

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30587
Docket No. MW-30208
94-3-91-3-651

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Consolidated Rail Corporation

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

- (1) The Carrier violated the Agreement when it assigned Allegheny "B" Seniority District employes H. P. Drenning, J. C. Fiedler and W. A. Bell to Class 3 Machine Operator positions advertised on Bulletin A-57 on the Allegheny "A" Seniority District effective on July 2, 1990 (System Docket MW-1465).
- (2) The claim as presented by Vice Chairman Singer on July 3, 1990 to Division Engineer R. J. Rumsey shall be allowed as presented because said claim was not disallowed by Division Engineer R. J. Rumsey in accordance with Rule 26 of the Agreement.
- (3) As a consequence of the violations referred to in Part (1) and/or Part (2) above, Claimant R. Simpson shall be placed on the Allegheny 'A' Seniority District Class 3 Machine Operator Roster with a seniority date of July 2, 1990, and shall be compensated for all wage loss suffered."

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.

Claimant entered the Carrier's service on April 11, 1977. At the relevant time, Claimant worked as a Trackman on the Allegheny "A" Seniority District. Also at that time, W. A. Bell (seniority date of October 14, 1974), H. P. Drenning (seniority date of October 19, 1976) and J. C. Fiedler (seniority date of October 1, 1975) were employees on the Allegheny "B" Seniority District.

By Bulletin A-57, three Class 3 Machine Operator positions (MO3 Rail Lifter or MO3 Scrap Picker) were advertised for bid on the Allegheny "A" Seniority District. No Allegheny "A" Machine Operators bid on the positions. The Carrier awarded the positions to Bell, Drenning and Fiedler over Claimant effective July 2, 1990 based upon their overall greater BMWSE seniority.

Claim was filed on July 3, 1990 seeking the awarding of one of the three positions to Claimant and further seeking make whole relief. The Organization contended that although junior to Bell, Drenning and Fiedler with respect to overall BMWSE seniority, Claimant was entitled to one of the positions on the Allegheny "A" Roster due to the fact that he possessed Allegheny "A" Roster seniority whereas Bell, Drenning and Fiedler did not.

Although the claim was received in the Carrier's Division Engineer's office on July 5, 1990, it was not acted upon within the 60 day time limit specified in Rule 26(a). After further progression of the claim, on December 7, 1990, the Carrier's Manager-Labor Relations determined that Claimant "will be allowed \$233.83 which is the difference in earnings of what he earned and what W. A. Bell ... earned between July 2 and July 26, 1990." However, with respect to the seniority aspect of the claim, in his December 7, 1990 letter the Carrier's Manager-Labor Relations stated that "Claim for roster rights is denied."

The Organization asserts that the claim should be sustained as presented because the claim was not denied in a timely fashion. To the extent modified below, we agree.

First, the plain language of Rule 26(a) mandates that result. Rule 26(a) states [emphasis added]:

"... The Division Engineer or other designated official shall render a decision within sixty (60) days from the date same is filed, in writing, to whoever filed the claim or grievance (the employee or his union representative). When not so notified, the claim will be allowed."

The phrase "will be allowed" leaves us little discretion.

Second, this Carrier's failure to act upon claims in a timely fashion as required by Rule 26(a) has been the subject of prior matters before this Board. See Third Division Award 27692 between the parties where the Carrier failed to respond to claims until after the 60 day period allowed by Rule 26(a) had expired. This Board sustained the claims as presented stating:

"Under Rule 26(a), when the Carrier fails to timely respond to claims, as a matter of contract, the claims "... will be allowed." ... At the point the Carrier failed to initially deny the claims in this case, the matter was over. In this case, what happened thereafter is immaterial."

Third, in Award 27692 this Board observed that the Carrier's failure to timely respond to claims had been the subject of dispute even before Award 27692. In that award, this Board noted that the Carrier had been previously admonished for not processing claims in a timely fashion. In Award 27692 we stated:

".... [W]e do find relevant the observation made to the Carrier in Fourth Division Award 4590, supra:

'The Carrier should take strong note that the time limits issue raised by the Organization is a serious issue for this Board. As stated by the Board in Third Division Award 25856:

'The Carrier is cautioned ... that under the time limit Rules it is required to respond to Claims within the time limits specified even though it may consider the Claims involved as barred or otherwise defective.'"

