Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36120
Docket No. MW-36054
02-3-00-3-79

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company (Western Lines))

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier terminated the seniority of Ms. Wendy L. Trujillo in writing on December 2, 1997 (Carrier's File 1133013 SPW).

(2) As a consequence of the violation referred to in Part (1) above, Ms. Wendy L. Trujillo shall now be reinstated to service and compensated fro all wage loss suffered."

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 were given due notice of hearing thereon.

There is an extensive record before the Board which the parties developed on the property. The Board finds as salient the following facts and notes that none of these facts is disputed. The Claimant was hired on September 22, 1997 and began working for the Carrier as a new hire. A determination was made that she did not have the fitness and ability for the position. On November 4, 1997, the Manager Track Maintenance informed the Claimant that her application for employment was rejected. November 4, 1997 was the last day the Claimant worked for the Carrier. That date was 43 days after beginning employment. On December 2, 1997, the Claimant was sent a written notification and explanation as to why her application was rejected. December 2, 1997 was 74 days after the Claimant was hired.

What stands before the Board is a contract interpretation dispute. The Carrier states it followed the Agreement. The Organization states it failed to do so. Both sides argue over the meaning of Rule 4 (a) of the Agreement which states:

> "Probationary Period - (a) Applications for employment will be rejected within sixty (60) calendar days after seniority date is established, or applicant shall be considered accepted. Applications rejected by the Carrier must be declined in writing to the applicant."

The Carrier states it correctly told the Claimant that she was rejected as an employee within the 60 calendar days required in Rule 4, and sent her a written notification reasonably thereafter. The Organization argues that the Carrier failed to notify the Claimant of her rejection until 74 days, which is well beyond the language of the Rule, supra. The Organization further argues that the Carrier not only failed to follow Rule 4(a) but the Carrier's reasons for its decision were clearly refuted.

The Board finds the language of Rule 4 (a) absolutely clear and unambiguous. It contains two different sentences. The first states that 60 days is the limit of time necessary to reject an application. The Carrier complied with the 60 calendar day boundary agreed to by the parties. The second sentence is not joined by "and" to the first sentence. Clearly, it is separated from the 60 days notice and does not require the Carrier to decline in writing within 60 days. In this instant case, the Carrier declined in writing to the Claimant in 74 calendar days. This does not violate Rule 4 (a). Nor is there any requirement by this or any other Rule herein disputed to mandate the Carrier explanation for probationary rejection. Finding no violation of the Agreement in these instant facts, the claim must be denied.

AWARD

Claim denied.

ORDER

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of July 2002.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 36120, DOCKET MW-36054
(Referee Zusman)

Although the Majority correctly characterized the dispute before the Board in Docket No. MW-36054, as focused on the contractual interpretation of Rule 4(a), and correctly found that Rule 4(a) contains two different sentences which are absolutely clear and unambiguous, the Majority grievously erred in its interpretation thereof and a vigorous dissent is required.

In Award 36120, the Majority erroneously upheld the Carrier's position that ***notification in writing*** to the applicant (Claimant) that her application was rejected *seventy-four (74)* calendar days after her seniority date was established complied with Rule 4(a), because ***verbal notification*** thereof had been made within sixty (60) calendar days after her seniority date was established.

For ready reference, Rule 4(a) reads:

> "Probationary Period. - (a) Applications for employment will be rejected within sixty (60) calendar days after seniority date is established, or applicant shall be considered accepted. Applications rejected by the carrier must be declined in writing to the applicant."

A simple reading of Rule 4(a) discloses that the parties did not contemplate ***verbal notification*** to an applicant that his/her application, *presumably written*, was rejected. This conclusion finds further support in the unrefuted historical application of Rule 4(a) established in the record of the dispute decided by Award 36120, i.e, one written notification to an applicant, **NOT** one verbal notification "and" one written notification to an applicant.

Moreover, from a simple reading, the first sentence of Rule 4(a) defines a specific time frame as a condition for notification of *when* applications *will be* validly rejected, i.e., ***within sixty (60) calendar days***, or the applicant shall be considered accepted. The second sentence of Rule 4(a) defines, as a condition of notification, *how* applications *must be* validly rejected, i.e., ***in writing*** to the applicant. Those two complete thoughts, mandating the conditions of notification for "applications rejected", are inextricably intertwined *irrespective* of whether the word "and" connects them and even considered separately, the two sentences of Rule 4(a) reveal the conditions the parties agreed would be necessary for a valid application rejection - the **only** two conditions.

By Award 36120, the Majority has, through the guise of an interpretation, **added** a ***third condition*** or ***step*** to the notification of application rejection, i.e., ***verbal*** notification. The salient point is that no such *third condition or step* for valid rejection of an application exists in the Agreement and the Board was without authority to insert language not intended by the parties. If the parties *had* intended it, the parties would have included it - *they did not.*

Instead of examining what is clearly ***in*** Rule 4(a), the Majority took special note of what is **NOT *in*** Rule 4(a), i.e., that the first and second sentences of the rule are not joined by the word "and". However, inasmuch as the first and second sentences of Rule 4(a) share the same subject, i.e., "applications rejected", it is reasonable that they be considered in conjunction in order to glean the true meaning of the parties' intent. Nevertheless, the Majority in Award 36120 viewed the two sentences of Rule 4(a) as ***unconnected*** and somehow unrelated because the word "and" did not connect them. The Majority clearly erred because the parties did **NOT** consider, much less intend, that applications, *presumably written*, would be rejected ***verbally***. The Majority's adulterated interpretation will lead to the absurd result of the Carrier ***verbally*** rejecting applications within sixty (60) calendar days and subsequently rejecting applications in writing to the applicant **ANYTIME *thereafter***.

Because fundamental principles of contract construction were ignored in Award 36120, it was decided on a faulty premise. I respectfully dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member