

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39026
Docket No. SG-38447
08-3-NRAB-00003-040391
(04-3-391)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Company:

Claim on behalf of D. Razniewski, for \$1,222.88, account Carrier violated the current Signalman's Agreement, particularly Rules 33 and 37, when beginning December 6, 2002, and continuing for several weeks, Carrier was conducting a cut-over of a new control point on the Geneva Subdivision at C.P.U015, 'Park.' Every employee that stayed at lodging facilities during this cut-over was reimbursed for expenses incurred same as they have in the past, including the Claimant. Carrier in this case refused to pay the Claimant while paying all the others. Carrier also violated Rule 69 when it failed to disallow the claim within the 60 day time limit. Carrier's File No. 1364787. General Chairman's File No. N 33 37 320. BRS File Case No. 12837-UP.”

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 Organization filed the instant claim on behalf of Claimant D. Razniewski, alleging that the Carrier violated the parties' Agreement, particularly Rules 33 and 37, when it denied reimbursement for lodging expenses incurred by the Claimant from December 2 through December 17, 2002, while the Claimant and his gang, along with other gangs, were involved in a signal cut-over.

The Organization initially contends that the Carrier committed a procedural violation by failing to disallow the claim within the 60-day limit set forth in Rule 69. The Organization asserts that during a May 19, 2003 conference, it informed the Carrier that it had never received a denial of the instant claim and requested that the claim be allowed as presented. The Organization points out that in a letter dated May 19, the Carrier alleged that the claim had been denied in a letter dated March 31, but the record shows that the Organization did not receive a copy of this March letter until the Carrier provided a copy with its May 19, 2003 letter. The Organization maintains that because it did not receive a copy of the Carrier's denial until more than 100 days after filing the instant claim, the Carrier obviously failed to meet the time requirement for denying the claim.

As for the Carrier's argument that it mailed its denial on March 31, 2003, within the time limit, and that when a letter is placed in the mail it is presumed to be received, the Organization asserts that the Board has repeatedly held that time limit provisions are to be applied as written. Any deviation from this principle amounts to re-writing the parties' Agreement, which no third party is empowered to do. The Organization emphasizes that the Carrier has not provided any proof that the March 31, 2003 letter was ever mailed. The Organization contends that without any proof otherwise, it is necessary to conclude that this letter was never mailed or

delivered. As the Board consistently has found, the instant claim therefore should be allowed as presented. The Organization further argues that if the Carrier's reason for not responding to the instant claim in a timely fashion is allowed to stand in this case, then the Carrier could attempt to defeat the issue in the next case by taking the same position.

Turning to the merits, the Organization contends that when the Carrier refused to reimburse the Claimant for his lodging expenses, while paying everyone else working on the cut-over away from their headquarters, the Carrier violated the parties' Agreement. It argues that there was no evidence to support the Carrier's affirmative defense that it had a long-standing policy that employees were to obtain permission before staying in lodging facilities. The Organization points out that numerous Awards have held that a mere statement does not constitute fact. The Board also has consistently held that when a carrier adopts an affirmative defense, it has the burden of proving that assertion. The Carrier, however, offered no proof of its assertion in this case. The Organization insists that pursuant to the parties' Agreement, the Carrier should reimburse the Claimant for his lodging expenses, as it did the other employees.

The Organization then emphasizes that over the years, there have been several similar situations involving work on cutovers of new signals, switches, control points, and grade-crossing warning protection that involved 24-hour coverage provided by several signal construction gangs, including the Claimant's, where it was necessary for them to secure lodging. The Carrier has reimbursed the employees in full for their lodging expenses on each of these occasions.

The Organization points out that the Carrier based its arbitrary decision not to reimburse the Claimant first on its assertion that the Claimant had not obtained permission. The Carrier subsequently asserted that the job location was 20 minutes from the gangs' headquarters, and thereafter took the position that the Claimant's expenses were not necessary because his home and headquarters were within a reasonable distance from the cut-over location. The Organization insists that the Carrier is shooting in the dark. It maintains that there is no reference in the Agreement that establishes what is or is not a reasonable distance from the work location that determines whether an employee qualifies for the payment of lodging

expenses. Moreover, the Agreement does not state that management will determine what is or is not reasonable, yet the Carrier based its denial on what is the reasonable distance from the work location in order to receive payment.

The Organization then contends that the Carrier paid the lodging expenses of another Signaller from the same gang as the Claimant, and this other Signaller was working on the same cut-over located the same distance from the headquarters as the Claimant. The Organization emphasizes that the Agreement does not allow local management to authorize payment to some employees for lodging while denying such payment to others.

The Organization asserts that the Carrier's actions demonstrate its disparate treatment of employees. It contends that the Board has repeatedly held that the Carrier is obligated to treat its employees with fairness and equality, and the Carrier was arbitrary in its unequal treatment of the Claimant in the instant case. The Organization maintains that the Carrier's decision not to pay the Claimant's lodging expenses should not be allowed to stand.

The Carrier initially contends that none of the provisions cited by the Organization grants the Claimant a demand right to have the Carrier reimburse him for unilaterally staying at an outside facility located in the same town as his headquarters point. The Carrier asserts that Rule 33 does not apply because there were no emergency conditions involved in this situation, and the Claimant was not required to work away from his headquarters point or stay out overnight away from his headquarters point. Moreover, the work location was less than 17 miles from the Claimant's headquarters point.

