Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 6878
SECOND DIVISION Docket No. 6796
2-SP(PL)-MA-'75

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

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Southern Pacific Transportation Company (Pacific Lines)

Dispute: Claim of Employes:

1. That Carrier violated the time limit provisions of Rule 38 (b) of the current controlling Agreement when it failed to reply to a claim from the Organization's Local Chairman by means of established procedure.

2. That Carrier violated Rule 57 and Memorandum "A" of the current controlling Agreement when it failed to use the emergency crew board, and used other than Machinists to perform work of the Machinist Craft.

3. That Carrier be ordered to allow instant claim as presented and compensate Machinists H. R. West and N. Antonaros (hereinafter referred to as Claimants) nine (9) hours each at the pro rata rate.

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 waived right of appearance at hearing thereon.

It is Petitioner's position that the present claim must prevail not only on the merits, but also since Carrier failed to comply with Rule 38 (b)'s time limit requirements.

As to the latter point, Petitioner emphasizes Rule 38 (b)'s provision that a claim must be allowed as presented if Carrier does not notify in writing whoever filed the grievance of its disallowance and the reasons therefor. Petitioner maintains that Superintendent Morris did not

disallow the claim, which was filed on June 6, 1973, until August 9, 1973.

Superintendent Morris insists that he did deposit on June 26, 1973, to the Local Chairman in the "Machinist" message slot or, as it is termed by Petitioner, shelf at the Bakersfield Roundhouse office. According to Carrier, that slot or shelf has been constantly used as a convenient center for the dissemination of all types of communications, including responses to time claims.

While evidence has been introduced that shows that in many instances similar communications were conveyed to the Local Chairman by United States Mail, the record does not provide a valid basis for finding that Mr. Morris' testimony regarding the June 25 letter is not to be credited and that the mode of communication in question was improper or not calculated to reach the Local Chairman at a timely date. Neither Rule 38 (b) nor any other provision of the applicable Agreement makes it mandatory that letters of disallowance be delivered by hand or United States Mail and we find no persuasive ground for departing in this case from the principle set forth in Award 6352 of this Division that "notice is effective upon the mailing or posting" of a letter. Paragraph 1 of the claim accordingly will be denied.

With respect to the merits, there is insufficient proof to establish that machinists' work was performed by non-machinists in the repair of the defective diesel at Tehachapi or that a derailment or other circumstances were involved that required the utilization of extra machinists. A machinist and electrician completed the preliminary work of removing the pilot and disconnecting traction motor leads and on the following day two machinists, along with a driver, carmen and supervisors went to Telachapi in connection with the repairs. So far as the record shows, neither the driver, carmen nor supervisors trespassed on machinists' work rights. After the initial claim letter, which contained allegations and conclusory statements, none of Petitioner's communications to Carrier on the property presented any data or discussion regarding the merits of this dispute.

To prevail on the merits, a claim must be supported by proof as distinguished from mere assertion and conjecture. In the present case, the necessary proof is lacking and the claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of June, 1975.

LABOR MEMBER'S DISSENT
TO AWARD NO. 6878, DOCKET NO. 6796

This Award is in contradiction to many sound correct Awards of this Board concerning the fact that the burden is on the party claiming delivery of a written document to prove that it was received. The Award dictum on this issue states in pertinent part:

> "xxxx Neither Rule 38 (b) nor any other provision of the applicable Agreement makes it mandatory that letters of disallowance be delivered by hand or United States Mail and we find no persuasive ground for departing in this case from the principle set forth in Award 6352 of this Division that 'notice is effective upon the mailing or posting' of a letter. Paragraph 1 of the claim accordingly will be denied. xxx"

Such tortured reasoning flies in the face of many sound correct Awards on this issue that were furnished to this Referee supporting the well established principle of the above burden of proof. Such as on this same Division; wherein Award No. 6750, Referee Irving T. Bergman stated:

> "Prior Awards have decided, in substance, that although a written document is forwarded through a usual channel for delivery, if receipt of the document is denied, the burden is on the party claiming delivery to prove that it was received, Second Division Award No. 3653, Third Division Awards 11575, 14695, 10173, 11505, 14354, 15395, 15496. In Third Division Award 11568, it was stated: 'The burden is mutual. Not only must the griever adequately prove presentation of his claim, but should the same be denied, the Carrier must also adequately prove notification of denial. To allow a claim without a consideration of the merits, on a presumption that a letter containing the claim was delivered, when the receipt has been denied, could create chaos.'
>
> "The present case falls within the reasoning of the above Awards. The Local Chairman stated that he placed the written claim in a basket designated for that purpose but the General Foreman denied

receipt. The Record has no further proof of delivery and receipt.
Claim Dismissed."

