

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23432
Docket Number CL-23103

John J. Mikrut, Jr., Referee

PARTIES TO DISPUTE:

{ Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and Station Employees
{ Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8863) that:

1. Carrier violated the agreement between the parties, Rules 38 and 66 in particular, when Yardmasters were used to handle train orders and OS trains, and failed to deny the claims dated February 3, March 1, April 5, 30 and May 10, 1978, filed with Mr. C. W. Moore, ATM.

2. The claims of E. Denk, for January 3, 4, 5, 6, 7, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 31, February 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, March 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 25, 28, 29, 30, 31, April 1, 2, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28 and 29, 1978 and H. D. McCann for March 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30 and 31, 1978 will now be allowed as presented.

OPINION OF BOARD: Like so many cases which are appealed to this Board, the instant dispute is but one such case in which the precipitating incident(s) have become somewhat obscured because of various procedural developments which have arisen subsequent to the initial filing of the original claim(s).

The precipitating incident involved in the instant dispute was the filing of a number of time claims by Employees Denk and McCann alleging that "... yardmaster at Campbell Road was doing operator's work..." and further alleging that said action was in violation of Rule 66 of the parties' applicable Agreement. In this regard, Employee Denk filed 18 claims dated February 3, 1978, 20 claims dated March 1, 1978, 22 claims dated April 5, 1978, and 22 more claims dated May 10, 1978; Employee McCann filed 30 claims dated April 30, 1978. All of these claims were filed with Mr. C. W. Moore, Assistant Terminal Trainmaster.

In letter dated July 5, 1978, and addressed to J. P. Watters, Superintendent, the Vice General Chairman, J. T. Walker, appealed said claims contending that, "To date, Mr. Moore has failed to deny any of these claims..." In response to Mr. Walker's contentions, Mr. Watters, in letter dated August 3, 1978, replied that:

"The claims of H. D. McCann were all declined on May 11, 1978. The claims of E. Denk for January 1978 were all declined February 8, 1978; claims of E. Denk for February 1978 were all declined March 2, 1978; claims of E. Denk for March 1978 were all declined May 11, 1978; claims of E. Denk for April 1978 were all declined on May 11, 1978."

Vice General Chairman Walker in letter dated August 20, 1978, and addressed to J. R. Neikirk, Vice President-Administration, disputed Mr. Watters' contention that the claims had been denied. In said correspondence, Mr. Walker apprised Mr. Neikirk that the claims were now being appealed under Rule 38 of the parties' Agreement and further that:

"Although Mr. Waters (sic) has made an unsubstantiated statement that the claims were denied, such is not the case. Mr. Moore has never made any effort to deny the claims and they should now be paid."

In his reply dated October 11, 1978, Mr. Neikirk, inter alia, informed Mr. Walker that "... all of such claims were properly and timely (within 60-days) disallowed by Trainmaster L. E. Reed in individual letters addressed to the claimants"; and, in addition:

"It is the Carrier's position that the claims in this case are all barred from further handling due to the claimant and/or his representative failing to comply with Rule 38 of the Master Agreement for the following reasons:

1. By letters (30) to Assistant Trainmaster Moore dated 4/30/78, claimant H. D. McCann submitted claims for various dates (30) in March 1978. By letters (30) dated 5/11/78, those claims were declined by the trainmaster. By letter dated July 5, 1978, the Vice General Chairman appealed the claims to Superintendent Watters, however, the Vice General Chairman did not notify Trainmaster Reed, in writing, of the rejection of his decisions of May 11, 1978.
- and
2. By letters (18) to Assistant Trainmaster Moore dated February 3, 1978, Claimant E. Denk submitted claims for various dates (18) in January 1978. By letters (18) dated 2/8/78, those claims were declined by the trainmaster. By letter dated July 5, 1978, the Vice General Chairman appealed the claims to Superintendent Watters, however, the 60-day time limit for appeal had expired and the Vice General Chairman did not notify Trainmaster Reed, in writing, of the rejection of his decisions of February 8, 1978.
3. By letters (20) to Assistant Trainmaster Moore dated March 1, 1978, Claimant E. Denk submitted claims for various dates (20) in February, 1978. These claims were disallowed by the Trainmaster in his twenty (20) letters dated March 2, 1978. By letter dated July 5, 1978, the

Vice General Chairman appealed the claims to Superintendent Watters, however, the 60-day time limit for appeal had expired and the Vice General Chairman did not notify Trainmaster Reed, in writing, of the rejection of his decisions of March 2, 1978.

