Award No. 16727
Docket No. MW-17258

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The claim* as presented by General Chairman W. R. Ancell on June 22, 1966, to Division Engineer Black should be allowed, as presented, because said claim was not disallowed by Superintendent W. J. Holtman in accordance with the time limits stipulated within Article V of the August 21, 1954, Agreement. (System File MW-24-66/D-7-47)

"(*) The claim, as presented, reads:

'1. That the Carrier violated our current agreement when on June 9th, 13th and 14th, 1966 they assigned track supervisor Dave Byers, who holds an appointed position and holds no seniority in the machine operator's department, to operate machine B-27 in the Alamosa, Colorado Yards.

2. That Mr. W. H. Ogden to which machine B-27 is assigned by bulletin, be paid for 24 hours at his punitive rate of pay account of this violation.' "

EMPLOYES' STATEMENT OF FACTS: Claimant Ogden is the regularly assigned operator of Machines B-27 and D-24. The Carrier assigned the work of operating the B-27 on June 9, 13 and 14, 1966, to Track Supervisor Byers. The performance of said work by a track supervisor was protested and, on June 22, 1966, the claim in behalf of Machine Operator Ogden was presented to Division Engineer Black. Mr. Black timely disallowed the claim which was then appealed to Superintendent W. J. Holtman within a letter reading:

"August 23, 1966

D-7-47

Mr. W. J. Holtman, Superintendent
The Denver and Rio Grande Western Railroad
2125 15th Street
Denver, Colorado

The claim was then handled with the Director of Personnel who denied the claim as follows:

"January 27, 1967

MW-24-66

Mr. W. P. Fraser
General Chairman, BMWE
Denver, Colorado

Dear Sir:

Reference is made to your letter December 28, 1966, File D-7-47, and to conference held January 10, 1967, in connection with the following:

'Claimed by the System Committee of the Brotherhood of Maintenance of Way Employes:

1. That the Carrier violated our current agreement when on June 9th, 13th and 14th, 1966 they assigned track supervisor Dave Byers, who holds an appointed position and holds no seniority in the machine operators' department, to operate machine B-27 in the Alamosa, Colorado Yards.

2. That Mr. W. H. Ogden to which machine B-27 is assigned by bulletin be paid for 24 hours at his punitive rate of pay account of this violation.'

In your letter you state that this machine was assigned to Mr. W. H. Ogden and he is entitled to operate the machine any time it is used. Carrier does not agree to this statement. As a matter of fact, you cannot furnish contractual proof to support your position.

At our conference on January 10, 1967, Carrier offered to pay this claim at pro rata rate of pay because of the provisions of the Time Limit Rule.

Carrier's records show that Mr. Ogden was employed at a location approximately 50 miles from Alamosa on the dates named in your claim and that he was compensated for these dates.

You have not shown that Mr. Ogden suffered any monetary damage on these dates or that he was available to perform this work. Furthermore, there is no rule in your Agreement which provides for payment at overtime rate to the claimant for work which he did not perform. See 3rd Division Award 13177.

Claim is denied.

Yours truly,

/s/ E. B. Herdman
E. B. Herdman
Dir. of Personnel"

OPINION OF BOARD: According to Carrier, this claim was "appealed to the Division Superintendent under date of August 23, 1966, and was not denied within the sixty-day time limit."

Carrier concedes that ordinarily such failure to deny within sixty days would require payment under the provisions of Article V (c) of the Agreement of August 21, 1954; but Carrier seeks to avoid that result in this case, contending that:

> ". . . the claim was defective under the provisions of Article V of the August 21, 1954 Agreement prior to Carrier also failing under the same rule in a later stage of handling . . ."

The Employes tell us that this defense of Carrier "represents a new defense which was **not** presented to the Employes during the handling of this dispute on the property." (Emphasis in original.) The record supports the Employes' contention in this regard.

Since Carrier did not assert its defense under Article V on the property, the defense cannot be asserted here. National Disputes Committee Decisions 5, 10, 17, 22, 23.

In view of the admitted failure of Carrier's Superintendent to deny the claim within the sixty-day limit, the claim shall be allowed as presented.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1968.

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