The issue involved in that Award was the same as in the instant case where it is claimed by the Carrier that a basket (slot or shelf) was used as a channel for the delivery of written documents including claims. The majority goes on to state:

> "While evidence has been introduced that shows that in many instances similar communications were conveyed to the Local Chairman by United States Mail, the record does not provide a valid basis for finding that Mr. Morris' testimony regarding the June 25 letter is not to be credited and that the mode of communication in question was improper or not calculated to reach the Local Chairman at a timely date.xxxx"

In the record voluminous documentation was entered showing that all claim correspondence had been addressed to the Local Chairman at his home. This was in the unchallengable form of cancelled envelopes, Carrier officials letters addressed to his home, etc. The record further revealed that the so called shelf or slot was used for bulletins, engine inspection forms, etc. or for the business of practically every mechanic in the shop. Apparently this majority feels that the proper way to receive mail is to "go and hunt for it"- likened unto an Easter egg hunt.

Referee Sickles stated in Third Division Award No. 20293:

> "It is a general principle of the law of agency that a letter properly addressed, stamped, and deposited in the United States mail is presumed to have been received by the addressee. But, this is a rebuttable presumption. If the addressee denies receipt of the letter then the addressor

has the burden of proving that the letter was in fact received. Petitioner herein has adduced no proof, in the record, to prove de facto receipt of the letter by the Carrier.

The perils attendant to entrusting performance of an act to an agent are borne by the principal."

"In Award 11568 (Sempliner), the Board cited Award 11505 and, in addition, noted that the method of presentation is the choice of the Claimant, and with that choice goes the responsibility that it is adequate. The Award concluded that the burden of proving presentation is on the petitioner. See also, Awards 15496 (House) and 16537 (McGovern).

"A petitioner is required to prove de facto receipt of a letter which is properly addressed, stamped and deposited in the United States mail, when the addressee denies receipt. But, we find that the facts of record in this dispute do not raise as strong an initial presumption as in the situation cited above. While there is a suggestion in the documents submitted to this Board that the notification was placed in the United States mail and was never returned to the sender, the record developed on the property fails to show use of the United States mails.

In the instant case the Carrier did not use the United States mail and as stated above when they chose a different method of presentation then with that choice went the responsibility that it was adequate.

Some of the other Third Division Awards holding the same, and not quoted above are 19069 and 19078.

Referee Zumas stated in First Division Award No. 22809:

"At this point, the burden was on the carrier to prove that the declination letters had been written and sent to Claimants, or that they had otherwise been duly notified of the action taken within the time limit of the rule. Carrier does allege that evidence in its records proves that the copies of the letters addressed to the Auditor of Disbursements were received by him and 'were found in Auditor's March, 1963, records.' There is no supporting evidence to prove that the declination letters dated March 18, 1963, were properly addressed and dispatched

to claimants or their representatives within the 60-day time limit, or at any other time. In Award No. 20 491, we held:"

> "2. The carrier asserts further, that is sent the 'recall from Furlough' notice to the claimant by ordinary U.S. Mail on July 3, 1961, and that the notice was not returned to it. The claimant has not only denied that he received said notice but has also disputed that the carrier actually sent it to him. The burden of proof convincingly to demonstrate that it mailed the notice to the claimant rests upon the carrier. The record is barren of any evidence or indication that it did send the notice.***"

"Lack of evidence proving the declination letters were dispatche within the 60-day time limit requires a sustaining award in line with many prior decisions of this Division, a representative gro of which are Nos. 14 905, 15 372, 17 208, 18 449, 19 343, 20 585 and 21 587."

These awards are just a sampling of the legion laying this issue to rest until this majority resurrected an issue that had been so firmly resolved by the several Divisions of the National Railroad Adjustment Board.

One of the basic purposes for which the National Railroad Adjustment Board was established was to secure uniformity of interpretation of the rules governing the relationship of the Carriers and the Organizations of Employes. See Third Division Award No. 4569.

Referee Jesse Simons stated in his Findings in Second Division Award No. 6201:

> "This critical need for Referees, and Boards, to give the highest consideration and greatest possible weight to prior Awards, is grounded on the premise that it will permit the parties, <u>all the parties</u>, across the country to be supplied with a unitary body of decisions permitting uniform administration of the rules and clauses of the agreements. National agreements, national unions, and nation-wide carriers require such unitary interpretation and application of their respective rights and

obligations so contract administration can be a simple straight-forward matter, and adjudication and re-adjucation reduced to a minimum."

Therefore, Award No. 6878 is palpably erroneous.

G. R. DeHague, Labor Member

D. S.Anderson, Labor Member

M. J. Cullen, Labor Member

W. O. Hearn, Labor Member

E. J. McDermott, Labor Member