

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31047
Docket No. MW-30797
95-3-92-3-600

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 Employees
(Consolidated Rail Corporation

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

- (1) The Agreement was violated when, on December 14, 1990, the Carrier used Supervisors of Track T. Mingolla and G. Majchrzak, Vehicle Operator A. Devivo, Track Foreman P. Hackenberg and Welder G. Strong instead of assigning Trackman S. D. Esteves to perform trackman's work (change broken rail, pull and respike crossties, remove and reapply rail anchors, apply joint bars and bolts, dismantling and reinstalling rubber highway grade crossing panels) at New Brunswick Avenue Crossing at Mile Post 28 on the Lehigh Main Line at Piscataway, New Jersey (System Docket MW-2011).
- (2) The claim as presented by Trackman S. D. Esteves on December 18, 1990 to Division Engineer T. C. Tierney shall be allowed as presented because the claim was not disallowed by Division Engineer T. C. Tierney in accordance with Rule 26(a).
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Trackman S. D. Esteves shall be allowed payment for all time made by Messrs. Mingolla, Majchrzak, Devivo, Hackenberg and Strong on December 14, 1990 at his trackman's straight time rate of pay."

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.

The claim filed December 18, 1990 asserts that on December 14, 1990 the Carrier improperly utilized supervisors rather than Claimant to perform work.

The Organization argues that the Carrier did not timely respond to the claim as required by Rule 26(a): "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)." As such, the Organization seeks that the claim be allowed as presented.

The Carrier asserts that it did respond in a timely fashion. In support of that position, the Carrier produced a copy of a February 6, 1991 letter from the Division Engineer to Claimant denying the claim.

The claim will be sustained. Examination of the Carrier's February 6, 1991 denial letter relied upon by the Carrier shows that it bears a date stamp as being received by the Regional Director Personnel on January 8, 1991—approximately one month before it was purportedly written. Given that conflict, we are satisfied that the Carrier has not shown that it responded to the claim in a timely fashion as required by Rule 26(a).

As a remedy, Claimant shall be compensated for the lost work opportunity as requested in the claim.

AWARD

Claim sustained.

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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 1st day of September 1995.