

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 11860
Docket No. 11604
90-2-88-2-89

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: ((International Brotherhood of Electrical Workers
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

1. Claim and grievance filed with W. Barrick, General Manager, Amtrak Maintenance Facility, Beech Grove, Indiana, by letter dated September 29, 1986 from Local Chairman of Electricians' Shop Committee D. A. Clement:

"Dear Sir:

Please be advised the International Brotherhood of Electrical Workers take serious exception to the carriers award of Bulletin I.B.E.W. #86.

Bulletin #86 was awarded to brothers:
L. C. Catt (313-56-8532 roster #117)
T. Preston (311-54-4743 roster #140)
R. L. Hayes (405-96-4900 (roster #97)
D. L. Hallum (309-76-0297 roster #84)
W. J. Ellis (314-48-2830 roster #126)
S. P. Conlin (304-60-8413 roster #154)

These awards are in part positively in error. Your office of Labor Management also received job bids from:
H. M. Merchant (317-52-6045 roster #69)
G. S. Abellada (332-52-6626 roster #103)
R. R. Taylor (308-58-6116 roster #123)

Obviously these three brothers should have been included on award #86, and brothers W. J. Ellis, T. Preston and S. P. Conlin should have been omitted, due to being junior in seniority.

As far as the qualifications are concerned allow me to bring to your attention the agreement between carrier and the I.B.E.W. dated April 22, 1982. Note exhibit A letter 12 where it was agreed that when employees require additional training to become or remain qualified for positions, they may be assigned to class-room or on-the-job training at such times and places as necessary. This document was signed by J. R. Johnson, Director of Labor Relations, and agreed by P. A. Puglia, General Chairman I.B.E.W.

In the agreement between the National Railroad Corporation and its I.B.E.W. employees effective September 1, 1975 Rule #8(a) states that employees after being awarded bulletined positions or permitted to exercise displacement rights, will be allowed 20 working days in which to demonstrate their ability to completely perform the job. Also Rule 6(f) state that if employees transferring from one position to another position on the same shift by award shall receive an additional 3 hours pay at the straight time rate of the positions they were awarded for each day they are required to work on their former positions.

The International Brotherhood of Electrical Workers are asking the carrier to honor the seniority of brothers Merchant, Abellada, and Taylor for the I.B.E.W. bulletin #86, and allowing brothers Ellis, Preston, and Conlin the rights to exercise their seniority.";

as revised and supplemented by letter to W. Barrick (undated) submitted on October 20, 1986 from D. A. Clement:

"Dear Sir:

Concerning our letter dated Sept. 29, 1986 regarding the Awards of Bulletin I.B.E.W. #86 dated Sept. 22, 1986. On Sept. 29, 1986 Bro. Roger A. Johnson (310-74-0058 Roster #88) returned from vacation and submitted a bid on Bulletin I.B.E.W. #86. The junior employee Brother R. R. Taylor (308-58-6116 roster #123) would be replaced by Brother Johnson on Sept. 30, 1986 to complete the awards for Bulletin I.B.E.W. #86.

Please reply!."

Furthermore, the Division Manager-Labor Relations not only failed to reply within the Agreement time limits when the appeal was duly carried to him by the Organization, but he failed to reply at all; and accordingly it is the additional claim of the Employees that this claim should be sustained in entirety as presented, without consideration of the merits, as provided for in Rule 24 - Grievances of the Agreement, especially (b) and (c) thereof.

FINDINGS:

The Second 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.

By Bulletin No. 86, new positions were advertised for six Electricians to perform installations, modifications and repairs on Turboliner equipment with qualifications noted. Claimants were denied the positions for lack of qualifications. The Organization filed a Claim with the Carrier alleging violation of Rules 6(f), 8(a) and Article 12 of the Memorandum of Understanding signed May 27, 1982.

