

The Second Division consisted of the regular members and in addition Referee Abraham Weiss when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Baltimore and Ohio Railroad Company

Dispute: Claim of Employees:

- No. 1. That under the controlling Agreement the Carrier failed to call the Cumberland Wrecking Crew to a derailment of 26 cars at Garrett, Pennsylvania, at which time the Carrier enlisted the services of the Penn Erection and Rigging Company and Winter Brothers Emergency Company and permitted them to perform work accruing to carmen of the Carriers assigned wrecking crew, in this instance, the Cumberland assigned wrecking crew.
- No. 2. That the Carrier failed to comply with the rules of the controlling Agreement specifically, Rule 142, and the December 4, 1975 Agreement, specifically, Article VII--Wrecking Service, effective March 27, 1976, as well as Article V, Carriers' Proposal No. 7, effective November 1, 1954.
- No. 3. That accordingly the Carrier be ordered to compensate the following Claimants for their losses arising out of this incident; Carmen, L. D. Mathias, A. T. Rice Jr., P. H. Sibley, R. G. Hovatter, G. R. Shafferman; L. D. Saville, J. E. Bierman, A. F. Hinkle, W. D. Rawnsley and W. C. Shaffer, each nine (9) hours pay at the time and one-half rate and eight (8) hours at the doubletime rate; H. E. Fraley, ten (10) hours pay at the time and one-half rate and eight (8) hours pay at the doubletime rate; E. F. Ellis, eighteen (18) hours pay at the time and one-half rate and one (1) hour pay at the doubletime rate; R. H. Schriver, twenty-five (25) hours pay at the time and one-half rate and two (2) hours pay at the doubletime 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.

The instant claim requires consideration of procedural questions involving

compliance with time limits in the handling of the claim on the property before the substantive issue can be reached; namely, (1) did Carrier timely deny the original claim and (2) did Carrier timely respond to Petitioner's appeal of the denial of the initial claim.

As to the first procedural question, Petitioner alleges that the original claim dated March 15, 1978 was not denied in a timely fashion. The basis of the allegation is that although the denial letter was dated May 12, 1978, it was not sent through the U.S. Mail, but was hand delivered to the Local Chairman on the property on May 25, 1978, well in excess of the 60 day time limit specified in Article V, Carrier's Proposal No. 7, effective November 1, 1954.

The record indicates that the initial claim was submitted on the Organization's letterhead, Local Lodge No. 656, Cumberland, Md. 21502, and signed by Wendell C. Shaffer, Local Chairman. The declination letter dated May 12, 1978, signed by the Manager of Car Department, Pittsburgh, Pa., was addressed to W. C. Shaffer, Local 656, Cumberland, Maryland, without identifying the Organization or listing the zip code. The copy of the declination letter in the record before us bears a date stamp as having been received in Carrier's Labor Relations Department in Baltimore, Maryland on May 16, 1978. (The Local Chairman was handed the letter on May 25).

Carrier denies it violated the Time Limit Rule in that the Local Chairman's initial claim did not contain a U.S. mailing address for a return reply and that the letter of declination dated May 12, 1978 was forwarded through company mail in the normal and usual mail. Carrier cites the Board's ruling in Second Division Award 6352 that in replying to a claim "notice is effected upon the mailing or posting thereof".

Petitioner asserts that the Local Chairman did not authorize the use of the company mail; that he affixed his return address on the envelope containing the initial claim; and that the use of the company mail was not the normal and usual manner as alleged by Carrier.

We have no reason to question Petitioner's statement that the Local Chairman's return address was on the envelope containing the initial claim. That statement was uncontroverted and un rebutted; we have no probative evidence to the contrary. Further, Carrier has not demonstrated convincingly that the use of the company mail was normal and usual under the circumstances herein described.

