

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31345
Docket No. TD-31422
96-3-93-3-339

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Please accept this as a time claim for 8 hours pay at the time and one half rate for P. T. Stack [et al] for 2nd trick on May ..., 1991 when the Carrier filled the open 2nd trick SOTO's position with a person other than [sic] a train dispatcher. This is a violation of our June 16, 1989 agreement regarding the SOTO/CTD position and designating men to be relieved by agreement personal [sic].

Please advise as to pay that Mr. Stack [et al] may expect compensation for the above at the applicable SOTO's rate of pay."

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 herein.

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

This dispute comprises ten individual one-day pay claims by six different claimants for dates from May 12 through May 23, 1991. Although they are all similar, some differences exist between some of the claims. In general, however, they each allege that Carrier failed to fill temporary vacancies, due to the incumbent's vacation absence, with Agreement-covered train dispatchers.

This dispute raised a procedural issue that requires resolution before reaching the substantive merits. In essence, the Organization contends that the claims must be allowed as presented because Carrier failed to comply with the time limitation requirements of Rule 17.

After the claims were initially denied, nine were appealed to Carrier's Manager of Labor Relations on June 17, 1991. The tenth was appealed on June 24, 1991. Each appeal letter concluded with this paragraph:

"If you agree with this appeal as stated, please advise when [claimant] may expect one days pay at the applicable rate for that SOTO/CTD's position. If you do not agree, please advise to a time and date to a meeting as one is desired on this claim at this level."

More than 100 days later, on October 6, 1991, the Organization's representative who appealed the claims again wrote to the Manager of Labor Relations, in pertinent part, as follows:

"These claims expired under this rule [Rule 17] on August 18, 1991, and August 24, 1991. A meeting was desired on these claims and requested by the A.T.D.A. but the Carrier elected not to contact Mr. Shalda or myself to arrange a meeting on the above claims. The Carrier did not request a postponement or extension of time on these claims."

Carrier's Manager of Labor Relations responded on October 23, 1991. He wrote, in part, the following:

"M. F. Cimato, Assistant Manager of Labor Relations, talked to you [Office Chairman Hurst] about a meeting. You indicated to Mr. Cimato to handle claims with Vice General Chairman E. Shalda. Mr. Cimato tried to contact Mr. Shalda unsuccessfully and then Mr. Cimato was advised that Mr. Shalda was on a Leave of Absence.

Labor Relations Specialist P. M. Sloan, of my office, asked you in this office about setting up a meeting and you advised him that you would be back with him.

Rule 17(b) in part states: If requested, a grievance or claim will be discussed on a mutually agreed upon date.

Please advise this office on what dates you would like to meet on the above claim.

As stated above, these claims have not expired as you have claimed."

The Manager's letter did not provide any information regarding dates on when the asserted scheduling discussion occurred. Nor did the Manager's letter assert that there was an agreed upon extension of Rule 17 time limits.

In its next correspondence, the Organization maintained its position that the claims were in default under Rule 17. The parties discussed the claims in conference on November 21, 1991 and agreed to return the claims to the local level for further discussion. However, the Carrier's November 26th conference report explicitly states the parties agreed that the remand was "... without prejudice to our respective positions on the conference scheduling requirements of Rule 17(b)."

On February 18, 1992, Carrier formally denied each of the claims on the merits. Its denials did not mention the procedural issue remaining in dispute.

Following conference on July 24, 1992, Carrier wrote on September 10, 1992, again denying the claims on the merits. It also said:

On the procedural issue, it is the Carrier's position that Rule 17(b) was not violated by the Manager-Labor Relations. In each appeal letter, the Office Chairman requested a meeting if the Manager-Labor Relations did not agree with the Organization's position. Under Rule 17(b), this request automatically postponed the 60 day time limit to respond until the meeting has been held. The record is clear that the Manager-Labor Relations was diligent in trying to set a date and time for a meeting with the Office Chairman, and it was solely because of the Organization's indifference that a meeting was not held within 60 days after the Office Chairman appealed the claims.

On January 3, 1993, the General Chairman challenged Carrier's procedural position regarding an automatic postponement of the 60 day time limit. His letter states:

Obviously, the sixty day time limit runs from either the date of the claim or the date the conference is held. If no conference is held at that level, as in this case, the date of the claim is applicable. To suggest, as you seem to be, that a request for a conference forevermore suspends the sixty day time limit specified in Rule 17(b), would effectively nullify last [sic] sentence of the same rule."

In subsequent correspondence on the property, neither party retreated from its position on the time limits issue.

Rule 17(b) reads as follows:

"(b) A grievance or claim denied in accordance with paragraph (a) shall be considered closed unless it is appealed to the Manager-Labor Relations by the employee or his union representative within sixty (60) calendar days after the date it was denied. If requested, a grievance or claim will be discussed on a mutually agreed upon date. When a grievance or claim is not allowed, the Manager-Labor Relations will so notify, in writing, whoever listed the grievance or claim (employee or his representative) within sixty (60) calendar days after the date the grievance or claim was received or the date the grievance or claim was discussed (which ever is applicable) of the reason therefor. When not so notified, the grievance or claim will be allowed."

Rule 17 contains ten subdivisions. The first three include multiple references to 60-day limitations for the taking of action by one party or the other. Subdivision (e) also provides for extension of the applicable time limits by agreement. When read in its entirety, Rule 17 contemplates that the various claim handling activities will occur within 60-day intervals unless extensions are agreed upon. Indeed, even the Carrier's September 10, 1992 letter suggests an acknowledgment that normally conferences are held within 60 days of the appeal.

Given the manner in which the procedural issue is postured here, Carrier's position is, effectively, an affirmative defense. Accordingly, it has the burden of proof to establish the validity of its position. In its Ex-Parte Submission, the Carrier maintained only the aspect of its position that the time limit was automatically extended by virtue of the Organization's request for a conference. It did not continue to maintain that it had undertaken efforts to schedule a conference within the 60-day limit.

If Carrier's contention, regarding automatic extension, is taken to its logical conclusion, there would never be a time limit on its response to the Organization's appeals as long as it did not actually participate in a conference. If Carrier were so inclined, it could resist agreeing to a conference indefinitely and, thereby, interminably delay the claims process. Nothing in the language of Rule 17 explicitly supports such a result or the automatic time limits extension that the Carrier advocates. Quite to the contrary, Rule 17(e) provides only for extensions by agreement. Accordingly, it is determined that Carrier has failed to sustain its burden of proof to establish its position.

If, as Carrier once contended on the property, it encountered difficulty in properly scheduling a conference, Carrier could have requested an extension of time limits. Even Carrier does not say it did so. In the alternative, Carrier could have issued a denial, to protect time limits, until a conference date could be agreed upon with the allegedly "indifferent" Organization representatives. Carrier did not avail itself of this tactic either. Indeed, the record does not establish that Carrier actually took any action whatsoever to advance the claim handling process under Rule 17 within 60 days of the appeals. On the evidence, it must be concluded that Carrier essentially ignored these claims until the Organization drew attention to them.

Under the circumstances, we must sustain the claims under the default language of Rule 17(b). While we prefer to see claims decided on their merits, where possible, we are not free to ignore the provisions of Rule 17 of the parties Agreement as they have applied it. Our decision, it should be noted, is subject to the compensation limitation established by Rule 17(g) and the non-precedence provisions of Rule 17(j).

Because these claims are decided on procedural grounds, we do not reach their merits.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of January 1996.