

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Form 1

Award No. 12785
Docket No. 12711
94-2-93-2-61

The Second Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

PARTIES TO DISPUTE: (The Brotherhood of Railway Carmen/Division
 (Transportation Communications
 (International Union
 (
 (
 (Atchison, Topeka and Santa Fe Railway
 (Company

STATEMENT OF CLAIM:

- "1. That the Atchison, Topeka and Santa Fe Railway Company violated the controlling Agreement, specifically Rules 39(a), 16 and 98 when it failed to notify the Organization, in writing within sixty (60) days from the date of the claim, of the claim disallowance. Also, when it assigned B&B Painters to clean and paint machinery in the East Freight Car Mill and Door area at the System Maintenance Terminal at Topeka, Kansas.
2. That, accordingly, the Atchison, Topeka and Santa Fe Railway Company be ordered to compensate Carman Painters R.H. Barnes and R.L. Milner each eighty (80) hours each at the pro rata rate of pay for a period of approximately three (3) weeks, beginning December 30, 1991, when the B&B Painters were assigned Carman Painters' work."

FINDINGS:

The Second 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 waived right of appearance at hearing thereon.

The Claimants were regularly assigned Carman Painters but, in late 1991 for a three-week period, painting of machinery was assigned to painters of the B&B that were painting the interior of the building in the East Freight Car Shop.

In addition to the merits of the dispute, the Organization has raised a procedural question. The initial claim was submitted on February 23, 1992. On May 25, 1992, the Organization advised the Carrier that it had "hand-delivered" the claim and stated that the Carrier had failed to deny same within the 60-day contractual time limit.

On June 11, 1992, the Carrier responded to the Organization, attaching a letter of denial dated April 13, 1992. The June 11, 1992 letter stated:

I am not surprised that this correspondence was not delivered through our shop mail. We have been experiencing an aberration of sorts regarding the routing of shop correspondence in the facility. In the future all correspondence concerning our working agreement will be sent via U.S. mail to your organization's office of record.

The April 13, 1992 denial letter merely advised that no rule had been violated and the claim was declined in its entirety.

Concerning the merits of the case, the Carrier stated that:

...before the machinery painting was assigned to the B&B forces an oral agreement was reached between Topeka supervision and local chairman Norton to handle the work in this manner.

The Organization denies that there was an oral agreement.

The Board is of the view that the dispute should be resolved on the procedural issue. The Organization placed the Carrier on notice on May 25, 1992 that no denial had been received. This raises an affirmative defense on the part of the Carrier and it is obligated to establish compliance with the Agreement by a preponderance of the evidence.

Interestingly, the November 25, 1992 correspondence to the General Chairman states:

"The shop mail procedures had proved dependable in the past for both parties, and the Carrier properly relied upon this system when declining the instant claim."

Yet, on June 11, 1992, the Carrier advised the Local Chairman that it was not surprised that the correspondence was not delivered through the shop mail because the Carrier had been experiencing an aberration of sorts regarding the routing of shop correspondence in the facility. Something other than a mere statement by the Carrier that the denial was issued is required, once the matter has been raised. Rule 39(a) is clear in its statement that a Carrier must, within 60 days from the date same is filed, notify the reasons for such disallowance, in writing:

"If not so notified, the claim or grievance shall be allowed as presented..."

This is but another illustration of numerous cases considered by the Board regarding issues of timeliness concerning documentation exchanged on the property. Unless, and until, the parties devise a more effective method of demonstrating actual submissions and receipts, this type of result will prevail.

A W A R D

Claim sustained.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmarked date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois this 17 day of November, 1994.