

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26169
Docket Number MW-26115

John E. Cloney, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(National Railroad Passenger Corporation
((Amtrak) - Northeast Corridor

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

(1) The Carrier violated the Agreement when it failed and refused to maintain the former YMCA headquarters point at Sunnyside Yard in the condition specified by Rule 84(a) during the months of January, February and March 1983 (System File NEC-BMWE-SD-64).

(2) As a consequence of the aforesaid violation, the following named claimants shall each be allowed the respective compensation claimed at their regular straight time rates of pay:

1.	R. J. Gerard	- 33 Hours Claimed
2.	L. Diaz, Jr.	- 29 Hours Claimed
3.	A. Mendez	- 34 Hours Claimed
4.	L. B. Cadogan	- 34 Hours Claimed
5.	A. J. Migliore	- 24 Hours Claimed
6.	C. H. Cooper	- 10 Hours Claimed
7.	S. P. Butler	- 32 Hours Claimed
8.	J. F. Murphy	- 36 Hours Claimed
9.	L. Minichiello	- 39 Hours Claimed
10.	I. Modano	- 39 Hours Claimed
11.	J. R. Cruz	- 39 Hours Claimed
12.	O. DiGangi	- 39 Hours Claimed
13.	J. O. Santos	- 37 Hours Claimed
14.	R. Johnson	- 39 Hours Claimed
15.	A. Esposito	- 38 Hours Claimed
16.	H. Murdaugh	- 39 Hours Claimed
17.	R. Kiesling	- 39 Hours Claimed
18.	F. Petrulli	- 39 Hours Claimed
19.	R. J. Holmes	- 39 Hours Claimed
20.	K. Hunte	- 28 Hours Claimed
21.	G. Tisco	- 39 Hours Claimed
22.	A. Bono	- 39 Hours Claimed
23.	C. F. McGovern	- 39 Hours Claimed
24.	I. Tripoli	- 38 Hours Claimed
25.	E. Calo	- 38 Hours Claimed
26.	F. Cosenza	- 37 Hours Claimed
27.	R. Aliendre	- 21 Hours Claimed
28.	A. Lumia	- 39 Hours Claimed
29.	A. Lullo	- 39 Hours Claimed"

OPINION OF BOARD: By letter dated March 16, 1983, Claim for compensation was filed on behalf of twenty-nine employees at Carrier's Sunnyside Yard. Attached to the Claiming Letter were individual forms completed by the twenty-nine. Each contended that because of Carrier's violations of Rule 84(a) at their Headquarters in the former YMCA in Sunnyside Yard, it was necessary they use the closest available washroom, which was the Maintenance of Equipment washroom. Claimants stated this required them to report one half hour early and leave one half hour late. Each form contained a list of dates from January 17, to March 11, 1983, and each Claimant noted the days for which one hour was being claimed by check mark after the individual dates. Except for name, position and hours claimed (which varied from 10 to 39) the forms were identical. Each alleged in part:

"The Claimants headquarters does not have adequate heat when the temperature drops below freezing. In addition the locker room is flooded making the use of toilets and wash up facilities impossible. When the toilet is usable there is only one toilet for 50-60 employees and the general conditions are never sanitary and clean due to the persistent flooding problem. Supervisor of Track was informed of this condition on July 26, 1982 and the condition has remained essentially unchanged since this date."

Rule 84 of the Agreement states:

"(a) Each designated headquarters will be supplied with lockers, washing and toilet facilities, proper heating, electrical fixtures, table and benches and will be maintained in a clean and sanitary condition."

On April 21, 1983, the Division Engineer denied the Claim stating "While a problem does exist with the headquarters facilities in the former YMCA buildings, efforts are underway to correct this problem." He also noted:

". . .I can find no provisions in the current B.M.W.E. agreement (specifically Rule 84(a) which you have cited) that allows for any additional compensation for employees. Further, you have not provided me with any evidence to support your contention that the employees involved actually report to work 1/2 hour early and leave 1/2 hour late."

On April 30, 1983, the Organization wrote the Division Engineer stating "Please be advised that the claims listed below that have been denied by your office will be appealed." This was followed by a list of 16 Claims. It included the numbers assigned the Claims by the Organization and the Carrier and listed Claimants names. Number 16 on the list was the instant Claim, showing "29 MW Employees in Sunnyside Yard" as Claimants.

