

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22600
Docket Number MW-22274

Louis Yagoda, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ Chicago, Milwaukee, St. Paul and Pacific
{ Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

The claim in favor of Track Foreman D. J. Susdorf, as presented in a letter* dated June 10, 1976, shall be allowed as therein presented because Mr. B. J. McCanna (Superintendent/Division Manager) did not tender a decision in conformance with Sections 1(a) and 1(c) of Agreement Rule 47 (System File C# 47/D-1945).

*Letter of claim presentation will be quoted within the Employees' Statement of Facts."

OPINION OF BOARD: The letter referred to in the Statement of Claim and dated June 10, 1976, is from Organization's General Chairman R. O. Chambers to Carrier's Roadmaster David J. Bock and submits a claim on behalf of Foreman D. J. Susdorf for earnings he would have received had he been called to work as of April 19, 1976. This claim is based on an alleged denial of entitled work to Mr. Susdorf when another foreman (Hokkanen) was called instead of Susdorf at approximately 6:00 p.m. on April 19, 1976 to remove a red board on a section of track, described in the letter as assigned to Foreman Susdorf and for maintenance of which he is held responsible. Inasmuch as Claimant Susdorf had completed his regular schedule of work (although available) when this assignment was worked, the remedial compensation sought is at the penalty rate amounting to two (2) hours and forty (40) minutes pay.

Roadmaster Bock issued denial of said claim, under date of June 29, 1976, stating that Foreman Hokkanen was qualified for and entitled to the work in question.

There followed under date of August 11, 1976, a written appeal from this denial addressed to Superintendent B. J. McCanna by General Chairman R. W. Mobry.

Carrier exhibits with the material submitted to us a document dated August 12, 1976, which purports to be an exact duplication of a letter from Division Manager McCanna to General Chairman Mobry, declining the appeal.

Organization states, however, to the Board that "Superintendent McCanna failed to respond" to the appeal sent to him.

By letter dated November 24, 1976, General Chairman Mobry wrote to Assistant Vice President, Labor Relations, V. W. Merritt, addressing that he had not received, to that date, a response from Mr. McCanna to the claim appeal and declaring that the claim is therefore "now in default and should be found as presented in accordance with Rule 47."

By letter dated January 20, 1977, Mr. Merritt wrote Mr. Mobry, enclosing a copy of the letter to him dated August 12, 1976 by Mr. McCanna, declining the claim, as evidence of timely response from an appropriate source. He goes on to deal with the merits of the claim from Carrier's point of view, concluding that the claim is "without factual and/or schedule rule support and is therefore" declined in its entirety.

After subsequent conference between the parties, the controversy remained at impasse and the claim was thereafter submitted to the National Railroad Adjustment Board for final and binding decision, reaching us in the form appearing in the above Statement of Claim.

In its position before the Board, Organization persists in its posture that it never received a response from Division Manager McCanna to its appeal letter addressed to him under date of August 11, 1976, and none from any Carrier official until it wrote again, this time to Assistant Vice President Merritt on November 24, 1976, about 80 days later, thereafter receiving its first management reply - from Mr. Merritt - on January 20, 1977, constituting more than 3 months of failure of Carrier to reply to an appeal and the answer not coming to the individual to whom addressed. This is regarded by Employees as a clear violation of the provisions of Rule 47, Section 1(a) which requires, in part, that "Carrier shall, within 60 days from the date claim is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of such disallowance." It is pointed out by Organization that this clause specifies an explicit consequence of failure by Carrier to disallow grievance within the 60-day period: the allowance of the grievance. Section 1(c) of Rule 47 requires, in part, that the Rule "shall govern in appeals taken to each succeeding officer" (except at the final step, not applicable here).

In the instant situation, the lapse in time of more than 3 months without a response from Superintendent **McCanna**, the appropriate "succeeding officer" at that step, compels, in Organization's view, the allowance of the claim as initially presented.

We find here a contrwersy in which **the one** who was to have been the recipient of a response to an appeal letter, states that he failed to receive such from the individial he addressed within the required **60-day** period. The latter exhibits what purports to be such a reply dated one day after the appeal was sent to him.

In the face of denial of receipt, the burden for prwing that the letter was timely sent falls on the sender. That burden is not satisfactorily met by the supplying of only a properly dated purported carbon copy of a letter allegedly timely sent. Certain probative underpinnings **are** missing, which we believe are not unreasonable to expect from Carrier for convincing support of the action it contends it took. Was the original of such letter put in an envelope, properly addressed to the proper individual, sealed, stamped and conveyed to a postal connection? When and by whom?

We are unable to find the answers to these questions from the combination of silence or unilateral assertion in the record which reaches us.

We **must** therefore conclude that Carrier has failed to show that it timely met the response requirements put on it by Rule 47 in respect to the instant claim and, pursuant to that Rule, sustain Claimants in their contention that said claim was "allowed" by Carrier's default.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as apprwed June 21, 1934;

That this Division of the **Adjustment** Board has jurisdiction wer the dispute involved herein; and

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That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of October 1979.

10/30/79
NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION
CHICAGO, ILLINOIS