

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Delaware and Hudson Railway Company

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

(1) The Carrier violated the Agreement when it assigned junior Equipment Operator S. Muztafago to fill a temporary vacancy as equipment operator ('D&H #20, tractor trailer') on March 5, February 21, 22, 27, 28 and 29, 1984, instead of assigning and using Equipment Operator D. J. Killmeier who was senior, available, willing and qualified to fill that vacancy (System Files 26.84 and 27.84).

(2) Director Labor Relations M. Melius failed to disallow the claim (appealed to him under date of October 1, 1984) as contractually stipulated within Subsections (e)2 and (e)4 of Rule 35.

(3) As a consequence of either or both (1) and/or (2) above, Claimant D. J. Killmeier shall be allowed seventeen (17) hours of pay at his time and one-half rate and two and one-half (2 1/2) hours of pay at his double time rate."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimant established and holds seniority as a System Equipment Operator on Gang T-27 headquartered at Colonie, New York. Mr. S. Muztafago also maintains seniority as a System Equipment Operator but is junior in seniority to the Claimant and was on furlough status as a result of a general force reduction when the incidents involved here occurred.

On February 21, 22, 27, 28 and 29 and March 5, 1984, Carrier recalled junior System Equipment Operator S. Muztafago to fill a temporary vacancy as equipment operator created when the incumbent employee bid off the position. Two Claims were timely presented to the Carrier alleging that Claimant, the more senior employee, should have been assigned to fill the vacancy. The Claims thereafter were combined and timely progressed by the employees through the various stages of appeal to the Director of Labor Relations and Human Resources, who, on November 30, 1984, responded in relevant part as follows:

"In response to the above, this to advise that we will be available to meet with you on January 9, 1985. Without prejudice to our earlier position as to the location for conference, this to advise that we will meet with you at 2:00 p.m. in Colonie, New York.

With respect to the above claim, it is understood and agreed that time limits are waived pending conference discussion."

This Board was presented with precisely the same situation in Third Division Award 27480. Therein we stated:

"The Organization contends that Carrier failed in its letter to disallow the claim and/or timely and properly obtain an extension of the time limits within which to do so. We agree. Rule 35(e)(2) stipulates that in each instance in which a claim is disallowed, the Carrier shall, within sixty (60) days from the date such claim is filed, give written notification of the reason for such disallowance, and if not so notified, the claim will be allowed as presented. Rule 35(e)(4) provides that the written notification requirement just described 'shall govern in appeals taken to each succeeding officer.' In the instant case, the claim was appealed to the Director of Labor Relations and Human Resources on October 1, 1984. If he wished to disallow the claim, he was contractually obligated to notify the Organization in writing of the reasons for such disallowance. We find nothing in Carrier's November 30, 1984, letter which could reasonably be construed as a notice of claim disallowance as required by Rule 35(e)(2). While the letter clearly states that it was '...understood and agreed that time limits are waived pending conference discussion,' the Organization argued on the property without refutation that the Carrier did not timely or properly obtain its concurrence to extend the time limits, and that its unilateral assertion on the 60th day was improper.

While we are reluctant to reach a decision on the basis of a procedural defect rather than on the merits of a claim, we also recognize that the time limitations and provisions for written notice are mandatory procedural requirements. Since the Carrier did not comply with the provisions of Rule 35, the claim will be allowed as presented. See Third Division Awards 9492, 9554, 10576, 12233, 12472."

In view of our foregoing discussion in Third Division Award 27480, we are constrained to conclude that a sustaining Award must be issued in the instant case as well.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September 1988.