

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25474

Docket Number NW-25110

Martin F. Scheinman, Referee

(Brotherhood of Maintenance of Way **Employes**  
PARTIES TO DISPUTE: (  
(**Escanaba** and Lake Superior Railroad Company

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

(1) The claim\* as presented by Assistant General Chairman F. M. Larson on **May** 18, 1981 to Director Field Operations W. F. Drusch shall be allowed as presented because said claim was not disallowed by Director Field Operations W. F. Drusch in accordance with Rule 52(a) [System File **ELS 1904**].

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

OPINION OF BOARD: At the time this dispute arose, Claimants, **J.** Helgren and **J.** Vermulen, held seniority as Section Laborers. Claimant Helgren was more **senior**, by one day, than Claimant Vermulen. On or about March 18, 1981, a vacancy occurred in the Track Foreman's position at **Channing**, Michigan. Carrier did not bulletin the position and hired a new **employee**, R. **Hart**, to fill it.

As a result of Carrier's action, the Organization filed this claim on May 38, 1981. Carrier did not respond to the claim. Accordingly, the Organization filed a second letter with Carrier on July 21, 1981. Thereafter, in March 1983, the Organization appealed the claim to this Board. for adjudication.

The Organization contends that Carrier's failure to respond to its **initial** claim violates Rule 52(a) of the **Agreement**. That rule provides that Carrier must disallow the **Organization** a claim within sixty days of its submission. If the Organization is not so notified, **"the** claim or grievance shall be allowed as presented...". Thus, the Organization maintains that the claim must be sustained on procedural grounds alone.

Carrier, on **the** other hand, denies that it violated the **Agreement**. First, it argues **that** the claim is so vague that it cannot adequately prepare a defense. Second, Carrier asserts that the Organization is guilty of **laches**. Carrier points out that the Organization did not pursue its claim for some two years after it was initially filed. In Carrier's view, such delay constitutes **laches**. Thus, Carrier contends that the claim should be dismissed on this ground alone. Third, Carrier asserts that the claim was untimely filed. **For** these **reasons**, then, **Carrier** concludes that the claim should be rejected.

After reviewing the record evidence we are convinced that the claim must be sustained. The record reveals that the claim was filed on May 18, 1981. As a result, the burden fell on Carrier to deny it within sixty days, as required by Rule 52(a). Carrier's failure to do so requires that **the** claim must be allowed as presented-. Thus, as of July 18, 1981, the claim had to be sustained.

Carrier's arguments may be valid on the merits. However, by failing to timely respond, it defaulted upon the claim. Thus, the Organization's position must be sustained.

There remains the issue of **an appropriate** remedy. The record indicates that Claimant **J. Helgren** is more **senior** than Claimant **Vermullen**. As such, only he is entitled to compensation for **Carrier's** failure to bulletin the position at issue.

**Helgren**, however, is not entitled to compensation for **all** the man hours expended by R. Hart in the disputed position. Instead, **Claimant** should be compensated only the difference between what he earned and the wages paid to R. Hart. The record is unclear as to Claimant's employment status during the claim period. The parties are thus directed to review payroll records and determine wages paid Claimant. Claimant is to **be paid** the difference if any. Thus, Claimant will be made whole for **Carrier's** violation of the Agreement. Accordingly, the claim is sustained to this extent only.

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 in accordance with the Opinion,

NATIONAL RAILROAD **ADJUSTMENT** BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dwyer - Executive Secretary

Dated at **Chicago**, Illinois, this 23rd day of May 1985.