Award 27692 issued February 2, 1989. This dispute (and the Carrier's failure to comply with the admonitions in that award) occurred long after the issuance of that award (claim was filed in this matter on July 3, 1990). The Carrier must therefore be charged with knowledge of the contents of Award 27692. In light of the above, we are therefore compelled to follow Award 27692.

The Carrier argues that National Disputes Committee Decision 16 dictates that, at most, the monetary portion of the claim should be granted and then only until the time that the Carrier did respond to the claim. Thereafter, according to the Carrier, the claim should be resolved on the merits. We cannot adopt that rationale in this case.

First, as earlier noted, in a series of awards this Carrier has been forewarned of the consequences of failing to comply with negotiated time limits for responding to claims. The notice given to the Carrier in those awards and the clear language of Rule 26(a) ("When not so notified, the claim will be allowed") will have little effect if the Carrier is permitted to avoid the consequences of those awards and the clear language of Rule 26(a) by citation to NDC Decision 16.

Second, it is not clear that the Carrier relied upon NDC Decision 16 on the property. NDC Decision 16 is not specifically mentioned in the on-property handling. All that we know from reading the correspondence on the property is that a certain sum of money was paid to Claimant. We do not sufficiently know why that money was paid and if the basis used for computing that payment was correct. Nor was NDC Decision 16 mentioned in the Carrier's submission. This is not a situation where the Carrier has cited a case to us for consideration which was not previously mentioned but is consistent with a position previously taken on the property. This is a case where the Carrier has, for all purposes, raised a new argument not previously raised on the property. As new argument, we therefore cannot now consider the effects of NDC Decision 16.

Third, SBA 1016, Award 77 also does not change the result. In that case and consistent with the Carrier's theory in this case, NDC Decision 16 was found to only permit payment of the claim until the claim was denied. But, although arising on this property between the parties, it is not clear from that award whether NDC 16 was raised on the property. Given the principle barring new argument, we must assume that the argument was raised in that case in a timely fashion. Further, that Board did not consider the ramifications of the prior awards cited above which admonished the Carrier to comply with the time requirements of Rule 26(a). We therefore do not find that award controlling before this Board.

Fourth, Third Division Award 26239 is distinguishable. That case involved a different carrier and did not involve a situation where that carrier (as here) was repeatedly forewarned of the consequences of a failure to comply with the clear language of the Agreement requiring the timely response to claims.

With respect to the remedy, we are, however, cognizant of the Carrier's general position that it may well be improper to award seniority rights by default. But nevertheless, the language of Rule 26(a) is clear as are the previous admonitions given to the Carrier in the awards discussed above. Under the circumstances of this case, and taking into account the issues raised by the Carrier, the remedy shall be as follows:

First, that portion of the claim seeking seniority rights for Claimant shall be sustained. Claimant shall be placed on the Allegheny "A" Seniority District, Class 3 Machine Operator Roster effective July 2, 1990--the date the positions in dispute were awarded to Bell, Drenning and Fiedler. However, the parties should be aware that we grant those rights only because of the Carrier's failure to timely respond to the claim. Our granting of seniority rights in this case shall not be used as precedent for other employees seeking similar rights in other claims which are considered on the merits. Resolution by this Board of the merits of the underlying dispute between the parties concerning the recognition of overall BMW seniority over specific district seniority will have to await another day.

Second, Claimant shall be made whole for further lost wages, if any, over and above the money already paid by the Carrier resulting from not being granted one of the Class 3 Machine Operator positions in dispute.

Third, we are further cognizant that a default with respect to seniority rights might well place an employee into a position for which qualifications are necessary which qualifications may not be possessed by the employee. Claimant's entitlement to the seniority he seeks and to the further compensation contemplated by this award shall therefore be contingent upon Claimant reasonably demonstrating to the Carrier that he is qualified to hold the position of Class 3 Machine Operator. In order to receive the wages and seniority ordered by this award, if not already qualified, Claimant shall be required to demonstrate to the Carrier that he is so qualified. See Rule 3, Section 2 ("a reasonable, practicable demonstration of his qualifications to perform the duties of the position."). This Board shall retain jurisdiction over this aspect of the dispute to make certain that any qualification period and qualification determination are implemented by the Carrier in a fair and objective manner.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 2nd day of December 1994.