The factual situation in Second Division Award 6352, cited by Carrier, is distinguishable on two grounds: both the Local Chairman filing the claim and the Master Mechanic to whom the claim was addressed, both worked in the same city, Los Angeles; and the Master Mechanic's reply to the claim was posted in the regular company mail service identically with the manner all correspondence had been transmitted to the Local Chairman. Insofar as can be determined, Petitioner in Award 6352 did not contest the accuracy of the company's statement that company mail was customarily used to communicate with the Local Chairman. Although the Master Mechanic's letter to the Local Chairman was not received until 65 days after the date the latter sent his claim, Award 6352 discounts this, noting that the Local Chairman did not work the day after the Master Mechanic's letter was posted

(December 9), "a nationwide rail strike occurred on that day and with his rest days following, actual receipt of Carrier's reply by him might not have happened until Monday, December 14".

Thus, the factors present in Award 6352 are not found in the instant case.

We find Second Division Award 7626 more in point. In that case, the Local Chairman's claim letter dated January 26, 1974 contained a return address. Carrier on March 22, 1974 sent a denial letter by company mail to the Local Chairman, in care of a Carrier official at Carrier's address, which letter was delivered to the Local Chairman on April 4, 1974 -- 8 days after the 60 day time limit prescribed in the applicable rule.

The Board in Award 7626 stated:

"The procedural rule in this case is whether the Carrier complied with the sixty (60) day time limit in Rule 34(a). Such notice provisions ordinarily are satisfied when a party gives up control of a letter by dispatching it in the U. S. Mails or other method of communication authorized by the Organization. There was no evidence in the record to show that the Local Chairman authorized the use of the Company mails as a method of communication. In fact, the Local Chairman used a return address on his claim letter, but the Carrier elected to use another address for a carrier representative. The Carrier did not relinquish control over its letter of denial when it was sent in the Company mail. The Local Chairman did not authorize the use of Company mail. Under such circumstances notice was not effective until the Carrier relinquished control over the letter by actually delivering it to the Local Chairman. The notice of denial therefore was not given by the Carrier until after the sixty (60) day time limit under Rule 34(a). This Board has no discretion with respect to this time limit. Under Rule 34(a) a claim must be allowed as presented when the Carrier fails to give timely notice. The claim therefore must be sustained on a procedural basis and this Board expresses no opinion concerning the merits of substantive issues."

We concur in the above findings.

As to the second question involving timely notice, the facts are that Petitioner filed an appeal dated July 14, 1978, to which Carrier responded on September 15, 1978. Carrier asserts that it received the appeal on July 18, 1978 and that, therefore, its denial letter of September 15 was within the 60-day time limit. Carrier finds support for its conclusion in prior Board awards that the date of receipt of a claim or appeal determines the 60-day time limit, which commences to run from that date and accordingly, we find no merit in Petitioner's claim that Carrier's denial of its appeal was untimely.

As we have noted, the Local Chairman was "notified" of the denial of the claim significantly later than the 60 day limit specified in Article V of the 1954

Form 1
Page 4

Award No. 8677
Docket No. 8411
2-B&O-CM-'81

Agreement. Petitioner raised the time limit issue at its first opportunity, during the handling of the claim on the property. The parties have made it explicitly clear that time limits are important to them. Accordingly, we find that Carrier committed procedural error in that it did not comply with the provisions of Article V of the 1954 Agreement with reference to the Local Chairman's claim. Under Article V, a claim must be sustained on the procedural basis and this Board expresses no opinion concerning the merits of the substantive issues involved in the claim.

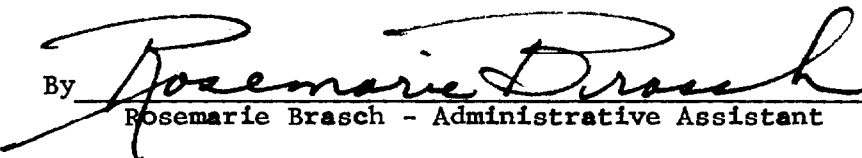
A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of April, 1981.