Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38347
Docket No. MW-39470
07-3-06-3-264

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 Division - IBT Rail Conference
(National Railroad Passenger Corporation (Amtrak – Northeast Corridor)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned employes holding pilot positions in accordance with the Letter of Agreement dated November 2, 2001 to perform work other than that stipulated by the Letter of Agreement dated November 2, 2001 (System File NEC-BMWE-SD-4524 AMT).

(2) The claim* as presented by Vice Chairman K. Hussey on December 15, 2004 to Division Engineer S. C. Falkenstein shall be allowed as presented because said claim was not disallowed by Division Engineer S. C. Falkenstein in accordance with Rule 64(b).

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, the claim shall be allowed as presented in accordance with the provisions of Rule 64(b)."

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 December 15, 2004, the Organization through its Vice Chairman filed the following claim:

> "I am submitting this continuing claim on behalf of BMWE represented track department maintenance employees headquartered in Sunnyside Yard, Queens, New York. Besides being a continuing claim, any violations of the attached Penn Station & New York tunnels Projects/Pilot Agreement as well as rule 55 of the BMWE/Amtrak collective bargaining agreement as described below that have occurred during the 60 days prior to the carrier's receipt of this claim are being claimed.
>
> I have attached a 4 page document dated 11/2/2001. This document is commonly referred to as the Pilot agreement. During the past year in formal and informal meetings with New York division engineering managers, managers of life safety projects, labor relations officers and other assorted Amtrak officials the NY division BMWE grievance committee and this office have repeatedly expressed our concerns that the carrier has violated and continues to violate the provisions of the Pilot Agreement.
>
> The first page of the Pilot agreement clearly describes the 3 projects for which the carrier and the organization entered the agreement. The last sentence of the first page of this document states "It is further understood that additional projects may be included under this agreement by written concurrence of the parties." To this date the carrier has not sought any written concurrence for additional projects. Despite this office repeatedly pleading with carrier officials to comply with this Pilot agreement and with the

BMWE/Amtrak collective bargaining agreement, employees holding pilot positions are being assigned on a regular basis to perform work which is not covered in the Pilot agreement and by doing so violating that agreement as well as rule 55 and the work classification rule of the BMWE/Amtrak agreement. The work being claimed includes but is not limited to 3rd rail renewal and installation, cable delivery, material handling, etc.

Please contact this office to set a date, time and place to review work orders, history of paid labor, form "d" track movement permits and other documents so that we may jointly decide the amount of compensation due the claimants. Thank you."

By letter dated March 8, 2005 from the Division Engineer, the Carrier denied the claim, stating, in pertinent part:

"This will acknowledge receipt of your letter dated December 15, 2004, hand delivered on December 17, 2004, in which you claim unspecified compensation for unnamed claimants on unidentified dates when Amtrak allegedly violated the November 2, 2001 Pilot Agreement and Rule 55 of the contract."

* * *

Based on its March 8, 2005 letter, the Carrier admittedly received the claim on December 17, 2004 and issued its declination on March 8, 2005 - 81 days after the Carrier actually received the claim. However, Rule 64 - CLAIMS FOR COMPENSATION - TIME LIMITS FOR FILING reads, in relevant part, as follows:

"(b) . . . Should any such claim or grievance be disallowed, AMTRAK 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, of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of AMTRAK as to other similar claims or grievances."

Rule 64(b) is clear and unequivocal - "AMTRAK 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, of the reasons for such disallowance . . . [and i]f not so notified, the claim or grievance shall be allowed as presented. . . ." The mandatory word "shall" used in Rule 64(b) leaves nothing to discretion. The Carrier denied the claim 81 days after receipt of the claim, but Rule 64(b) only allows 60 days for such denial. The consequences of the Carrier's late denial also flow from the mandatory word "shall" in Rule 64(b) - if the denial is late, ". . . the claim or grievance shall be allowed as presented. . . ." [Emphasis added.] We therefore have no choice. Under the clear self-enforcing language of Rule 64(b) the Carrier's untimely denial of the claim means that the claim must be sustained "as presented."

Given that the Carrier did not respond to the claim in a timely fashion as required by Rule 64(b), whether the Organization's claim was invalid or the Organization could file potentially frivolous claims is, for purposes of this case, immaterial. See Third Division Award 37068 between the parties (where the Carrier asserted that a claim was invalid and the Board nevertheless held that ". . . the Carrier's failure to timely respond under the time limits contained in Rule 64(b) precludes it from relying upon such defense to avoid payment of the claim as presented.") See also, Third Division Award 21900:

> ". . . [W]e concur with the Carrier's assertion that Employes could submit obviously frivolous claims. But, we are inclined to determine that the Carrier can protect itself from such circumstances by the simple expedient of responding to the claim and setting forth its defenses therein. Were we to rule to the contrary, we would allow the Carrier to make the determination as to what is or is not a claim which is worthy of presentation here, and in essence, we would permit the Carrier to usurp the function of this Board. . . ."

The Carrier points to certain equitable considerations and asserted practices between the parties concerning claims handling that it asks this Board to consider. When clear contract language exists as it does here requiring the Carrier to respond within 60 days else the claim be allowed as presented, this dispute can only be decided on the basis of that clear language and not upon equitable principles or past practices.

This Board's holding in this case should not be misunderstood. Because the Carrier did not respond to the claim within the 60 day period required by Rule 64(b) we have, as required by that rule, sustained the claim "as presented". This Board's holding does not mean that the affected employees are automatically entitled to some unspecified compensation. In the initial claim letter dated December 15, 2004, the Organization requested ". . . to review work orders, history of paid labor, form "d" track movement permits and other documents so that we may jointly decide the amount of compensation due the claimants." As set forth in the statement of claim, that is the remedy the Organization seeks from this Board ("The claim . . . as presented . . . on December 15, 2004 . . . shall be allowed as presented. . . .")

The parties will have to now engage in that record review process (or some other mutually agreed upon procedure) and if the relevant records show that employees are entitled to compensation, the employees shall be paid accordingly as a continuing claim as requested in the claim letter dated December 15, 2004 (". . . being a continuing claim. . . .")

As specified in Rule 64(b) the Carrier's late response in this case ". . . shall not be considered as a precedent or waiver of the contentions of AMTRAK as to other similar claims or grievances."

AWARD

Claim sustained in accordance with the Findings.

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 5th day of September 2007.