The Carrier denied any violation of the Agreement supporting its position with Rules 6(e) and 8(a). It argued that the Claimants did not have the proper qualifications and that the Carrier was not obligated to put them in the position and thereafter train them.

During the progression of this case on the property the Organization raised a procedural threshold issue which is central to this Board's consideration. The Organization presented to the Division Manager-Labor Relations on November 18, 1986, its appeal of the General Manager's October 28, 1986 declination. By letter dated February 4, 1987, the Division Manager responded to the Local Chairman stating:

"Per our conversation on the above date concerning the appeal dated November 18, 1986, in which an extension was granted Claimants...on January 12, 1987 by...President Stonebraker...until the next conference tentatively set for the second week in February 1987. An answer will be given by February 17, 1987 as agreed upon by myself and Mr. Stonebraker." (Emphasis added)

There is dispute thereafter as to what occurred. It is the position of the Organization that no further response was heard and the Carrier is alleged to have violated Rule 24. That Rule requires a claim to be declined in writing within 60 calendar days or "the claim or grievance shall be allowed as presented."

The Carrier asserts that the Claim was denied by letter dated February 17, 1987, and presents both the letter and further proof. That additional evidence was presented as attachments to a letter dated April 22, 1988, and as an August 8, 1988 letter further relating to the Organization's alleged receipt of the February 17, 1987 denial by the Carrier.

With respect to the procedural issue raised by the Organization, this Board has thoroughly reviewed the record as exchanged on the property. Clearly, the August 8, 1988 letter presented by the Carrier came after this dispute was filed at the Board on or about May 10, 1988, and is improper for our consideration. The record indicates that the Organization explicitly made note of and requested allowance of the Claim on April 1, 1987, pursuant to Rule 24(b). It stated that "The Division Manager-Labor Relations not only failed to reply to the Organization within the time limits allowed by the Agreement; he failed to reply at all."

The Carrier response of April 30, 1987, acknowledged that "...the docketing of these cases for discussion does not constitute waiver by the Carrier of any procedural contentions relating to the Organization's or employees' progression of these cases on the Carrier's property."

The Carrier's full response to the instant Claim was made in a three page letter of August 31, 1987, which focuses entirely on merits and contains only the initial statement that: "The time limits for reply were extended by mutual agreement." There is no indication as to which time limits were extended. The Carrier never directly addressed nor refuted the Organization's procedural Claim. As such, the August 31, 1987 letter fails to provide the necessary probative evidence to weigh in favor of the Carrier.

On April 1, 1988, the Carrier was notified that the Organization held to its position of a procedural violation and would not extend time limits, but would appeal to the Board. On April 22, 1988, the Carrier requested to rediscuss this case and enclosed the letter dated February 17, 1987, issued by the Division Manager-Labor Relations denying the Organization's appeal. The Carrier does not state on the property why it took over one year to produce the letter, nor does it state that the letter was ever mailed, only that it existed. Although the Carrier produced in its Submission an envelope postmarked to the Local Chairman, there is no discussion on the property as to how it had such an envelope. As the parties are well aware, this Board does not accept in Ex Parte Submissions lines of argument which were not clearly joined on the property (Second Division Award 11633; Third Division Awards 27328, 23883). Since discussions of the envelope and evidence of its mailing did not transpire until August 8, 1988, such is not properly before this Board.

This Board must conclude that if the Carrier had such evidence that it had properly declined the Claim, it would have specifically and explicitly denied the procedural issue on the property. We conclude that Carrier failed to timely provide such clear and convincing evidence to refute the Organization's procedural objection. Therefore, the procedural violation of Rule 24 must be sustained without any consideration whatsoever of the merits of this Claim. This is consistent with the position repeatedly and consistently taken by the Board (Second Division Award 10173; Third Division Awards 27692, 27654, 27640, 27480).

