

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30638
Docket No. MW-29357
94-3-90-3-267

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation
((AMTRAK) - Northeast Corridor)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow EWE 'A' Tamper Operator J. R. McKinney per diem expenses and pay differential in connection with his position beginning in November, 1988 (System File NEC-BMWE-SD-2455).
- (2) As a consequence of the violation referred to in Part (1) hereof, the Claimant shall be allowed per diem expenses and pay rate differential as envisaged by the Contract Tamper Agreement, from November 21, 1988 and continuing."

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 employee 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 therein.

Parties to said dispute waived right of appearance at hearing thereon.

First, the Board notes that the Carrier makes several procedural arguments. For instance, it contends the claim was not timely filed and was presented to the wrong officer. With respect to the time limit argument, it is noted that the basis for this argument, as advanced by the Carrier in its Submission, was different than the time limit argument made on the property. On the property, the Carrier argued that the claim was received on February 17, 1989, beyond 60 days from the date of the claim, November 21. Thus, it seemed to accept the time limits tolled November 22. Before the Board the Carrier advanced the theory that the time limits tolled the date of the bulletin, November 8, and argued a claim sent January 11 was untimely. This is a new and different argument and one that will not and cannot be considered.

Regarding the allegation that the claim was submitted to the wrong officer, it is noted that the officer accepted and responded to the claim without taking exception to it on this basis. Thus, under these circumstances, this objection was waived.

Regarding the merits, the Organization's central contention is that the transfer in question should have been advertised along with a per diem and hourly premium in light of the following paragraph of the May 21, 1979, Letter of Agreement between the Parties:

- "1. All 16 and 32 tool production-type Tampers having three-function capabilities, including the 07 switch Tamper, will be considered a part of this agreement; and the positions assigned to these Tampers will be maintained for a period of twenty-four (24) months beginning on the effective date of this agreement."

Indeed, taken out of context, the above language seems to support the Organization's position. However, that is precisely the problem. The Organization takes the language out of context. First, as a general matter, the May 21, 1979 Letter of Agreement was negotiated in the context of the Carrier's long-range program to upgrade tracks in the Northeast corridor. The trackage involved in the instant case was subsequently acquired and not even owned by the Carrier at the time of the May 21, 1979 Letter of Agreement.

More specifically, the paragraph relied on by the Organization, consistent with well-established principles of contract interpretation, must be read in the context of all the language of the Letter of Agreement. The commitment that all 16 and 32 tool production tampers be part of the Agreement was modified by specific limitations set forth in the Agreement. Consider, for instance, the sentence prior to Paragraph 1 relied on by the Organization stating, "Consistent with the foregoing, it is agreed between the parties as follows:...." Thus, the commitment that all tampers be subject to per diem and hourly premium must be "consistent" with the "foregoing."

First, the "foregoing" lists specific machines and locations. Second, and more important to this case, is the fact that all specific assignments were to be advertised under the provisions of Rules 90A and 90B. It is noted under Rules 90A and 90B that an employee can be required to work anywhere on the Southern or Northern District without a fixed headquarters point. It was in this context the per diem was negotiated. The job in dispute was advertised with a fixed headquarters point limited to one zone, and thus, it did not involve travel. There are other restrictive provisions applicable to "contract" tamper positions, such as restricted vacation choices and a two-year minimum bid that were not part of this assignment.

In short, the May 21, 1979 contract tamper Letter of Agreement simply does not apply to a position such as the one in question which was advertised on an entirely different basis with entirely different terms and conditions than would be ordinarily attached to a contract provision.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of December 1994.