

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Delaware and Hudson Railway Company

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

(1) The claim* as presented by the District Chairman on July 10, 1984 to Production Engineer (Assistant Chief Engineer R. L. Bowen) shall be allowed as presented because said claim was not disallowed by Mr. R. L. Bowen in accordance with Rule 35(e)(2) (System File 012.22).

*The letter of claim will be reproduced
within our initial submission."

FINDINGS:

The Third 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 Organization's Claim on behalf of Trackman R. Perry alleges Carrier violated the Agreement by depriving Claimant of overtime. During the progression of this Claim on the property the Organization further alleged that Carrier made two procedural errors when the wrong Carrier official responded to the Claim and after the sixty (60) days specified in the Rule.

A review of the record shows that with respect to the time limits of the Agreement, the District Chairman filed the initial Claim by Certified mail dated July 10, 1984, addressed to the Production Engineer. The District Chairman received a declination by regular mail, undated, signed by the Chief Engineer. The District Chairman responded by Certified mail dated September 26, 1984, that the undated response was "not received by this office in the allowed time." Thereafter, Carrier responded that although undated, it was "mailed from our office on September 6, 1984," within the time frame.

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Award No. 27769
Docket No. MW-27027
89-3-85-3-678

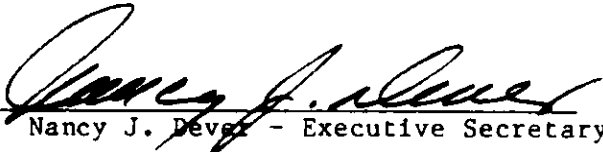
The record before us indicates that the original claim of the Organization was sent by Certified mail. There is no evidence produced by the Carrier on the property to indicate that the regular mails were generally used. When confronted with a challenge to the declination of a claim within the time limits of an Agreement, this Board has generally held that the burden is on the sender to show by probative evidence that the denial had been sent within the time frame. The Carrier, therefore, has the burden of proof.

Although the Carrier asserts that said letter was timely sent, the Board finds no probative evidence of record to support the assertion. The Carrier had a responsibility to produce such evidence to document the date the letter was sent. This the Carrier did not do, and the Claim must therefore, be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of March 1989.