

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26019

Docket Number MW-25784

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(The Chesapeake and Ohio Railway Company
(Southern Region)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned Shop Craft employes instead of Bridge and Structures employes to perform painting work at the Diesel House at Huntington, West Virginia on July 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 and August 3, 1982 (System File C-TC-1420/MG-3788).

(2) Because of the aforesaid violation, the members of B&B Force 1404, employed by the Carrier on the claim dates, shall each be allowed pay at their respective rates for an equal proportionate share of the two hundred sixty-four (264) man-hours expended by Shop Craft employes in performing the work referred to in Part 1 hereof."

OPINION OF BOARD: Under date of November 12, 1982, the Carrier's Manager of Engineering replied to the General Chairman in this Claim as follows:

"This refers to your letter of September 13, 1982, subject C-TC-1420, claiming time on behalf of B&B Force 1404, Huntington Carpenter Shop, 264 hours, July 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 and August 3, 1982, because of Shop Laborers performing painting duties.

Your claim in the amount of 264 hours is declined in its entirety as presented for Shop Laborers performing painting duties, however, we are making further investigation into this matter."

The General Chairman, in his appeal to the next level in the claim procedure, stated in his letter that he had received the Carrier's denial on November 15, 1982, and such date is not contested. The General Chairman's higher level appeal was dated January 13, 1983, which the Carrier states was received on January 17, 1983, which is 63 days after the General Chairman's receipt of the earlier denial. The Carrier argues that the Claim is therefore time-barred under the Rule 21(h)(1)B, which reads as follows:

"(h) Grievance Procedure:

(1). (B) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from the receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60 day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose."

The Board does not support the Carrier's procedural position. First, the letter of the Manager of Engineering, referring to "further investigation", implies that an additional response would be forthcoming. No such further reply is on record, and the Organization cannot be faulted for anticipating such information prior to accepting or rejecting the Carrier's position. More significantly, however, there appears to be no reason to question that the Organization mailed its reply on January 13, 1983, which was within the 60-day time limit. This meets the Rule requirement. Among Awards supporting this view is Award No. 10490, which reads in pertinent part as follows:

"The issue is whether the Carrier complied with Article V, Section 1 (a) of the Agreement requiring Carrier to notify the Organization of a denial of a claim within 60 days from the date the claim was filed. Here the record shows the letter of denial was written on November 15, 1955 but admittedly was not received by the Organization until after 60 days had elapsed from the time the claim was filed. A copy of the letter is in the record and the Organization in its initial submission did not deny that the letter had been mailed. While the decisions seem to be split on the issue it is the opinion of this Board that both parties have a right to rely on the regularity of the mail and since the letter was mailed within the 60 day period Article V, Section 1 (a) was not violated by the Carrier. This is especially true where usually handling of claims is by mail. See Award No. 3541, Second Division where that Board held:

'This presumption being that both parties are telling the truth, we find that carrier gave timely notices of disallowance of claim as required by the Time Limit Rule and that the local chairman failed to receive them, so neither is in default under the rule.'

This principle will work both ways. Where the Organization asserts that it has mailed an appeal within the 60 day required period, producing a copy of the letter from its files, and the Carrier alleges it did not receive the letter the presumption then would be that the Organization had not violated the 60 day rule."

This dispute involves the Organization's allegation of work improperly assigned to Carmen instead of Maintenance of Way employes. The Brotherhood Railway Carmen were notified of the dispute and indicated that in this instance the Brotherhood would make no response.

The Organization claims that between July 19 and August 3, 1982, two Shop Craft Painters (Carmen) were required to paint "hand railings, steps, door facings, electrical boxes, a bulletin board and the sand tower platform", all located at the Huntington Shops Diesel House, consuming 264 hours. The Carrier concedes that the work was performed by the Carmen Painters but claims that the work involved only 72 hours.

The division of painting work between Maintenance of Way Painters and Carmen Painters is the specific subject of Appendix H (1955), resulting from meetings among the Carrier and the two affected Organizations. Appendix H reads in pertinent part as follows:

"Considerable thought and expression of thought was contributed by all parties present and as a compromise solution, it was mutually agreed by those present representing the two painter organizations that the scope of this agreement will cover Huntington Shops only, as follows:

1. The Maintenance of Way painters will paint all buildings, and portions of same, such as floors, walls, ceilings, roofs, columns, channels, beams or structural steel, together with any attachments to buildings, such as heating and cooling elements, stacks, canopies, ducts, pipes, conduits, fire racks and extinguishers, electrical motors, boxes, switches and receptacles, wire tool rooms and office space enclosures, overhead electric cranes, column cranes, and all cranes attached to overhead structure of buildings.

"2. The Shop Craft painters will paint all equipment, facilities or accessories, whether free, fastened or mounted in floor of buildings, such as machinery, racks, bins, benches, tables, tool boxes, cabinets, lockers, furniture, stretcher cases, jib cranes, scaffolding, shop signs *(floor striping, identification markings)*, welding booths and all mobile equipment."

During the course of the claim handling procedure, the Carrier indicated in correspondence with the Organization that 20 hours of painting electrical boxes, step edges, door facings and handrailing "could fall under Paragraph 1 of Appendix H". In the view of the Board, this clearly supports the Organization as to these items. This leaves in substantial dispute the painting of the sand tower platform and (of minimal importance) a bulletin board.

The Carrier alleges that painting the sand tower platform has been "historically" performed by Carmen Painters but offers no evidentiary support for this position. Even if true, such would not be significant if found to be in violation of Appendix H. A careful reading of Paragraphs 1 and 2 of Appendix H gives every indication that painting a "platform" falls more logically under Paragraph 1. Thus, the Board finds the Claim must be sustained.

The amount of hours consumed remains in dispute. The Organization claims 264 hours for 11 days' work by two employes. Straight-time day for 22 work days would be 176 hours, and the figure of 264 hours can be reached only by calculating the hours at premium rate. The Carrier, on the other hand, states the work involved 72 hours, without further explanation. The Board directs that the parties confer to review time records to be provided by the Carrier for the two Carmen Painters during the period in question. The Claim will be settled on the basis of such records if available. If such records cannot be produced or do not support the Carrier's position, the Claim shall be settled for a total of 176 hours.

The Board finds without merit the Carrier's procedural objections as to specific identity of the Claimants (since Force 1404 was clearly identified) or as to what other work such Claimants may have been assigned during such period.

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 Employes involved in this dispute are respectively Carrier and Employes 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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of May 1986.