Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12897
Docket No. 12683
95-2-93-2-27

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists and
(Aerospace Workers
(
(The Monongahela Railway Company

STATEMENT OF CLAIM:

EMPLOYEES STATEMENT OF CLAIM:

"1. The Monongahela Railway Company violated the Rules of the Controlling Agreement of January 1, 1980, and particularly Rule(s) 23, 27, 30, 60, 61.

2. Accordingly, Machinists D. Evanoski and J. Kautzman are entitled to the payment as requested that 301.5 hours at time and one half the applicable rate and 20 hours at double time rate be divided equally between the two Claimants."

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.

On May 12, 1993, the Claimants filed the claim at issue here. In pertinent part, they contend that a Maintenance of Way Truck Driver represented by the Brotherhood of Mainentance of Way Employees "performed the duties of Machine Inspector Machinist" during the period from March 14, 1992 to May 6, 1992.

On May 19, the Carrier denied the claim because both of the Claimants had been asked to work (quoted ver batim): "on every Friday for week-end duty, but refused to work on account of to far to drive." The following day, May 20, the same letter was sent to the General Chairman of the Organization (because the May 19 letter had been sent in error to the Organization's District Chairman). The denial letter also had attached a statement signed by three employees that claimed all Repairmen had the opportunity to work overtime between March 14, 1992 and May 6, 1992.

On July 14, 1992, the claim was progressed to the Carrier's Director of Labor Relations. It brought forth three reasons why the claim should be sustained:

1. That a procedural error was committed because the original denial letter of May 19 was sent to the Local Chairman.

2. That the Claimants were not asked to work overtime, as shown by their statement attached to the letter;

3. That the Maintenance of Way truck driver performed work "that accrues to the Machinist Craft either historically or by Agreement.

The next piece of correspondence exchanged on the property is dated September 18 from the Organization to the Carrier. It requested payment of the claim because the Carrier had not responded to the July 14, 1992 letter within the applicable time limits set forth by the parties' Agreement.

On September 23, 1992, the Carrier responded and asserted that pursuant to the practice established by the parties on the property, a conference would be held between the parties before a written decision would be rendered. The Carrier also asserted that the parties had agreed to conference the claim on October 28, 1992.

Four days later, by letter dated September 26, 1992, the Organization, in pertinent part stated:

> "At this time, I am informing you that I disagree with a part of your letter and never agreed to it as stated. The following is quoted from your letter, which I am referring to:

> '.... wherein we agreed that, pursuant to the practice established by the parties on the Monongahela Railway Company, we would have a conference on the subject case before this office renders a written decision.'

This was the position of Mr. Beideck, and I did not agree with him. I informed him that the claim was payable as presented and particularly as stated in the certified letters sent to you dated July 14, 1992 and September 18, 1992."

Subsquently, the Carrier on October 9, 1992 responded to the Organization and it made the following contentions:

1. That the initial claim was vague and did not provide the vital information needed for the Carrier's response. Accordingly, the Carrier argued that the Organization failed to meet its burden of proof.

2. With respect to the notice of May 19, 1992, that was sent to the Local Chairman rather than to the General Chairman (to whom it was sent the following day), the Carrier basically argues that Rule 30 of the Agreement provided that the employee or his representative can be provided a reply.

3. With respect to the sixty (60) day time limit argument, the Carrier again asserted that it has been the practice of the property to not reply to an initial claim until a conference was held. In support of its position, it provided letters from the former Director of Labor Relations.

4. With respect to the merits of the claim, the Carrier again asserted that it could not speculate as to what work was being claimed and that notwithstanding, the Claimants declined overtime work when it was offered and specifically declined weekend duty because the distance to travel to work was excessive.

Apparently the parties met on October 28, 1992, as stated in the Carrier's letter of November 10, 1992. In that letter, the Carrier attached two documents, one of which was signed by three employees and basically stated that the person who allegedly performed Machinist work actually had not and that he and the other two employees had served in their roles of truck drivers. The second document contained a statement of a Track Supervisor that the Claimants had had the opportunity to work overtime on weekends, but had refused to do so because of the distance from their home to the work place.

On November 16, 1992, the General Chairman rejected the Carrier's denial. He enclosed the three time claims which had been submitted in 1986 and 1988; a statement of an employee (who previously held the position occupied by the employee who the Organization claims performed Machinist work) that he did not perform Machinist work and a statement of seven (7) employees as to their version of what duties were performed by a Maintenance of Way truck driver (i.e., that they did not repair equipment on trucks.)

On December 15, 1992, the Carrier again rejected the claim, mainly because the information provided by the Organization was inconclusive, vague, and unsubstantiated.

The Organization, by letter dated December 24, 1992, again rejected the Carrier's denial of the claim. It recounted many of the events relative to this claim and its belief that the Carrier had not presented the various events that made up the progression of this claim in their true light.

On January 4, 1993, the Carrier again rejected the claim. This was followed by a letter from the Carrier that attached a notorized statement of the former Director of Labor Relations which formalized his earlier statement that written decisions were not rendered until after an appeal conference had been held. There was no response from the Organization.

Turning first to the various procedural contentions advanced by the Organization. The Rule in question, in pertinent part reads:

"**RULE 30 - TIME LIMIT ON CLAIMS AND GRIEVANCES**
(Effective September 1, 1977)

(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 or grievance be disallowed, the Carrier shall, 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 shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances." (Empasis added.)

Without belaboring the point, the initial claim was signed by the two (2) Claimants and apparently by the Local Chairman. While the initial denial was sent to the General Chairman (rather than to the Local Chairman) with copies to the two Claimants, this in itself does not constitute a procedural violation, given the language of Rule 30.

With respect to the contention that the Carrier violated Rule 30(1)(c) because it did not answer the Organization's appeal within sixty (60) days, we note that while the Rule is clear in its requirement that the Carrier must respond within sixty (60) days, it was unrefuted on the property that the parties had had a long-standing practice (accepted previously by the Organization) that claims would be discussed at a conference before a written response was made.

Consequently, it is not arguable that either party may insist upon strict compliance with the terms of the Agreement, as was done in this case. However, there is also a body of opinion that advances the notion that once a practice has been established that runs counter to the terms of the Agreement, the party wishing to enforce the Agreement must provide notice of its intent. The Division follows that line of reasoning and the Carrier is now on notice by the Organization that the sixty (60) day time limits must be adhered to by the Carrier in subsequent cases.

With respect to the merits, the initial claim was extremely vague. The statement that another employee has "performed Machinist work almost daily, and on Saturdays and Sundays for a long period of time in violation of the Machinist's Agreement and shown on payroll time sheets" provided no specifics as to the actual work performed and which specific Rule allegedly had been breached. The remainder of the documentation devleoped on the property provides little evidence on which this Board can act.

Nowhere on the property is the specific language of the Scope Rule cited on which the claim is based, nor is the claimed work described and related to language in the Scope Rule. The burden of proof rests entirely upon the Organization to demonstrate that it is entitled to the work in question. In order to prevail, it must show by substantial evidence that it is entitled to the work by specific rule language or by virtue of an exclusive system-wide past practice. We find neither in this case.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 16th day of August 1995.