. This is rebuttable, however. The burden is on Petitioner to show receipt, not merely that it was mailed----. As receipt of the rejection is essential we find merit to Carrier's contention." That case cited an Award No. 14354, where the shoe was on the other foot in finding: "It was the responsibility of the Carrier to be certain that the letter of disallowance was properly delivered to the Employees Local Chairman." The claim was dismissed.

In Third Division Award No. 13529, a grievance was being properly processed until the Organization, in appealing further, failed to notify the last carrier's representative that his decision was rejected and that appeal would be taken further. The carrier did not answer the appeal because of this error. The Organization argued that the carrier must pay the claim as presented because it did not answer within the required 60 days. The dispute was referred to the National Disputes Committee which ruled that: "---inasmuch as the Signal and Communications Engineer was not notified in writing of the rejection of his decision the claims are barred."

In Third Division Award No. 8383, the Organization representative stated on the record at a disciplinary hearing that in his capacity as Local Chairman, he requested return to service and payment for time lost. Despite the argument that the carrier received this notice in the written transcript, it was held that this was not valid as a claim required by Article V, 1, (a).

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There are many prior Awards which emphasize that Agreements and Rules must be followed literally. We are not authorized to approve a manner of communication which would result in a change from the required procedure in processing a grievance.

The Organization did not follow the language of Article V, the decisions of the Board, or the usual manner (Railway Labor Act, Section 3, First (i), in processing this claim.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January, 1973.