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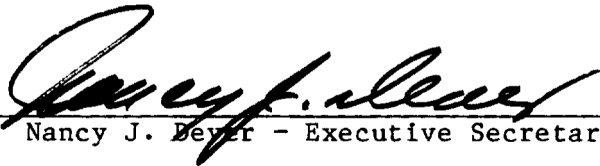
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A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of May 1990.

CARRIER MEMBERS' DISSENT
TO
AWARD 11860, DOCKET 11604
(Referee Zusman)

The Majority erred in sustaining this case on procedural grounds. The fact of the matter is that the Carrier's Division Manager-Labor Relations denied the Organization's appeal by letter dated February 17, 1987, and the Organization's Local Chairman, upon being asked, acknowledged not only his receipt of the disputed letter, but also furnished a copy of the envelope in which he received it. The Majority closed its eyes to the evidence documenting the Local Chairman's receipt of the disputed letter on the basis such evidence was introduced after the claim had been noticed to the Board, thereby permitting the Organization to benefit by "laying behind the log."

A recitation of the facts is in order.

The record reveals that under date of March 24, 1987, Local Chairman R. D. Wallace urged the General Chairman to progress the claim based on the contention no officer of Local 784 had received a reply to the undated claim submitted to the Division Manager-Labor Relations by then Local Chairman D. A. Clement. The General Chairman progressed the claim to the Carrier's Director-Labor Relations under date of April 1, 1987, on that basis, contending the grievance should be allowed as presented pursuant to Rule 24(b) of the Agreement.

Under date of August 31, 1987, the Director-Labor Relations confirmed the parties' May 13, 1987 conference discussion. Importantly, in the second paragraph of that letter the Carrier

summarized the conference contentions of the Organization. Conspicuous by its absence was any reference to the alleged procedural deficiency. Even more conspicuous is the absence of any immediate objection to the Carrier's characterization of the Organization's position at the conference.

Seven months later, by letter dated April 1, 1988, the General Chairman informed the Carrier that the Organization had not waived its position that the claim must be sustained as presented in accordance with Rule 24(b) and (c). He further suggested that another conference might be warranted.

Immediately following his April 18, 1988 receipt of the aforementioned letter, Carrier's Director-Labor Relations (by letter dated April 22, 1988) furnished the General Chairman with "...a copy of the letter dated February 17, 1987, issued by Mr. J. W. Carter, Jr. Division Manager-Labor Relations denying the organization's appeal of this case..." and scheduled the case for further discussion on May 4, 1988.

As the Majority noted at Page 4 of the Award, "...this dispute was filed at the Board on or about May 10, 1988...." While the Organization had ample time and opportunity to dispute the denial letter furnished on or about April 22, 1988, it did not dispute the issuance of the denial letter until July 14, 1988. Hence, it was this "out of time" letter which precipitated the Carrier's August 8, 1988 internal memorandum.

The Majority's strained conclusion that the Carrier had not stated that the appeal denial was ever mailed flies in the face of logic. It is inherent in the provision of such denial letter that it was mailed. In fact, the letter forwarding the denial to the Organization clearly stated that it was "issued." Still the Majority erroneously concluded that a denial was not issued.

From the record made on the property, the Majority should have dismissed the entire procedural matter by reason of the fact it was initiated solely because there was a change in Local Chairmen.

When all is said and done, contrary to the conclusion of the Majority, the Carrier did timely refute the procedural contention on the property and the on-property record was sealed on or about May 10, 1988 with that denial issuance unchallenged by the Organization.

The Majority's misreading of this element was critical to its erroneous conclusion that the Carrier failed to timely provide clear and convincing evidence to refute the Organization's self-generated procedural objection. That conclusion is plainly wrong and inconsistent with the record which was properly placed before the Board.

The ultimate consequence of this decision is that it erodes the confidence of the parties and casts a shadow upon the efficacy of the arbitration process.

We dissent.

Michael C. Lesnik
M. C. LESNIK

M. W. Fingert
M. W. FINGERT

Robert L. Hicks
R. L. HICKS

P. V. Varga
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James E. Yost
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