On May 27, 1983, the General Chairman wrote the Regional Engineer and requested fifteen Claims be listed for discussion, including this one. The list was identical with the April 30, 1983, list except that Claim JD 1983-16, which was Number 6 on the April 30, 1983, list is deleted.

On July 20, 1983, the Regional Engineer responded, referring the General Chairman to a May 23, 1983, letter. No copy of this is in the record but it apparently dealt with the question of discussions at monthly meetings in general, rather than this specific Claim. The July 20, 1983, response then quotes Rule 64(c) that:

"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 receipt of notice of disallowance, and the representative of AMTRAK shall be notified in writing within that time of the rejection of his decision. Failing to comply with the provision, the matter shall be considered closed"

The Regional Engineer contended there had not been compliance with this provision. He further noted the May 27, 1983, letter did identify the Claims but:

"Contains no specific information as to why the Division Engineer's Response, under letter dated April 27, 1982 is considered unsatisfactory, nor what rule or rules are alleged to have been violated We have continually maintained that it is the Organization's burden of proof . . . to present specific data upon which the case can be adjudged as credible."

The letter then discussed the Claims' merits and ended in a denial. On September 12, 1983, the General Chairman advanced the Claim to the Assistant Vice President and on the same date notified the Regional Engineer his decision was "unsatisfactory."

He denied the "letter of May 27, 1983 was not a proper progression letter" and then commented on the merits.

On December 23, 1983, the Assistant Vice President responded that Rule 84 does not provide for the payment of penalties; that the M of E washroom was 300' from the Headquarters and there was no evidence that employees had to report and depart one-half hour late because they had to use it. He denied the Claim for these reasons "as well as those set forth in previous Carrier correspondence."

The Organization contends payment of the one hour per day claimed would simply make Claimants whole for losses suffered and would not be in the nature of a penalty. It further argues that even if it were considered a penalty, a monetary award is necessary to preserve the sanctity of the Agreement and to assure compliance with its terms. Finally, the Organization relies upon the line of cases holding a penalty will be imposed where the Agreement violation is "flagrant, deliberate or repeated."

This Board has reported in some detail the correspondence of the parties in the handling of this Claim because Carrier argues the Claim's progression "has not been in compliance with . . . Rule 64." It maintains:

"Specifically, when the Organization appealed the denial decision from the Division Engineer by letter dated May 27, 1983 . . . they did not notify the Division Engineer in writing of the rejection of his decision."

We are unable to agree. It does not appear the Division Engineer was communicated with by the Organization on May 27, 1983. However, the Organization's April 30, 1983, letter to that official clearly listed this case as one which "will be appealed." This was timely notice and, although the word "rejection" was not used the letter clearly informed the Division Engineer of the Organization's position. This letter, coming as it did almost one month prior to the May 27, 1983, appeal, is to be distinguished from those situations in which notice is attempted by merely sending a copy of the appeal itself. To the extent Carrier's position embraces the allegation of the Regional Engineer's letter that the Division Engineer was not notified why his decision was unsatisfactory or that the progressing letter did not state what rule was allegedly violated, we must reject it. Rule 64 requires notice. It does not require reasons be given with that notice. The original Claim clearly identified the rule relied upon and quoted it in part. In fact, it was quoted 29 times. There was no fatal lack of specificity.

Carrier concedes "some problems" existed with gutters and downspouts but contends these were corrected in a reasonable period. It views Rule 84 as "directory" but not mandatory and argues that no compensation could be payable under the rule. We do not agree with Carrier's position regarding the nature of the rule. It is clear to this Board that the rule imposes a requirement upon the Carrier that the facility be maintained at the level described in the Agreement and that compensation could be in order for employees shown to have suffered loss as a result of a failure to do so.

Our problem with this case is the lack of substantial evidence of loss. Carrier contends, and the Organization does not deny, that the M of E washroom which the employees used was on the property 300 feet from the Headquarters Building. Given this proximity, we do not believe the mere assertion that one hour per day was required to use the M of E washroom constitutes adequate evidence of loss. Nor does this Board believe that any breach of its contractual obligation by Carrier in this case was of such a nature as to require a penalty.

Under these circumstances, Item 1 of the Statement of Claim is sustained. Item 2 of the Statement of Claim is denied.

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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest


Nancy J. Decker - Executive Secretary

Dated at Chicago, Illinois this 29th day of October 1986.