The Carrier argues that Rule 37 does not support the Organization's contentions regarding lodging entitlements at the Claimant's headquarters point. It points out that the Claimant's entire expense account involved disputed items.

As for the Organization's "equity argument" that the Claimant should have been reimbursed for lodging expenses simply because the Carrier afforded such reimbursements to others, the Carrier insists that whether or not the Carrier exceeded the minimum requirements by allowing another Signaller lodging at his

headquarters point, this does not equate to an "Agreement violation" where the Claimant is concerned. The Carrier asserts that the Organization has not specified any Agreement provision that would have granted the Claimant a demand right for reimbursement of lodging expenses under the circumstances at issue, with the Claimant residing 33 minutes from the headquarters and 9.5 miles from the work site. The Carrier insists that absent such a showing, there can be no valid claim, and the Organization's assertions are void ab initio. The Carrier further emphasizes that the other Signalman mentioned by the Organization resided 77 miles from the worksite, meaning that there was a rationale for reimbursing this other Signalman for lodging expenses.

The Carrier also argues that the Claimant was not instructed to stay in outside lodging in connection with the work at issue. In fact, the Claimant previously had been instructed by his supervisor to obtain advance permission before staying in public lodgings during such cutovers, which the Claimant failed to do. The Carrier further asserts that the Claimant had the option of reporting directly to the work site from his residence, which was 9.5 miles apart. It suggests that the Organization is attempting to write a new provision into the parties' Agreement in that there are no existing provisions that come into play in this situation.

Turning to the Organization's position that the Carrier did not deny the claim in a timely manner, the Carrier insists that it responded to the claim on March 31, 2003, i.e., 57 days after the claim was filed and well within the 60-day time limit set forth in Rule 69. The Carrier emphasizes that when the Local Chairman advised that he allegedly had not received its denial, the Carrier furnished a copy of that denial on the same day. The Carrier asserts that it could not have come up with a finished denial on such short notice if the original denial had not already been sent.

The Carrier goes on to point out that there are numerous Awards holding that once a letter is deposited in the U.S. Mail, it is considered delivered for purposes of Agreement time limits. The Carrier argues that its on-property handling of this matter conformed with Rule 69.

The Carrier further asserts that even if there was merit to the Organization's procedural contentions, the Board has already ruled that it may not consider a time limit issue absent a valid claim. When no valid claim exists, any subsequent procedural arguments relating to the Carrier's handling cannot be reached. The Carrier contends that the Organization is requesting the Board to go beyond its jurisdiction and allow the Claimant benefits beyond the negotiated provisions of the controlling Rule only because another employee received such benefits to which he also was not entitled. Moreover, the Organization asserts that such a remedy must be awarded based on an alleged procedural defect on the Carrier's part.

The Carrier insists that the Claimant was not entitled to reimbursement for lodging at his headquarters point under either Rule 33 or Rule 37, and the Organization and the Claimant did not submit any valid claim. The Carrier therefore contends that it did not violate any Agreement provisions, and the alleged claim must be dismissed as void ab initio. The Board previously held that it has no authority to issue an Award that would invalidate a contractually negotiated Rule, so the Board has not recourse but to dismiss the instant claim outright.

The Carrier emphasizes that the Organization has not shown that any Agreement provision entitles the Claimant to reimbursement for lodging expenses. The Carrier points out that the Board has repeatedly held that mere unsupported allegations do not constitute proof, and the party alleging an Agreement violation must show definite proof of such a violation. The Carrier contends that the instant claim is only an allegation, and the Organization failed to show how the Agreement has been violated. The Carrier asserts that the Organization is seeking reimbursement of lodging expenses under circumstances never contemplated by the Agreement. Because the Organization failed to demonstrate any Agreement violation, the instant claim must be dismissed or denied in its entirety.

The Carrier argues that changes to the Agreement must be made through negotiation, not arbitration. If the Board were to sustain the instant claim, it would be tantamount to rewriting the parties' Agreement, and it would usurp the Carrier's managerial prerogative in establishing gangs and assigning work. The Carrier insists that if the Organization desires to have individuals demand reimbursement of lodging expenses at their headquarters location while performing

planned work and without regard to the proximity of their residences, then such benefits may be secured only at the bargaining table and not in this forum.

The Board reviewed the procedural arguments raised by the Organization and finds them to be without merit. The record reveals that the claim was filed on or about February 3 and the Carrier responded by letter dated March 31, 2003. The Board finds that the Carrier's response fell within the required time limit of 60 days set forth in Rule 69 of the Agreement. Consequently, there was no violation by the Carrier of the time limits required when it answered the claim.

The Board also finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it failed to reimburse the Claimant for his lodging expenses in December 2002. The record reveals that the Claimant lived less than ten miles from his headquarters point and the Carrier had told him on several occasions in the past that he had to receive permission from supervision before he could stay in a hotel or motel and expect to be reimbursed. The Carrier takes the position that its payment to other employees was a mistake and that the Claimant was not entitled by the Rules to any reimbursement for meals and lodging. The Claimant was not working outside of his assigned territory and he was not on a traveling gang.

For all of the above reasons, the Board must find that the Organization failed to meet its burden of proof that the Carrier violated Rule 33 or Rule 37 and, therefore, the claim must be denied.

AWARD

Claim denied.

Form 1
Page 8

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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 April 2008.