NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26213

THIRD DIVISION Docket Number MW-26129

John E. Cloney, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 selected employes junior to Messrs. R. Glenn, J. McDougal, W. Roscoe, L. Carter, R. Davis and J. Jankowski for heavy equipment operator training at Sunnyside Yard without implementing the procedures set forth in the August 26, 1977 Training Agreement (System File NEC-BMWE-SD-267).

2. The Agreement was further violated when Division Engineer Zimmerman failed to disallow any of the six (6) claims presented to him on June 7, 1982 as contractually stipulated within Agreement Rule 64(b).

3. As a consequence of either or both (1) and/or (2) above, Claimants R. Glenn, J. McDougal, W. Roscoe, L. Carter, R. Davis and J. Jankowski shall be allowed:

> '. . . the same level of training on the back hoe, front end loader and bull dozer as was afforded the junior man. In addition should the junior man be awarded an EWE position over the claimant because the claimant was not qualified because the claimant did not have the same training opportunities as per the agreement as the junior man please consider this a claim for the rate differential from EWE to the claimants position for all time the junior man is permitted to work on a bull dozer or front end loader ahead of the claimant. This claim is a continuing claim as per Rule 64 until such time as it is resolved.'"

OPINION OF BOARD: The Claim herein was filed with Division Engineer Zimmerman by letter dated June 7, 1982.

On August 26, 1977, the Carrier and the Organization signed a Memorandum of Agreement which stated in pertinent part:

It is Agreed:

"1. The Carrier will establish training programs for all the following classes of employees:

* * *

(d) Machine/Equipment Operators

* * *

3(a) The Carrier will solicit and accept applications from employees on M of W Track and Bridge and Building seniority rosters for training courses for trainee positions.

(b) The Carrier will designate the location, length of training course, type of training course . . .

* * *

(d) The Carrier will bulletin the types of training courses, qualifications for the course and location to be held, at least 15 days prior to the start of each month. Such bulletins will be displayed at each headquarters for not less than 7 days . . . .

(e) Trainees . . . will be selected from applications jointly by . . .

(f) The Assistant Chief Engineer - Maintenance . . . and the designated representative of the . . . General Chairman . . . will promptly review any complaint received from individual employees who applied. . . but were not so selected. If they are not able to dispose of such complaints, the complaints may be referred to the Chief Engineer . . . and the . . . General Chairman. . . . In no event shall such complaints be considered, handled or recognized as a grievance or a penalty claim against the Carrier."

According the Organization Carrier established a Machine/Equipment Operator training program in the Spring of 1982 at Sunnyside Yard and selected employees to participate instead of bulletining and selecting from applicants pursuant to the 1977 Agreement. The Claim was made on behalf of six employees, each of whom was senior to the individual employee named in the Claim as having been trained "in violation of the Agreement." The Claim actually consisted of six form letters, each of which identified the employee on whose behalf claim was made and named the junior employee the Organization contends was improperly selected for training. Although the Claim forms were dated June 7, 1982 they were apparently received by Zimmerman on various dates between July 12 and August 3, 1982.

On October 25, 1982, District Chairman Howell wrote Assistant Chief Engineer Ellis listing the Claims and contending "The Carrier has not answered the above claims in accordance with Rule 64 of the current M.W. Agreement, and are now allowable as they have been presented."

On February 18, 1983,(and apparently after a discussion on January 28, 1983) Ellis wrote Howell contending the claim was procedurally defective due to "a definite lack of specificity with regard to the dates being claimed."

Ellis agreed that while the Claim was not responded to within the time limits of Rule 64 that was of no moment as Rule 64 does not apply to the training Agreement. Rather he contended "if . . . an injustice or violation has occurred . . . it would be handled in accordance with the procedures outlined in section 3(f) - . . . ."

Ellis further stated the equipment training was done to supplement New York Tunnel Improvement gangs and therefore the claim would indicate Claimant "wishes to become a qualified Engineer of Work Equipment . . ." He noted that Carrier would encourage that but inasmuch as the operation of this equipment is associated with the tunnel project, the Claimant would have to be present, in the respective gang, in order to receive this training and indicated the New York Division was agreeable to resolving the Claim on this basis.

On February 25, 1983, Howell wrote Ellis that his decision was unacceptable and progressed the Claim. On April 18, 1983, the General Chairman wrote the Assistant Vice President - Labor Relations requesting the Claims be docketed and requested "remedial measures be taken instantly." He did not mention failure to respond under Rule 64.

On September 27, 1983, the Assistant Vice President, Labor Relations responded that Article 3 of the Training Agreement "under which the Organization progressed this claim on the property" requires any complaints are to be handled jointly. He took exception to the Organizations failure to cite specific dates. As to the merits, he contended all Machine Operators and Engineer Work positions were readvertised in January, 1982, and when there were no qualified bidders Carrier trained employees willing to work in the tunnels. As Claimants had not bid on the positions they can have no legitimate complaint.

This Board cannot agree that the Claim as presented was not sufficiently specific. As to each individual Claimant the Organization named the individual junior employee who was allegedly trained, the machines on which he was allegedly trained, and where the training took place. The Board does not believe the Carrier lacks the essential facts necessary to investigate or respond as it contends. We are further unable to agree that no Rule of the Agreement, or any other applicable Agreement has been cited in support of the Claim. While this position is consistent with Carriers view that this Claim can only be pursued under Section 3(f) of the Training Agreement this Board believes that position lacks merit. The Organization is not pursuing a Claim cognizable under Article 3(f). The essence of the Claim is that Carrier did not effectuate the Training Agreement in any respect and in fact disregarded it totally. We can think of no rule of Law, or provision of the Agreement, which would allow Carrier to insist the review procedures of the Training Agreement be invoked where everything which came before was done outside of the requirements of the agreement. Rather, this Board views the Claims as "Claims or grievances" within the meaning of Rule 64(b) of the Agreement which states:

> "(b) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the designated officer of AMTRAK authorized to receive same, within sixty (60) days from the date the employe received his pay check for the pay period in which the alleged shortage occurs.
>
> Should any such claim or grievance be disallowed, AMTRAK shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative), in writing, or the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of AMTRAK as to other similar claims or grievances."

Clearly notification of denial was not made within 60 days as required. While it seems no notification was made because Carrier believed no cognizable Claim existed this Board has consistently held that it is not for the Carrier to make that determination. As we said in Award 12473:

> "This requirement is mandatory not a matter of choice or dependent upon the type or quality of the claim."

Rule 64(b) thus requires this Claim must be allowed as presented. However, as was held in Third Division Award 24269 Carrier's liability arising out of failure to reply "is not infinite," but is stopped when a denial is received. The first written declination of this Claim came in Ellis' letter of February 18, 1983. This Board will sustain the Claim for the period from the Claim date to the date of receipt of the February 18, 1983, letter. Carrier contended in that letter that the training done was for the purpose of supplementing New York Tunnel gangs and offered training on a similar basis to Claimants. This contention has not been disputed and the offer appears an adequate response to that part of the Claim which seeks the same level of training for Claimants as was afforded the junior employees. We do not mean to imply that we consider the Training Agreement to be limited to certain gangs. In the circumstance of this case we view the offer of training made by Ellis as dispositive of one facet of the Claim. We will also require Claimants be compensated for the rate differential between the EWE rate and Claimants position for any time between the Claim date and the date the February 18, 1983, letter was received that the junior man was paid at the higher rate if the junior man had been awarded a position over Claimant because Claimant although otherwise qualified, was not qualified because of not having received training.

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 15th day of January 1987.