

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36273
Docket No. CL-35826
02-3-99-3-813

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12491) that:

Claim of the System Committee of the TCU (ST-98-86) in behalf of George Mackie:

I am claiming 1 days pay for each of the following dates, August 11 thru 14, August 17 thru 21 and August 24 thru 28, 1998 for the Carrier's violation of the following Rules.

18.14: Regular assigned employees will not be diverted to fill a vacancy in another position on the same tour except in case of emergency or when there is no other qualified employees available who can promptly protect the assignment.

34.2: Vacancies or extra work of thirty days or less duration are considered short vacancies and may be filled without bulletin.

34.3: The priority for filling short vacancies including vacation vacancies, that accrue to clerical employees qualified and available at the straight time rate will be as follows:

(a) Other than regular assigned employees without prior rights who have made known their desire to be called for such work within their declared home station territory.

(b) Other than regularly assigned employees without prior rights who have made known their desire to be called for such work within their declared home station territory.

(c) Other than regular assigned employees with appropriate prior rights who have made known their desire to be called for such away from their declared home station territory.

(d) Other than regularly assigned employees without prior rights who have made known their desire to be called for such work away from their declared home station territory.

34.10: This rule will not be used to avoid the establishment of new position where required under Rule 5 and will not be used for the purpose of abolishing regular positions.

This also infringes on my Prior Rights and Seniority as an ST employee, when the Carrier used Donna Coppilino (an SU-2 employee) to cover a vacancy on an SU-1 position, (Rick Knox, Edfld agent TBM03). Donna has assigned hours and may not be used in this manner. I was available and made written application for this position which was denied. I was able to cover this position if I had been allowed. Please advise as to when payment will be made and this illegal practice will be corrected.

Claim is further made that Carrier violated Rule 38.4 when it failed to respond to the grievance within 60 days from date of claim."

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.

On August 31, 1998, the Claimant initiated a grievance charging that the Carrier improperly utilized an SU-2 employee, Clerk Coppilino, to cover a vacancy on position TBMO3, a SU-1 position. The Claimant seeks 14 days of pay alleging that the Carrier improperly assigned Clerk Coppilino to the TBMO3 vacancy on each of the 14 dates set forth in the claim. The claim also charges that the Carrier violated Rules 18 and 34.

The Claimant filed the August 31, 1998 claim with the Director of Stations. Indeed, the record reflects that, in and around August 1998, the Claimant filed 17 similar claims (containing the same reassignment allegations but with different claim dates).

On November 14, 1998, the Claimant wrote to the Director of Stations to advise that he had not received a response to his August 31, 1998 claim. The Director of Stations wrote the Claimant a letter dated November 17, 1998, declaring that he had placed a letter denying the claim in the U.S. Mail on or about September 9, 1998. The Director of Stations attached the September 9, 1998 denial letter to his November 17, 1998 correspondence. During the on-the-property appeal, the Claimant emphasized that he did not receive the September 9, 1998 denial from the Director of Stations until he received the Director's November 17, 1998 letter. The Carrier countered that not only was the September 9, 1998 denial letter placed into the U.S. Mail, which is the usual method these parties use for communicating with each other, but also, the Carrier stressed that the Claimant timely received its denial letters to the 16 other claims and the Carrier sent all three denial letters via U.S. Mail.

The Organization alleges that the Carrier breached Rule 38.4 which provides:

"CLAIMS/GRIEVANCES NOT INVOLVING DISCIPLINE

38.4 When a claim/grievance is not allowed or when payment of a claim is less than the full amount claimed, written notification will be made to whomever filed the claim of the reason(s) within 60 days from the receipt of the claim. If such notification is not made, the claim/grievance will be allowed as filed, but such allowance will not validate the merits of the

claim or any similar claim nor will such allowance establish any precedent.”

The burden is on the sender of correspondence to proffer sufficient evidence to show that a claim or denial or an appeal was timely dispatched to the opposing party. For three reasons, the Carrier came forward with sufficient evidence to demonstrate that its denial letter must have been placed in the U.S. Mail on or about September 9, 1998, well within the 60-day time limit in Rule 38.4. First, upon receiving the Claimant’s November 14, 1998 letter, the Director of Stations promptly, if not immediately, informed the Claimant that the claim had been denied and sent the Claimant a copy of the denial letter. Second, the Claimant initiated 16 other claims during the same period and each of these denials, dispatched into the U.S. Mail, reached the Claimant. It would be highly unlikely for the Director of Stations to timely and properly deny 16 claims but overlook denying the 17th claim. Third, the parties herein have invariably relied on the U.S. Mail to deliver their various correspondences. Both parties have a right to rely on this well entrenched communication process. See Third Division Award 21179. There is nothing in this record to suggest that either party is trying to find loopholes or is using “lost in the mail” as an excuse for failing to timely dispatch their communications.

Therefore, the Board finds that, under the peculiar and particular circumstances in this record, the Carrier did not violate Rule 38.4.

Turning to the merits, we find that the Organization did not satisfy its burden of proving an Agreement violation. Aside from merely citing Rules 18 and 34, the Organization did not articulate exactly how the Carrier purportedly violated those Rules. More significantly, the Carrier affirmatively asserted that it did not fill the vacancy in question and that Clerk Coppilino actually worked her regular assignment. The Organization has not demonstrated any Agreement Rule that obligated the Carrier to fill the vacancy in question on the 14 claim dates. See Third Division Award 33498.

Inasmuch as the Organization failed to meet its burden of proof, the Board must deny the claim.

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 28th day of October 2002.