

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31893
Docket No. CL-31867
96-3-94-3-180

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(Transportation Communications International Union
PARTIES TO DISPUTE: (Delaware and Hudson Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11029) that:

The following claim is hereby presented to the company in behalf of Claimants listed on Attachment 'A'.

(a) The Carrier violated the Clerks' Rules Agreement effective September 26, 1990, particularly Rules 11, Appendix I and other Rules, when commencing on or about January 18, 1993, it assigned duties to the Claimants listed in Attachment 'A' and failed to meet with the organization to discuss the rates of pay for each of the Claimant's positions.

(b) Claimants should now each be allowed eight (8) hours punitive pay based on the pro-rata hourly rate of \$13.84, commencing January 18, 1993 and continuing for each and every respective workday thereafter, 24 hours a day, 7 days a week until this violation is corrected.

(c) Claimants were required and responsible to assume the additional primary duties from Grade III positions, onto each of their respective positions and should have had the rates of pay for same reviewed for a rate adjustment, as required by Rule 11.

(d) That in order to terminate this claim, the Carrier must meet with the Organization to address the rate of pay for each of the Claimant's positions and make the necessary and appropriate adjustments to same.

(e) That any spare/extra employee filling a regular assigned Claimant's position, must be considered as a Claimant in this claim, on the respective dates so filling such position.

(f) This claim has been presented in accordance with Rule 28-2 and should be allowed.

(g) Additionally, Carrier violated Rule 28-2 when the claim was not timely denied at the initial level."

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 were given due notice of hearing thereon.

In this dispute the Organization argues that the claim must be "allowed as presented" because of the Carrier's failure to meet the time limit in its initial response. The Carrier, in a letter to the Board subsequent to the parties' presentation of Submissions, contends that this is a "new argument" and may not be considered by the Board. The record shows the Carrier is in error. The issue was discussed in the on-property claim handling correspondence from the General Chairman to the General Manager. The Carrier acknowledged and responded to this point at length in its Submission to the Board. Rather than being "new," the time limit argument was fully explored.

Rule 28-2 provides in pertinent part as follows:

"(a) . . . Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing citing the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented"

The undisputed facts are as follows: The initial claim was dated March 12 and was received by the Carrier on March 18, 1993. The Carrier responded on May 14 by Federal Express, which reply was received by the Organization on May 18.

The Organization contends that more than 60 days elapsed from March 12 to May 18, thus allegedly exceeding the time limit set in Rule 28-2. The Organization presented a series of Awards concluding that the time limits set by Agreement of the parties must be strictly observed.

The Board has no difficulty in concurring with this principle. It is essential, however, to place a precise definition on when a claim is "filed" and the obligation of the Carrier to "notify" the Organization. (Procedures in many other Agreements utilize more precise language.) Here, the Board follows the generally accepted view that filing means the receipt of the claim by the Carrier, because the Carrier can hardly be expected to take any action until the claim is actually in hand. Likewise, "notify" is generally accepted as the date when a reply is sent to the Organization in normal fashion (here, by Federal Express). There were no undue delays either in the transmission of the claim to the Carrier or of the reply to the Organization. Thus, the Carrier's response was timely in that the reply was dispatched well within the 60-day limit (March 18 to May 14).

As to the merits, the incident leading to the claim was the Carrier's announcement by bulletin on January 14, 1993 that Transportation Clerks (the Claimants herein) are responsible "to make whatever calls are necessary to fill the position that will be vacant" when a Yardmaster or Transportation Clerk marks off from duty. This was a portion of the work formerly performed by Crew Dispatchers, whose pay rate is higher than that of Transportation Clerk.

The Organization relies on Rule 11 which calls for setting rates of pay, etc. by agreement of the General Chairman and the Carrier. Rule 11, however, applies only when "a new position is created." The Board concludes that the requirement to find replacement for an absent employee does not constitute a "new position." Further, a review of the range of duties assigned to Transportation Clerks and Crew Dispatchers does not demonstrate that the Claimants have been assigned higher skilled work by this single assignment or that their positions have been significantly changed.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 4th day of March 1997.