

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 25604
Docket **Number** 5625478

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
{
(National Railroad Passenger Corporation

STATEMENT OF CLAIM: Claim of ~~the~~ General **Committee** of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corporation:

Claim on behalf of C&S Maintainer J. H. ~~Hemmis~~, Harrisburg, Pennsylvania.

(a) Claim that Carrier denied promotion and caused loss of **work** opportunity to Claimant when it violated the Signalmen's Agreement, as amended and particularly Article 4, Sec. 18(b), when on **August** 18, 1981, position number 1001, Inspector Tests, Lancaster, Pa. was awarded on Bulletin No. 2125 dated August 18, 1981, to Mr. C. E. Welsh, effective August 31, 1981, instead of to Claimant. Claimant, being qualified and having the most service **in** the classes covered by the Agreement. should have been awarded the position.

(b) Claim that Carrier should award position No. 1001 (**As** advertised on Bulletin 2120, File No. 2120, dated August 6, 1981) to Claimant. Further, Claimant should be compensated for difference in **wages**, including overtime, between his present position **or** any other position he may hold, by displacement **or** award, until such time that he is awarded position 1001.
[Carrier File No. NEC-BBS-SE-140 J. H. ~~Hemmis~~]

OPINION OF BOARD: Claimant, a Maintainer, **Communications** and Signals, bid on the position of Inspector **Tests** based on a posting on August 18, 1981. He was denied the position, which was awarded to an Assistant Foreman who, as stated by the **Organization**, had less seniority "in the classes covered by the Agreement".

Applicable provisions of the Agreement are found in Article 4, Section 18 which reads as follows:

"(a) Assignments to positions in the leading maintainer, leading signalman, signal maintainer, T. & S. Maintainer, telegraph and telephone maintainer signalman, assistant signalman **or** helper classes shall be based on ability, fitness and seniority; ability and fitness being sufficient, seniority shall govern.

"(b) **Employees** covered by this Agreement who possess the necessary **qualifications** to plan, direct, lead, regulate and coordinate **the** work of other **employees** will be given consideration for promotion to positions in the foreman class. When two **or more** employees do possess the necessary qualifications (referred to in the preceding sentence of this paragraph) the **employee** with the **most** service in the classes covered by this Agreement shall be selected for promotion to the foreman **class**."

During the claims handling procedure, the Carrier failed to reply in **timely** fashion to one of the Organization's appeals. As a result, the Carrier agreed to pay the monetary portion of the claim. This payment **ran** to **December** 31, 1982, at which date the position was abolished.

Since the **monetary** portion of the claim has been settled and in view of the abolishment of the position, the Organization seeks as a remedy the Claimant's **"placement** on the seniority roster in [the Inspector-Foreman Class] immediately ahead of the employee assigned". The Organization argues that the Carrier's failure to meet the time limit requirements should include such remedy.

Previous Awards of the Third Division hold to the contrary. That is, while the monetary remedy is **required**, payment of such satisfies **the** Agreement while leaving the merit portion of the claim unresolved. In a similar case involving seniority placement, Award No. 20268 stated:

"Thus, the sole issue raised by the instant record is whether the Carrier's failure to render a timely denial to the initial claim made it liable for the claim beyond October 22, 1969, without regard to the merits, **or whether** the Carrier's liability under the time limits stopped when it issued its denial letter on October 22, 1969, leaving the claim subsequent to such denial to be considered on its **merits**. In National Disputes Committee **Decision** 16, Third Division **Docket** CL-12336 (Article V-8-21-54 **Agreement**), it was stated:

'The National Disputes Committee rules that receipt of **the** carrier's denial letter dated **December** 29, 1959 stopped the carrier's liability arising **out** of its failure to comply with Article V of the August 21, 1954 Agreement.

DECISION: Claim for compensation for each day **from** August 16, 1959 to **December** 30, 1959 shall be allowed as presented, on the basis of failure of the carrier to comply with the requirements of Article V of the **Agreement** of **August** 21, 1954, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to this claim for dates subsequent to **December** 30, 1959, **or** as to other similar claims **or** grievances.'

"The above decision leaves no doubt that, in the facts of this dispute, the Carrier's liability under **the time** limit provisions was stopped by its **October** 22, 1969 letter of denial of the claim. See also Award 16573. The **Employees** have not argued the **merits** of the claim for the period subsequent to **October** 22, 1969 **and, consequently**, the merits of the claim are not before this Board. Accordingly, we shall deny **the** claim.'

More recently, Award No. 24298 found:

"Many awards have been rendered by this Division involving late denial of claims by Carriers, especially since **Decision No. 16** of the National Disputes Committee. See also Decision No. 15 of the same Disputes Committee. Decision No. 16 of the National Disputes Committee, and awards following **the** issuance of that **Decision**, have generally held that a late denial is effective to toll Carrier's liability for the procedural violation as of that date. **From** the date of late denial, disputes are **considered** on their merits if the merits **are** properly before the Board.

"We find that the proper measure of damages for Carrier's violation of Rule **49(a)1** in the dispute **before** us, is **compensation** for claimant K. A. Bitterman at his straight **time** rate from September 18, 1980, through and including January 28, 1981. See **Award** No. 5 of Public Law Board No. 1844, as well as Third Division Awards No. 19842 and 21289 dealing with investigations not **timely** held, also Atlantic Coast Line RR v Brac, 120 F. 2d 812 (1954).

"As to the merits of the dispute, considering the offenses Claimant Bitterman was clearly guilty of, we will not award that he be reinstated to service or **compensated** beyond January 28, 1981 [the date of the Carrier's tardy denial]."

In the present instance, the Board finds no distinguishing basis on which to find otherwise than as in the two cited awards.

The **question** therefore remains as to whether the Claimant was improperly denied the position of Inspector Tests. Article 4, Section 18(b) refers to **employees** "who possess the necessary qualifications to plan, direct" etc. Throughout the dispute, the Carrier maintained that the Claimant was not qualified. (The **employee** awarded the position, an Assistant Foreman with **a number** of years of experience in that position, was considered **qualified**.) Although the particular circumstances involved prevented such from taking place, offers were **made** but not fulfilled to provide a test for the Claimant.

Based on the entire record, the Board finds no basis to question the **Carrier's** determination that the Claimant was not qualified. No contrary evidence was set forth by the Organization. This is sufficient to support the Carrier's decision.

With this finding, it is not **necessary** for the Board to examine other basis on which the Carrier alleges that the position was awarded **properly**.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

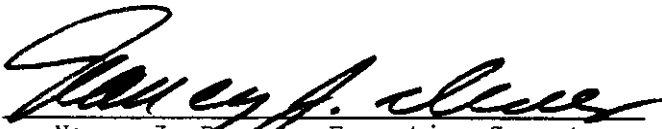
That the Agreement was not violated.

A W A R

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at **Chicago**, Illinois, this 22nd day of August 1985.

