

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company
(former Missouri Pacific Railroad Company)

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

(1) The Carrier violated the Agreement when it improperly disqualified Machine Operator D. Reaves, Jr. as Operator of ATS-102 (tamper) on May 18, 1987 (Carrier's File 870575).

(2) Regional Engineer G. R. Lilly failed to disallow the claim presented to him by Assistant General Chairman G. L. Barker on July 7, 1987 as contractually stipulated within Agreement Rule 12, Section 2(a).

(3) As a consequence of either or both (1) and (2) above, the Claimant shall:

'... be returned as operator of the AST-102 (sic)
as his seniority, ability, and merit would allow."

FINDINGS:

The Third 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 employees 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.

The Claimant has seniority with the Carrier since 1971. On March 16, 1987, he was assigned to train as the operator of an ATS-102 (tamper). On May 13, 1987, he was informed of his disqualification as the ATS-102 operator. A Claim protesting the disqualification was received by the Carrier on July 9. The Carrier defends its action asserting the absence of any Agreement provisions supporting the Claim and that the Claimant did not possess the necessary ability to master the operation of the ATS-102 tamper. The Carrier further maintains its actions were not unreasonable, arbitrary or capricious.

Before the merits can be reached, this Board must first address the Organization's contention the Carrier failed to adhere to the time limit provisions set forth in Rule 12, Section 2(a) in that it disallowed this Claim beyond the sixty (60) days within which it had to act. Furthermore, the Organization argues the Carrier also violated Rule 12, Section 2(a) when it did not decline the Claim by notifying the person who filed the Claim. Rule 12, Section 2(a) states:

"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."

As stated above, the record shows the Claim was received by the Carrier on July 9, 1987. On September 3, the Regional Engineer prepared and signed a letter of declination addressed to the General Chairman. That letter was postmarked September 7, 1987, which is the sixtieth day from receipt of the Claim.


The language of Rule 12, Section 2(a) could not be clearer. It requires the Carrier to notify whoever filed the Claim of its disallowance within sixty (60) days. The record establishes the denial was entered into the mail on September 7, 1987. This act cannot be construed as compliance with Rule 21.2(a) since the Organization was not notified of the denial by the act of posting the letter. Moreover, the Claim was filed by the Assistant General Chairman, not the General Chairman. Therefore, the Carrier's disallowance was procedurally defective on the time limit for disallowance as well as failing to address the disallowance to the individual specifically designated by Article 12.2(a). Accordingly, the Claimant's seniority on the ATS-102 tamper is to be restored. The Claimant is to be afforded the opportunity to bid on that job and given another opportunity to qualify on the ATS-102.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary


Dated at Chicago, Illinois, this 28th day of March 1991.


CARRIER MEMBERS' DISSENT
TO
AWARD 28734, DOCKET MW-28604
(Referee McAllister)

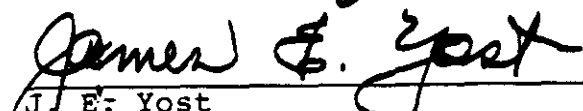
We do not agree with the Majority's findings on the time limit issue. The following Awards are merely a small sample of those that likewise are in disagreement. First Division Award 16366; Second Division Awards: 8833, 8725, 8680, 4609; Third Division Awards: 18881, 14695, 13219, 11575, 10490; Fourth Division Awards: 4736, 3234, 1717, 1177.


M. W. Fingerhut


R. L. Hicks


M. C. Lesnik


P. V. Varga


J. E. Yost