

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 29848  
Docket No. MW-29964  
93-3-91-3-351

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

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 Agreement was violated when the Carrier assigned EWE Tamper Operator W. Roscoe to perform foreman duties on Saturday, December 2, 1989 instead of calling Track Foreman E. Richert who was available and willing to perform such work (System File NEC-BMWE-SD-2677 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Track Foreman E. Richert shall be allowed eleven (11) hours' pay at the foreman's straight 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 employee or employees involved in this dispute are respectively carrier and employee 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.

This claim arose after the Carrier upgraded a qualified employee who was on the property to the position of Foreman for an overtime assignment, after the assigned Foreman failed to report for work as scheduled. The Organization asserts that Claimant should have been called to perform the work, and that in any event,

the Carrier violated the 60 day time limit for handling claims set forth in Rule 64 of the Agreement.

The Board has carefully reviewed and considered the various contentions, Submissions and Awards relied upon by both parties. We note from this review that certain contentions have been presented that were not discussed on the property. Therefore, these may not be considered by this Board.

Turning first to the procedural violation alleged by the Organization, it states in its appeal letter dated June 29, 1990:

"At this juncture, the union wishes to explain how the sixty-one (61) days was computed. The carrier signed the green card indicating this claim was received on Dec. 18th. This is the first day of the sixty day or computation period...The carrier then mailed it's response on Feb. 16th. This was considered to be the last day of the computation. Simple addition, fourteen (14) plus thirty one (31) plus 16 equals sixty one (61) days."

Following a long line of Awards, we find that the Carrier complied with the time limits of Rule 64 when it mailed its denial on February 16, 1990. As stated in Second Division Award 8725:

"We have followed the general rule set forth in Second Division Award No. 3545 which excludes the first day of the period and includes the last day of the period. In doing so, we have rejected the Organization's position that the first day is always counted."

Turning now to the merits of the claim, the Organization, on the property, failed to rebut the Carrier's assertion that it could properly upgrade a qualified employee in this instance under Rule 58, "Assignment To Higher Or Lower Rated Positions." Under well-established precedents of the Board, when material statements are made by one party and not denied by the other party, thereby leaving the contention as un rebutted, the material statements are accepted as fact. We will therefore deny the claim.

#### A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: *Catherine Loughrin*  
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.