

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23416
Docket Number MW-23273

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employes**
(Fort Worth and **Denver** Railway **Company**)

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

(1) **The** claim* as presented by the General **Chairman** on November 20, 1978 to Chief Engineer O. R. **Vining** shall be **allowed** as presented because said claim was not disallowed by **Chief** Engineer O. R. **Vining** in accordance with Rule 27(a) (System File **F-23-78/W-89**).

***The** letter of claim will be reproduced within our initial submission."

OPINION OF BOARD: Carrier sent a letter to numerous Maintenance of Way foremen and their crews telling them that effective at the end of the shift on September 27, 1978, their jobs would **be** abolished, account labor disputes on other railroads that affected operations on Carrier's road. Not all of Carrier's crews were affected. Some were allowed to continue work. The temporary layoff lasted two days, September 28 and September 29, 1978.

On November 20, 1978, the Organization filed a **claim** by letter to O. R. **Vining**, Chief Engineer, on behalf of all affected employes, alleging that Carrier had violated the schedule agreement by this action, specifically Rule 13--**Force** Reduction. **The** Organization alleges in this claim that Carrier failed to give advance notice concerning the layoff. It left **some crews** working, while others were **layed** off. **Employes** were not allowed to exercise their seniority and bump into jobs that were not affected. The Organization specifies in an attachment **to** its November 20, 1978, letter those foremen, **crews** and other Maintenance of Way **Employes** who it considers aggrieved by **Carrier's** action.

On February 20, 1979, the General Chairman wrote to Mr. D. M. Tisdale, Director of Labor Relations, indicating that on November 20, 1978, he had **filed** a claim with the Chief Engineer who, as of the date of his letter (February 20, 1979), had neither accepted nor denied the claim. The **General Chairman** pointed out in this letter that the Chief Engineer's failure to respond to the initial claim within 60 days was violation of Rule 27 of the Schedule Agreement. **There-**fore, according to this rule, the claim must be allowed as initially presented.

Rule 27 reads in pertinent part:

"...1. Should any such claim or **grievance** be **dis-allowed**, the company shall within sixty (60) calendar 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."

On March 12, 1979, D. M. Tisdale responded by letter to the General Chairman denying the claim on its merits, but making no mention in his letter of the Organization's procedural arguments. The claim was subsequently discussed in conference, **denied by Carrier**, and has been submitted to this Board for resolution. The Organization has progressed the claim to this Board on a procedural violation only. Carrier has responded to the claim on the merits, as **well as** on the procedural issue and **argues** that the claim is baseless on both counts.

The record of this case contains a major discrepancy. The Organization claims that it never received a response to its initial grievance from the Chief Engineer.

Carrier presented in Exhibit No. 2, as part of its submission to this Board, a copy of a letter addressed to the *General Chairman from C. R. Vining*, wherein the claim was denied, account not being supported by any rule in the working agreement.

On page 7 of the Organization's rebuttal brief, the General Chairman states that the first **time** the Organization saw the letter identified as Exhibit No. 2 was on **May 20, 1980**, when it was a part of Carrier's submission to this Board. The Director of Labor Relations in Carrier's rebuttal brief **states** that even though he did not mention the Chief **Engineer's** denial of the initial claim, the claim was discussed in conference on the merits and the procedural issue addressed. **The claim** was denied on both counts. It was noted in the conference that the Chief **Engineer** did timely reject the claim.

There **is no dispute** over the interpretation of Rule 27(a). It is clear **and unambiguous**. If a claim is not **responded to** by Carrier within 60 days, the claim will **be** allowed as submitted. This interpretation of such rules in the industry is virtually universal. The issue then is, **did** Carrier deny the instant claim **in** a timely fashion when it was submitted?

Based on a thorough review of the record of this case, it is the opinion of this Board that Carrier did not meet the conditions required under Rule 27(a) and that it did not reject the Organization's claim within the required 60 days. This Board bases that opinion on a number of points, not the least of which is the fact that the Director of Labor Relations did not mention the issue when he responded to the appeal of the claim at his level. This record is also barren of any facts that support Carrier's contention that the issue of timely rejection by Carrier was handled on the property and that its Exhibit No. 2 was made known to the Organization in the handling of the grievance on the property.

A review of Exhibit No. 2 also leaves some unanswered questions that have not been answered in the record. No explanation of the handwritten mark on the exhibit was offered. No facts were presented to support Carrier's contention that the letter was ever mailed. No reason was given for why C. H. Vining did not sign the Letter. In a case wherein it is alleged that Carrier failed to respond to a claim properly, the burden shifts to Carrier to prove that it in fact did respond, in a timely manner. Carrier has failed to carry that burden in this case. The record abounds with unanswered questions by Carrier on this point.

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 Employees involved in this dispute are respectively Carrier and Employees 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

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By order of Third Division

A. W. Paulson

ATTEST:

Executive Secretary

Dated at Chicago, Illinois, this 3rd day of November 1981.