

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35182
Docket No. TD-34874
00-3-98-3-593**

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

**(American Train Dispatchers Department/
(International Brotherhood of Locomotive Engineers**

PARTIES TO DISPUTE: (

(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim one day’s pay at the overtime Assistant Chief’s rate for Friday, April 28, 1995, and Saturday, April 29, 1995, account not called to cover the first Assistant Chief position when the Carrier blanked this position while incumbent Peter G. Leacock was on his rest days. Mr. M. G. Jakusz was also on his rest days and available to cover the position but was not called to do so.”

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 May 9, 1995, the Organization filed a claim on behalf of the Claimant, contending that the Carrier blanked a position that the Claimant could have filled in violation of the parties’ Agreement, specifically Rule 10. The Organization argues that First Trick Assistant Chief Dispatcher Peter G. Leacock was off on his regular rest

days on Friday and Saturday, April 28 and 29, 1995, and the Claimant, who was off on his rest days, was available and should have been called by the Carrier to fill the vacancy of Mr. Leacock. The Organization argues that the parties' Agreement contains no provision for the blanking of positions by the Carrier. The Organization further contends that the Claimant was qualified to perform the functions of the position and worked the position before. In addition, the Organization argues that the Carrier at no time notified the Organization of any change to the position, except for the change in the starting time. If changes had occurred, the Carrier was obligated to provide training to all qualified persons on the position. The Organization also argues that the Carrier has added related duties to Dispatchers' positions in the past without disqualifying anyone from their positions.

The Carrier denied the claim, contending that the responsibilities of Mr. Leacock's position had changed and that the Claimant was not familiar or qualified on any of the new functions. The Carrier argues that because the Claimant lacked the qualifications to fulfill the duties of the position in question, he could not have filled the position. The Carrier contends that numerous territorial changes have occurred in Dispatchers' positions that rendered Dispatchers not qualified on that particular territory, and that the Claimant could have come forward and would have been afforded an opportunity to become qualified. The Carrier also maintains that the Organization failed to show that the Claimant was qualified to perform the tasks at issue.

On March 28, 1997, the Organization filed an appeal on this particular claim which the Carrier again denied on May 27, 1997, contending that the Organization's appeal at such a late date was improper and unacceptable. The Carrier argues that the doctrine of laches applies because the Carrier's liability in this case could be substantial. Moreover, the Carrier argues that the Organization did not even attempt to explain its prolonged delay in handling the claim. The Organization responded on November 24, 1997, claiming that no fatal lapse in claim handling occurred and that the Carrier was not disadvantaged by the delay. The Organization also claims that since the Carrier did not point out a specific Agreement violation, the Carrier's laches argument is insufficient to defeat the claim. The Organization filed its Notice of Intent with the Third Division in August 1998, which the Carrier argues, according to Rule 41(c) of the parties' Agreement, should be barred because it was filed after the 12-month period allowed to file such intent.

The parties being unable to resolve the issues at hand, this matter came before the Board.

The Board has reviewed the record in this case and with respect to the timeliness argument raised by the Carrier, we must find that there was nothing in the Agreement at the time that this claim was initially made that set strict time limits for the processing of a claim. The record reveals that the claim in this case arose on May 9, 1995. It was initially denied on May 30, 1995. Nearly two years later, on April 8, 1997, the Agreement between the parties was signed, which set a time limit for the processing of a claim before the Board. The Carrier never made a 41(c) argument on the property. Moreover, on the Carrier Exhibits I and H, attached to the Carrier's submission, the Carrier wrote to the Organization about this case and indicated that it would be treated as a "lead case" before the Board. There was no statement in either of those letters by the Assistant Vice President of Labor Relations that this lead case would be challenged on the basis of timeliness because the appeal had been denied by the Carrier in May 1997 and had not yet been filed with the Third Division. The Organization then subsequently filed its Notice of Intent with the Board on August 24, 1998. Given that history, the Board cannot find that the Organization was not timely in the filing of this claim before the Board.

The Carrier also relies on the doctrine of laches to support its position that the Organization delayed too long in the processing of the claim in this case and, therefore, it should be denied. However, it is fundamental that the Carrier must have been disadvantaged by the delay before the laches argument has any merit. In this case, the claim is only for two days' pay, for April 28 and 29, 1995, and any delay did not increase the liability on the part of the Carrier. Hence, the doctrine of laches defense of the Carrier would not apply to this case and the procedural arguments raised by the Carrier must be rejected.

With respect to the substantive argument, the Carrier contends that despite the fact the Claimant had previously held the position at issue, the responsibilities of the position had changed and the Claimant was not qualified with respect to the new functions. However, the Carrier has not set forth sufficient evidence to support its position that the Claimant would not be capable of performing the responsibilities of the job. The Local Chairman wrote on June 24, 1995, that Claimant Jakusz had been qualified and had worked on that position. He also stated that the Carrier had never notified the Organization that there had been any change in the position. Hence, the

Carrier has not set forth a sufficient basis for claiming that the Rule was not violated because the Claimant was unable to perform the job at issue.

Rule 10 states, in part:

“ . . . combining or blanking positions for relief purposes will be subject to negotiation and agreement between the Superintendent and the Office Chairman, subject to concurrence of the Management and the General Chairman.”

In this case, it is clear that the Carrier blanked the position and did not negotiate and reach an agreement with the Organization. Since no such negotiation and agreement took place, the Carrier was in violation of the Rule when it did not call in the Claimant to cover the position on April 28 and 29, 1995.

For all of the above reasons, the claim must be sustained.

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 20th day of December, 2000.

Carrier Members' Dissent
to
Third Division Award 35182; Docket TD-34874
(Referee Meyers)

The Carrier, in its Submission, raised the issue that the claim was barred because it was filed too late with the Board. The Referee rejected the argument, at least in part, because the Carrier, while the dispute still was pending on the property, did not take the position that a subsequent filing of the claim with the Board, assuming there was such a filing, by the Organization, would be untimely. It is almost as difficult to set forth the rationale of the Referee as it is to understand it. The sole merit of the rationale is its novelty.



Martin W. Fingerhut



Michael C. Lesnik



Paul V. Varga