

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38138
Docket No. MW-36804
07-3-01-3-379

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to properly compensate Machine Operator T. D. Degenstein at his assigned rate of pay for the December 1999 second half pay period (System File R1.584/8-00402).**
- (2) The claim* referenced in Part (1) above, as presented by General Chairman E. N. Ostlund on March 13, 2000 to Manager Track Programs/Work Equipment D. E. McCall, shall be allowed as presented because said claim was not disallowed by Manager Track Programs/Work Equipment McCall in accordance with Rule 21-1(a) and 21-1(b).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant T. D. Degenstein shall now be paid for the difference in pay in the amount of one hundred four dollars and sixty-four cents (\$104.64)."**

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 1999, the Claimant was awarded a Machine Operator's position in the Engineering Services Equipment & Machine Sub-department. He was assigned to Production Crew 3 on the Paynesville Sub Division laying rail and performing other maintenance-of-way work. This was a temporary position.

Pursuant to Rule 33, entitled Composite Service, an employee who works one hour or more on higher rated work coming within the scope of the Agreement is entitled to the higher rate for the actual time worked. If the employee is used four hours or more for such higher rated work on any day, he is allowed the higher rate of pay for the entire day. If an employee is temporarily assigned to a lower rated position, his rate of pay is not reduced.

On January 15, 2000, the Claimant received his paycheck for service performed during the second half of December 1999. He claims that he had been compensated the improper rate of pay for part of this pay period which resulted in a shortage of \$104.64 in pay.

On March 13, 2000, the Organization filed a claim on behalf of the Claimant seeking reimbursement for the \$104.64 purportedly owed him. On June 1, 2000, some 79 days later, the Carrier denied the claim arguing that the Claimant was properly compensated because he was assigned a Laborer's position and had only worked the Machine Operator position on a temporary vacancy.

Rule 21-1 (a) is mandatory, not permissive. It requires the Carrier to deny a claim within 60 days of the date the claim is filed. Whether or not the Carrier considers a claim unmeritorious is immaterial. It still must deny the claim within 60 days. If the Carrier fails to do so, Rule 21-1 (a) requires the claim or grievance to be allowed as presented.

The Organization made a timely objection to the Carrier's failure to deny the claim within 60 days of March 13, 2000, the date on which it was filed. The Carrier denied the claim on June 1, 2000, 79 days later. Therefore, the claim must be allowed as presented pursuant to the mandatory terms of Rule 21-1 (a) without addressing the merits of the claim.

AWARD

Claim sustained.

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 23rd day of April 2007.