

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43024
Docket No. MW-42459
18-3-NRAB-00003-140062**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
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(Union Pacific Railroad Company former Missouri Pacific
(Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when beginning July 9, 2012, it failed to set forth the workdays and rest days of system gang members in writing a minimum of five (5) workdays in advance of the beginning of the consecutive half work period and when it failed to post such written notice at convenient locations accessible to the system gang members as required by Rule 28(c) (System File UP719BT12 MPR).
- (2) The claim referenced in Part (1) above, as filed by Vice Chairman B. Thies on September 7, 2012 to Mr. M. McClure, shall now be allowed as presented because the claim was not disallowed in accordance with Rule 23(a).
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, “*** the Carrier must compensate each employee assigned to or working on a system gang as of 07/9/12, fifty dollars (\$50) per day, beginning 07/9/12 and continuing until the Carrier fully complies with Rule 28(c).”

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 claim presents procedural issues from both parties which must be addressed. The Organization submitted claim #UP719BT17 dated September 7, 2012 alleging that the Carrier failed to post and send timely written notice to all system gangs working compressed halves on July 9, 2012 as required by Rule 28(c), seeking \$50 per day compensation for each member of such gang commencing on July 9, 2012 until proper notice is given. It included unsigned copies of certified mail form (#7006 0810 0006 4398 1515), and a corresponding return receipt requested form. In the dark green portion of the certified mail form, not clearly visible, was handwritten "claim 719 & 720 BT17." That certified mail number corresponded to the one typewritten on top of the claim.

By appeal dated January 23, 2013, the Organization stated that since it received no response to said claim, under Rule 23(a), requiring Carrier to disallow a claim within 60 days, the claim must be "allowed as presented." It included a copy of the certified mail form and return receipt requested form signed as received by Carrier on September 10. The Organization also posited that the Carrier had neither posted, nor sent a copy of the written schedules to the Organization as required by Rule 28(c).

In its denial dated February 28, 2013, the Carrier stated that it had no record of receiving this claim, only of having received claims 718 and 720, to which it timely responded. It asserted that it only received UP720BT12 in the certified envelope, which bore the same certified mail number, and since there was no proof that the Organization included this claim with claim 720, it was untimely filed on January 23, 2013, outside the 60 day time limit for initiating claims.

The Carrier also argued that the claim was procedurally defective since it did not name any Claimants, and they were not readily identifiable, citing Third Division Award 28596. It asserted that the absence of any gang numbers or the Claimant names makes it impossible for it to research if any Claimant was working a compressed schedule or whether such schedules were properly posted. The Carrier responded that the Organization failed to meet its burden of proving a violation of Rule 28(c), since it did not include any statements or proof that the schedules were not properly posted. Finally, the Carrier asserted that the remedy sought was neither rational nor supported by the Agreement, as it was meant as a penalty, there is no assertion of any lost time, and that the Organization just picked a number out of the air (\$50) and asked that it be paid for an unspecified number of employees and days. The Carrier noted that where the parties intended for there to be a penalty payment in the event of a violation, such as in Rule 28(l), they said so, and that their failure to do so in relation to Rule 28(c) undermines the requested remedy.

In its May 3, 2013 appeal after conference, the last correspondence on the property, the Organization included a copy of the cover letter dated September 7, 2012, with the same certified mail number, from Vice Chairman Thies to Mitchell McClure stating: "If you do not find the following claims enclosed, please contact me. UP719-720BT12." The Organization renewed its argument that the absence of a timely response disallowing the claim is a procedural defect requiring that the claim be allowed as presented. It also asserted that it would not be difficult for the Carrier to identify the Claimants by finding out who was assigned to each gang or to provide proof of written notice if it was given or posted.

A careful review of the record convinces the Board that we are faced with an allegation of default by the Carrier for failing to timely respond to a claim, as well as untimeliness of the claim based on the Carrier's assertion that it did not receive a copy of the claim protesting a failure to post a schedule in July, 2012 until January, 2013. While the Organization submitted some evidence of its intention to submit both this claim (#719) as well as claim #720 in the same certified envelope, there is no proof that it was actually sent or received by the Carrier. Since there appears to be a dispute of fact concerning the default issue, as well as arguable blame on both sides, the Board declines to dispose of this claim without addressing its merits, including the other procedural defects raised by the Carrier.

We are of the opinion that the claim filed by the Organization in this case is impermissibly vague, as to both the gang numbers encompassed within it, the identity of the Claimants covered by it, and the length of time for which a remedy is being sought. As noted by the Carrier, since the Organization is seeking a penalty remedy of \$50 each for a possible group that could include 2000 employees who are not readily ascertainable, over an unspecified period of time, it would make it impossible for the Carrier to investigate the validity of the assertion that there was no proper posting or to determine who was potentially affected if no posting occurred. See, g.e. Third Division Award 28596. The Organization presented no evidence in the form of statements by employees, that they received no notice of their schedules while working compressed halves in July, 2012, or lost any time at work as a result of such lack of notice. The Board finds that the Organization failed to meet its burden of proving a violation of Rule 28(c), or that such a violation would merit the requested remedy.

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 29th day of March 2018.