

Award No. 4851

Docket No. 4766

2-C&O-CM-'66

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Levi M. Hall when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Southern Region)**

DISPUTE: CLAIM OF EMPLOYEES:

1. That the current agreement was violated, particularly Rule 35, when General Foreman J. L. McKenzie failed to reply to claim filed under date of August 27, 1963, by Local Chairman G. C. Watkins within the time limits specified in said rule.

2. That accordingly, the Carrier be ordered to allow the claim as presented in Local Chairman G. C. Watkins' letter dated August 27, 1963.

EMPLOYEES' STATEMENT OF FACTS: The Chesapeake and Ohio Railway Co., hereinafter referred to as the carrier, maintains and operates a facility at Russell, Kentucky, known as the Fitzpatrick Yards where carmen are employed and trains are made up, switched, inspected and repaired.

On August 27, 1963, Local Chairman of the Carmen, G. C. Watkins filed a claim in writing with carrier's General Foreman J. L. McKenzie in behalf of Carmen C. A. Wilson and Charles Underwood, who were regularly assigned as such at the Russell Repair Track, claiming four (4) hours additional compensation each at the time and one-half rate, account other than carmen used to perform carmen's work in violation of Rules 32 and Carmen's Special Rule 154.

Local Chairman Watkins failed to receive an acknowledgment or reply to his letter of August 27, 1963, and by letter dated November 20, 1963, he wrote to General Foreman McKenzie making reference to his letter of August 27, 1963, pointing out that in view of the failure to reply within the time limits of Rule 35, the claim was subject to be paid as presented.

Master Mechanic L. S. Fidler replied to the local chairman's letter of November 20, 1963 by letter dated November 22, 1963 and attached a copy of a

reason for the local chairman not to get the letter in question. The bald assertion of the local chairman is without corroboration while the carrier's evidence shows that the letter in question was properly addressed and mailed and that others in circumstances similar to the local chairman did receive a copy of such letter.

The claim has clearly not been proven, and it should be declined.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 August 27, 1963, the Local Chairman of the Carmen filed a claim with Carrier's General Foreman in behalf of Carmen C. A. Wilson and Charles Underwood, who were regularly assigned as such, claiming four hours' additional compensation each at the time and one-half rate, on account of the fact that other than Carmen were used to perform Carmen's work in violation of Rule 32 and Carmen's Special Rule 154. The Local Chairman asserts that he failed to receive any acknowledgment or reply to his letter of August 27, which is in violation of Rule 35 (1) of the controlling Agreement which requires that if any grievance be disallowed, the Carrier shall within 60 days from the date the claim is filed notify whoever filed the claim or grievance in writing of the reasons for such disallowance.

Carrier contends that the Master Mechanic under date of October 21, 1963, replied to the Claim and that the letter was forwarded to the Local Chairman in the same manner as had been followed in the interchange of all previous correspondence by means of a Company Messenger.

It appears that the initial Claim was presented to the General Foreman whose office is located in Coal Hump Office Building. The Master Mechanic's office is located in a round house approximately 2 miles from the coal hump and correspondence between the two points is handled by a messenger. It is contended by Carrier that in the handling of claims, the Master Mechanic prepares a reply and his office force places it in a pouch or envelope addressed to the Local Chairman; that a messenger then picks up the parcel and delivers it to the General Foreman at Coal Hump Office Building where it is placed in a special box for the convenience of the Local Chairman; that the Local Chairman checks this box to pick up his mail as often as he sees fit. Carrier asserts that this was the usual procedure and it was followed in the instant case.

The Local Chairman insists that he did not receive the denial letter of the Master Mechanic alleged to have been written under date of October 21, 1963. Carrier maintains that the burden is on the Petitioner to establish that the Local Chairman did not get the letter and that all we have here is the uncorroborated statement of the Local Chairman. Carrier states that the

integrity of the Local Chairman is not in doubt. It is difficult to determine just what other evidence the Petitioner could have offered.

When the Local Chairman flatly denied that he had ever received the letter, the burden shifted to the Carrier to establish that this letter was in fact delivered. In its submission Carrier has offered the following statement:

"When the Local Chairman asserted that he had not been furnished a reply to his claim, the Master Mechanic immediately took action to re-trace just what could have happened to the letter in question. No irregularity could be developed; in fact, all that could be found indicated that there was no unusual handling and that the Local Chairman should certainly have received his mail in this instance as it was handled in the usual manner."

Other than a recital in the correspondence that Carrier's representative had talked to the messenger, no statement was offered on the property signed by the messenger nor was any other competent evidence offered in support of Carrier's position.

In addition we note the following statement in a letter from the Local Chairman to the Master Mechanic, and repeated in later correspondence during the progress of the claim on the property:

"I would like to remind you that about the same time you said you wrote me that a bid from Marvin Phelps was lost enroute from the Shop track office to your office."

Carrier's only comment in reply was that it had no knowledge of circumstances surrounding the incident cited.

Carrier has cited certain awards in support of its position which can be distinguished from the instant case. However, in Award 4208 (Harwood) a method similar to the one that had been used in remitting correspondence here had been adopted. It appears that in Award 4208 each of the parties claimed non-compliance with the time limit rules by the other party. It is said there: "We do not believe that either party could properly be penalized by rigid application of these procedural rules under the facts of the record here presented."

The dictum in Award 4208 is somewhat pertinent to the situation here: "It could however be suggested that such situations might well be avoided in the future by specifying the use of certified or registered mail, 'return receipt requested', when complying with the requirements of written communications between the parties."

Carrier selected the method by which the denial of the claim of August 27, 1963, was to be delivered. The employes cannot be held responsible for the handling of Company Mail by Company Messengers. It was the responsibility of the Carrier to see that the letter of denial was properly delivered to the Local Chairman. All of the Rules of the Agreement must be made effective though the result may appear to be somewhat harsh at times.

The Board finds that there has been a violation of Rule 35(1) of the controlling Agreement by the Carrier and that Claimants be compensated as requested in the Claim filed under date of August 27, 1963.

AWARD

Claim sustained in accordance with the Findings.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

**ATTEST: Charles C. McCarthy
Executive Secretary**

Dated at Chicago, Illinois, this 13th day of April, 1966.

CARRIER MEMBERS' DISSENT TO AWARD 4851

In the instant dispute the majority has not given a correct interpretation of the meaning and intent of Rule 35 (1), and has wrongly departed from previous better reasoned awards involving the same Time Limit Rule in other disputes identical to or similar to the instant case. See our Awards 2959 (Burke), 3285 (Carey), 3541 (Stone) and 4208 (Harwood).

We dissent.

**P. R. Humphreys
F. P. Butler
H. F. M. Braidwood
H. K. Hagerman
W. B. Jones**