4. By letters (21) to Assistant Trainmaster Moore dated April 5, 1978, claimant E. Denk submitted claims for various dates (21) in March, 1978. These claims were disallowed by the Trainmaster in his twenty-one (21) letters dated May 11, 1978. By letter dated July 5, 1978, the Vice General Chairman appealed the claims to Superintendent Watters, however, the Vice General Chairman did not notify Trainmaster Reed, in writing, of the rejection of his decisions of May 11, 1978.

Furthermore, and without waiving any of the Carrier's position regarding the employee's and/or his representative's failure to comply with Rule 38, these claims of E. Denk for March 1978 are for duplicate dates submitted by H. D. McCann.

5. By letters (22) to Assistant Trainmaster Moore dated May 10, 1978, claimant E. Denk submitted claims for various dates (22) in April 1978. These claims were disallowed by the Trainmaster in his twenty-two (22) letters dated May 11, 1978. By letter dated June 8, 1978, the local chairman appealed the claims to Superintendent Watters and by letter dated July 5, 1978, the Vice General Chairman also appealed the claims to Superintendent Watters, however, neither the local chairman nor the Vice General Chairman notified Trainmaster Reed, in writing, of the rejection of his decisions of May 11, 1978."

On January 30, 1979, a conference was held between the parties in an effort to resolve the dispute, but this conference proved to be unsuccessful.

In a letter dated April 2, 1979, from Mr. Neikirk to Mr. Walker, Carrier's position, which apparently was articulated at the January conference, was summarized as follows: (1) "...each of the claims in question was disallowed by the Carrier within the 60-day time limits specified by Rule 38"; (2) Organization's alleged contention that "...Assistant Trainmaster C. Moore is the only Carrier representative who can handle the claims" is incorrect, and "...in fact, Trainmaster L. E. Reed, is the officer at Cleveland Terminal who is authorized to receive and handle time claims from employees..."; (3) subject claims "are barred under the provisions of Rule 38 by reason of the fact that neither the claimant(s) nor the local chairman notified Trainmaster Reed, within 60-days, of the rejection of his decision"; and (4) "...there has been

no probative evidence presented to support the contention that Rule 66 - TRAIN ORDERS, has been violated, therefore, such contention lacks merit" (Emphasis added by Carrier).

In letter dated April 5, 1979, which is the last significant correspondence of record between the parties regarding this matter, Vice General Chairman Walker responded to Mr. Neikirk's letter of April 2, as follows:

"Your contention that the claims in question were disallowed by the Carrier is not understood. As stated in my letter of August 20, 1978, the claims have never been denied and should now be allowed as presented.

Your allegation that Mr. Reed's denial of other claims has complied with Rule 38 is not acceptable.

If the claims dated April 30, February 3, March 1, April 5 and May 10, 1978, were denied, please advise when and by whom.

Since no denial of these claims was ever received, it was not possible to advise anyone that their decision was being appealed."

Despite the various contentions and counter-contentions which have been proffered by the parties and which have been recounted hereinabove, there appears to be but one threshold issue which is before the Board, and that is whether Carrier denied the disputed claims within the 60-day time limit as specified in Rule 38. A negative finding on this issue precludes the necessity of the Board's consideration of any of the other related issues since such a determination would inevitably have destroyed the proverbial "house of cards" which the parties have erected as a result of their argumentation. Thus, in this regard, Carrier contends that said denials were initiated by Trainmaster Reed and that they were timely. Organization, on the other hand, contends that said denials were never made at all by any Carrier representative within the contractual time limits.

Upon a careful review of the complete record in this dispute, the Board quite frankly, is unable to determine with any degree of certainty whether Carrier denied said claims in the manner and within the time frame as Carrier alleges. Most assuredly, Carrier's contention in this regard places the burden of proof upon Carrier to demonstrate that such denials were, in fact, made (Third Division Award 10173). While the record clearly shows that Carrier did have documents in its possession which could have been used to verify this particular contention, the record also shows that after having been requested by Organization to provide such documentation/verification, it was not until after the dispute had left the property and had been appealed to this Board that Carrier, for the first time, saw fit to supply the confirming data which Organization had requested and which was so critical to Organization in the making of such a type of determination.

Insofar as this particular withholding of information by Carrier can only be viewed by this Board as being a denial of Organization's right to be provided with all relevant and necessary documentation regarding a particular dispute; and, moreover, insofar as it has long been held by this and numerous other Boards that new evidence which has not been presented by the parties on the property will not be considered by the Board (Third Division Awards 14994, 18122, 18247, 18545, 19832, 20918 and 21073), these particular determinations alone are fatal to Carrier's case herein, and the grievance, therefore, will be sustained.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

A. W. Pauls

Executive Secretary

Dated at Chicago, Illinois, this 3rd day of November 1981.