

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40238
Docket No. MW-40419
09-3-NRAB-00003-080248**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement in the issuing and assignment of the machine operator position by System Bulletin No. 228 dated June 21, 2006 and when it assigned junior employee R. Fiebiger to said position by System Bulletin No. 228A dated July 6, 2006, instead of Mr. L. Tendrup (System File C-06-040-042/8-00430-019).**
- (2) The claim referenced in Part (1) above as presented by General Chairman G. A. Bell on August 25, 2006 to Manager M. S. Hanson shall be allowed as presented because said claim was not disallowed by Manager Hanson in accordance with Rule 21-1(a).**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, the Carrier shall now correct the aforesaid July 6, 2006 System Bulletin No. 228A to show Claimant L. Tendrup as the successful bidder and the “***Claimant shall also have any difference in rate of pay, straight time, travel time, overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.”**

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.

This seniority dispute involves the Carrier's July 6, 2006 award of the position of Machine Operator on the Krautkramer Ultrasonic Testing Unit to a Machine Operator junior to the Claimant. Aside from the merits of the dispute concerning the propriety of relying on the posting requirement of specific training in awarding the bid when Claimant allegedly was not given the opportunity to obtain such training, the claim raises a procedural issue concerning the Carrier's alleged failure to timely deny the claim under Rule 21.1(a) which provides, in pertinent part:

“RULE 21 - TIME LIMIT - CLAIMS OR GRIEVANCES

1. All claims or grievances shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance . . . 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 the Company as to other similar claims or grievances.”

It appears undisputed that the Claimant has greater ESE&M Group 5 and 4 seniority than Fiebiger, who was initially temporarily assigned to the disputed position without a posting and who received training certification for it. According to the Organization, as a result of its protest the Carrier issued System Bulletin No. 228 advertising the permanent position, which included a training certification requirement, which the Claimant did not possess, and Fiebiger was awarded the bid because Carrier deemed the Claimant not qualified for the position.

The initial claim is dated August 25, 2006 and is addressed to Michael Hanson, Manager of Track Programs. A USPS tracking form confirms delivery on August 30, 2006 to the Carrier’s Metro 94 Business Center in St. Paul, Minnesota. The certified receipt shows that the envelope was sent to “MSH & DEM.” When no response was received, the Organization sent a November 22, 2006 default notice to Hanson, indicating that 83 days had passed since the claim was received by the Carrier, and requesting that the claim be paid as presented under Rule 21. In its correspondence on the property, the Carrier included a December 18, 2006 denial letter from Hanson indicating that the claim was excessive, there was no loss of earnings shown for the Claimant, nor did the Organization prove that he was qualified to work the position. The substance of the January 12, 2007 appeal of the Organization indicates, among other things, that it received no response to the claim at any time. The Carrier’s June 8, 2007 response denying the claim asserts that there was no default because the original claim, while addressed to the proper Carrier officer and sent to the proper address, shows that it was addressed to different officers and, if it was presented at all, was most likely addressed to D. E. McCall, who was not the proper officer. It notes that the November 22, 2006 claim was beyond the permissible time limits for filing a claim. The Organization’s October 3, 2007 appeal addressed the merits of the claim as well as the fact that the claim was of a continuing nature, was addressed and filed with Hanson, the proper Carrier official, at the proper address, and that the identity of the Carrier agent signing for the envelope was irrelevant. It explained that the large envelope contained five claims addressed to Hanson and one in a separate envelope addressed to McCall.

The Organization first argues that the claim should be sustained on procedural grounds because the Carrier failed to timely disallow it under Rule 21,

citing Third Division on-property Awards including 28532, 28744, 28745, 29481. It notes that there is no dispute that the claim was sent to the proper Carrier officer and was signed for as received by an agent of the Carrier. With respect to the merits, the Organization asserts that the Carrier controls training and because the Claimant was never given the opportunity to train and has demonstrated his capability to perform more complex Machine Operator functions, he should have been awarded the position and given 30 days to qualify under Rule 9(a) citing Third Division Award 30452 and Public Law Board No. 3460, Award 7. It posits that the Carrier failed to prove its affirmative defense that the Claimant suffered no monetary loss, and the claim should be paid as presented.

The Carrier contends that the Rules do not limit its right to determine the requirements of a position, or the fitness and ability of a bid applicant, relying on many Awards including Third Division Awards 2015 and 21329, as well as Second Division Award 2916. The Carrier asserts that there are no Rules obligating it to provide training in seniority order rather than to the employee who worked the position consistently. It concludes that because the Claimant lacked the formal training required for the position, he did not possess the minimum requirements of the job, citing Third Division Awards 10201, 20356, 21035, 21329, 24052 and 26295. The Carrier also asserts that the Claimant suffered no loss because he was working in a higher rated position and earned overtime, while the bid position had no overtime opportunities. Finally, the Carrier argues that there was no valid claim filed, that it was sent to the wrong Carrier officer and was thus untimely, as well as excessive. For all of these reasons the Carrier contends that the claim should be denied.

A careful review of the record convinces the Board that this dispute is governed by the precedent concerning Rule 21.1(a) indicating that the time limits for filing and disallowing claims must be strictly construed in accord with the parties' Agreement. See Third Division Awards 29481 and 28744. There is no dispute that the claim was addressed to the proper Carrier official, sent to the proper address, delivered on August 30, 2006, and signed for by an agent of the Carrier working at the business office. The Carrier's assertion that it was not received by Hanson is just that, an assertion based upon speculation that having the initials BEM on the receipt as well as Hanson's must have created confusion. However, there is no record evidence to support this contention. Neither Hanson nor McCall gave any written statement indicating that the claim was not properly received. Further, in the December 18, 2006 Hanson denial submitted by the

Carrier, he never addresses the Organization's position that the original claim was in default nor makes any statement indicating that he did not receive it in August 2006 as set forth clearly in the November 22, 2006 appeal to which he was responding. Hanson merely raises the excessive nature of the claim and the Organization's failure to show that the Claimant was qualified for the job in dispute. If Hanson had not timely received the claim, he would have said so at this time. Thus, in the absence of any evidence that the claim was not timely or properly filed, the undisputed fact that it was not disallowed until December 18, 2006 at the earliest (a letter the Organization's continued correspondence makes clear it never received) establishes that the 60-day time limit for disallowance of the claim required by Rule 21.1(a) was not met. Although the Board need not address the merits of the claim in this case, we do note that because the Carrier raised the possibility that there was no monetary loss suffered by the Claimant and the Organization acknowledged that the Claimant had not received the requisite training for the position, we refer back to the parties the calculation of any losses and the matter of training for the Claimant in light of the passage of time in this case.

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 21st day of December 2009.