

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37130
Docket No. CL-38045
04-3-03-3-439**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

**"Claim of the System Committee of the Organization (GL-13006)
that:**

This claim is being filed on behalf of Mr. Tim Grzeskiewicz for the Carrier's violation of the N.R.P.C., TCU, TC Agreement, particularly Rule 1-B-1 paragraph (a) that requires a job advertisement to show the primary duties of the position being advertised and the rate of pay, Rule 1-B-1 paragraph (i) requiring the junior man on the extra list that protects a vacancy to be assigned to a position that receives no bids Rule 6-A-1(a) that reads "The territory protected by each extra list shall be established after conference with the Division Chairman", and Rule 6-A-1 (I) "each extra list will protect TC-Agreement work within the confines of the extra list territory."

Attached, please find Bulletin #12, specifically position RBC-1. The bulletin explains the Tues. night clerical duties but excludes an explanation of the block operator and train director duties and the rate of pay. This information is necessary, if the bulletin is to comply with Rule I-B-I. The omission of this information deprives the employees of the information needed to decide weather or not to bid a position. It should be noted that I made a request to both you and Mr. Duld to have the position advertised correctly, and I was told by you and Mr. Duld that Mr. L. D. Miller of Labor Relations

instructed you not to change the content of the advertisement. Mr. Grzeskiewicz should never have been assigned to a position that had not been properly advertised, particularly considering the fact that all concerned were made aware of the faulty advertisement and had an opportunity to correct the situation.

Paragraph (i) of Rule 1-B-1, requires the junior employee on the extra list that protects the vacancy to be awarded the vacancy in the event that the vacancy receives no bids.

Mr. Grzeskiewicz is on the block operators extra list, but not the detention clerk extra list. Because of this, he is not on the list that protects the vacancy. Once again, the Carrier's violation of the agreement has created a position that can not be filled without creating another violation of the agreement.

The Carrier is also in violation of Rules 6-A-1 (a) and 6-A-1 (I). By insisting that Mr. Grzeskiewicz holds an extra list position that protects the vacancy, they have inadvertently established new extra list territory (combining the work of two lists that have historically remained separate), without conference with the division chairman, and they have assigned Mr. Grzeskiewicz to work that is not within the confines of his extra list territory.

Because of the Carrier's willingness to knowingly violate the agreement, Mr. Grzeskiewicz should be paid at the rate of time and a half at the block operators rate, for everyday that he is held off of his position as an extra block operator and posts or works for RBC-1 position from the date of 6/20/2001, continuing until this matter is resolved. Our request for time and a half is based on the fact that had Mr. Grzeskiewicz been permitted to remain on the extra list, he would have had the opportunity to work all 3 shifts as opposed to a straight midnight shift, he would have had the opportunity to work more often at the train directors rate and he would have at least made operators rate and possibly train directors rate instead of a clerical rate on Tuesday nights. It is Mr. Grzeskiewicz wish to

remain on the extra list, because he feels that a steady midnight shift would have a negative effect on his home life.

This claim is filed in accordance with the N.R.P.C., T.C.U., TC Agreement and should be allowed.

Additionally, Agreement was violated when Carrier failed to respond to the grievance as required by Rule 25 - Grievances."

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.

The claim challenged the force assignment of the Claimant to a position that went no bid. Our review of the record of on property handling reveals that the Organization failed to develop any facts which would establish a violation of any Agreement Rule. Because the Organization has the burden of proof, the claim must fail on its merits.

Nevertheless, the Organization contends that the claim must be sustained because the Acting Manager Train Operation's denial came six days beyond the 60-day time limit. The record reveals that by letter dated December 6, 2001, the District Chairman docketed the claim for appeal with the Division Manager Labor Relations. The December 6, 2001, letter made no mention of any contention that the denial of the claim had been untimely. The Division Manager Labor Relations

denied the appeal by letter dated April 22, 2002. There is no mention in that letter of any contention by the Organization that the initial denial was untimely. By letter dated May 24, 2002, the General Chairman docketed an appeal with the Director, Labor Relations. There is no mention in that letter of any contention that the original claim denial was untimely. The appeal was conferenced on October 31, 2002. By letter dated December 17, 2002, the Director, Labor Relations denied the appeal. There is no mention in that letter that the Organization asserted the alleged untimeliness of the initial claim denial at the conference. The first mention of any claim of an untimely initial claim denial appears in a letter dated August 28, 2003, from the General Chairman to the Director, Labor Relations.

In Third Division Award 36555, which involved the identical parties, the Carrier maintained that the claim was not properly presented to the General Supervisor. However, the Carrier did not raise that argument until after the second step appeal conference and offered no proof that the Supervisor never received the claim until after the third step appeal conference. The Board held:

“Although it is true that the Organization must present the claim in accordance with the Agreement, if a Carrier contends that the claim was not received, it must do so before several discussions of that claim have taken place and it should present evidence of failure to present the claim at its earliest opportunity. The Carrier failed to do so in this case. Consequently, based on the Organization’s presentation of the claim and its statement that it was mailed, the Board cannot deny the claim based on the procedural violation belatedly raised by the Carrier.”

We find the reasoning of Award 36555 analogous and persuasive. In the instant case, the Organization did not raise the procedural objection to the initial claim denial until almost two years after the denial was issued and until after the denial had been discussed at two subsequent levels of appeal. Under the circumstances, we find that the Organization waited far too long to raise the procedural issue and that its belated procedural objection cannot provide a basis for sustaining an otherwise clearly meritless claim.

Form 1
Page 5

Award No. 37130
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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 25th day of August 2004.