

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40390
Docket No. MW-39014
08-3-NRAB-00003-040539
(04-3-539)**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed and disqualified Mr. J. L. Kirk from a roadway equipment operator (REO) position on the BBCT5 Brushcutter on April 11, 2003 and continuing (System File J-0348-61/1378984).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. L. Kirk shall now ‘. . . be allowed the roadway equipment operator rate of pay for all time he is required to work in a lower class, or paid for all time lost if Claimant later becomes furloughed as a result of not being correctly assigned and allowed to qualify. That Claimant be awarded a seniority date of March 6, 2003, as a Northwestern Roadway Equipment Operator and that (sic) be given full cooperation and assistance of supervisors and others in his efforts to qualify on the brushcutter.’”**

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.

Claimant J. L. Kirk was assigned as a Roadway Equipment Operator (REO) on March 17, 2003 on the BBCT5 Brush Cutter. He had not established seniority within that classification. He had no experience operating this large and complicated piece of equipment. Pursuant to Rule 20 (d):

“If no qualifications for the position have been previously established, the employees assigned will be given full cooperation and assistance of supervisors and others in their efforts to qualify. Employees who are disqualified within the first thirty (30) working days, will vacate the position. . . .”

On March 31, 2003, the Claimant, encountered difficulty with his machine. The Claimant detected smoke coming from the right rear wheel of the brush cutter. He was unable to reach his Supervisor, who himself, encountered and was fixing a problem on the machine he was operating. Because the Claimant was on the main line, he elected to continue to operate the machine to a siding in order to clear the main line. As a result, instead of a simple repair, it cost the Carrier \$5,000.00 in parts and 42 hours in Machinist time to repair the brush cutter.

On April 11, 2003, Manager of Track Equipment Bidart, who was not present and did not personally observe the Claimant’s equipment difficulties on March 31, disqualified him from operating the BBCT5 Brush Cutter. Pursuant to Rule 48 (n) and 22 (i) the Organization timely requested a conference concerning the treatment of the Claimant. Manager of Track Programs Hathaway held the conference on May 12, 2003. At the conclusion of the conference, the Organization understood Hathaway to say something to the effect that he would get back to the Organization about the final outcome.

In the course of the on-property processing of the claim, Manager of Quality Procedures Steensen included in her response a statement from Hathaway, as follows:

“Conference [was held] on 5/12/03 with Mr. Kirk, Brush Cutter operator, Joe Larsen BMW, Roe Decker Track Supervisor, and Bruce Bidart Manager Track Equipment. I did not find any reason not to uphold the disqualification of Mr. Kirk. I informed Mr. Larsen I would be in contact if there was going to be a change in the status. Due to no change I did not follow up with Mr. Larsen. I have spoken to Mr. Larsen on a number of occasions after the conference on this claim and informed him the status has not changed. I have also had equipment Manager Bidart talk to Mr. Larsen to explain the facts again. . . .”

There was no change in the Claimant’s status. On August 28, 2003, the Organization called to ascertain the Claimant’s status. It discovered that after the May 12 conference, the Carrier removed the Claimant’s name from the REO seniority list. The very next day, August 29, 2003, the Organization filed this claim.

On the property, the Carrier raised the timeliness issue. Rule 49 (a) (1) provides:

“All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based.”

To resolve a timeliness objection to a claim, it is necessary to identify the “occurrence” and then count 60 days from the “occurrence” to ascertain if the claim was timely filed. The Organization would have the Board identify the “occurrence” as the date on which it learned of the Claimant’s removal from the REO seniority list. It argues that it did not have a clear answer from Manager of Track Programs Hathaway concerning the Carrier’s decision to disqualify the Claimant.

Manager Hathaway’s statement is not clear. In addition to the use of a double negative, he does indicate that he will get back to Larsen when an event that would not be within the knowledge of the Organization occurred. Larsen would not know of the

change in the Claimant's status, unless the Carrier informed him of that change. If the identification of the "occurrence" was dependent on this statement alone, the Organization would have a strong case. However, according to the Organization's argument, the "occurrence" that started the claim filing clock took place when the Organization learned of the removal of the Claimant's name from the REO seniority roster. The Organization learned this piece of information from the Carrier when it called. This call could have occurred any time after the May 12 conference. There is no contractual or equitable basis to toll the operation of the 60-day time clock.

The Organization filed its claim more than 60 days after the conclusion of the conference. Even if the outcome of the conference was in doubt, the Organization had the means to clarify and establish the outcome of the Claimant's disqualification. Here, the Organization missed the filing deadline by more than one and one-half months. Without a contractual or equitable basis to toll the 60-day time limit, to find this claim timely would obliterate the contractual time limit. The Board has no authority to do so. Accordingly, the Board concludes that the claim was untimely filed and must be denied.

AWARD

Claim dismissed.

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 March 2010.