Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28182
THIRD DIVISION Docket No. SG-27089
89-3-86-3-146

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (Conrail):

Claim on behalf of J. M. Delozier, 037666, Maintainer C&S (test), with headquarters at Rockville Tower, PA.

A. Claim that the Company violated the current Agreement between Consolidated Rail Corporation and the Brotherhood of Railroad Signalmen, particularly Rules 4-F-1(a) and 5-E-1(a), when they have Maintainer Delozier reporting to the Lemo C&S building at Lemoyne, PA, and not his designated headquarters at Rockville Tower.

B. Claim that J. M. Delozier be paid one (1) hour at the straight-time rate of pay for his present position, commencing on October 1, 1984, and continuing until correction is made. Carrier file: SD-2207."

FINDINGS:

The Third 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 employes 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.

Claimant in this dispute is the assigned Maintainer C&S (Test), with assigned headquarters at Rockville Tower, Pennsylvania. He was assigned to this position on or about January 11, 1984.

By letter dated November 20, 1984, the Local Chairman submitted a claim on behalf of Claimant contending a violation of Rules 4-F-1(a) and 5-E-1(a) because Claimant was allegedly reporting to the Lemo C&S building at Lemoyne, Pennsylvania instead of his headquarters at Rockville. Based on the above, the Claim requested compensation of one (1) hour at the straight time rate commencing on October 1, 1984, and continuing.

Carrier contends that inasmuch as the Supervisor had not issued any instructions for the Claimant to report to Lemoyne, Supervisor Parson contacted the Claimant on November 26, 1984, to investigate the facts. According to Carrier, the Claimant admitted that he and his Inspector made the determination to report to Lemoyne on certain occasions because they both resided closer to Lemoyne than to Rockville.

Based on the above, the Claim was denied by letter dated December 14, 1984.

By letter dated February 25, 1985, the Claim was appealed to the Manager-Labor Relations on the basis of an alleged time limit violation under Rule 4-K-1(a), which provides as follows:

> "4-K-1. (a) All grievances or claims other than those involving discipline must be presented, in writing, by the employee or on his behalf by a union representative, to the Supervisor-C&S (or other designated supervisor), within sixty (60) calendar days from the date of the occurrence on which the grievance or claim is based. Should any such grievance or claim be denied, the Supervisor shall, within sixty (60) calendar days from the date same is filed, notify whoever filed the grievance or claim (employee or his representative) in writing of such denial. If not so notified, the claim shall be allowed as presented."

The employees contend the Supervisor's denial dated December 14, 1984, was received by the Local Chairman in an envelope postmarked February 21, 1985, a total of ninety-three (93) days from the date of the initial Claim. The Organization has submitted a copy of the envelope postmarked February 21, 1985.

Carrier asserts that the subject denial was typed and mailed on December 14, 1984. Copies of statements from the clerk who typed the letter and the office engineer were provided to the employees with the Senior Director's letter denying the appeal on June 12, 1985. The subject statements attest that the instant Claim was timely denied and sent in the usual manner via First Class United States Mail on December 14, 1984.

Carrier contends that it fulfilled its obligation when the subject denial was placed in the mail on December 14, 1984, with the proper postage, and it cannot be held responsible if delivery is delayed by the Postal Service.

In any event, Carrier maintains in further argument, the instant Claim is void ab initio, since a purely voluntary act by an employee cannot be the basis for a claim that Carrier violated the Agreement. That being the case, Carrier submits that the Board may not consider the procedural objections raised by the Organization.

This Board has carefully reviewed the precedent Awards cited by Carrier in support of its position that there was no valid claim in the first place and finds them inapposite to the present case. In Third Division Award 26549, for example, this Board concluded that the claim had not been timely presented within 60 days of the occurrence. Because no valid claim existed, it was held that Carrier's later procedural error, as well as the merits of the claim, could not be considered. In another case cited by Carrier, the Board found that "a purely voluntary act by an employee should not be the basis for a claim that a Carrier violated its Agreement." Third Division Award 24298, Similarly in PLB No. 3636, Award No. 13, the Board concluded that the Organization was estopped from charging a contract violation where a mechanic precipitated the breach of the Labor Agreement. The later two Claims were denied on the merits.

Essentially, what the Carrier seeks from the Board is a ruling that the employee's actions render this Claim void ab initio, thereby precluding further consideration of later procedural errors. We disagree. The Carrier's arguments pertain directly to the merits of the Claim. Unlike Award 26459, where no valid Claim had been timely presented, here the Claim has been timely filed and is within the jurisdiction of the Board for disposition.

So stating, we turn to the timeliness argument raised by the Organization. There are numerous precedent Awards which have addressed procedural issues similar to that herein, and well-grounded principles have been established. Third Division Award 14354 found that:

> "As we stated in Award 10173, 'Article V, Section 1 places correlative obligations upon the parties with respect to the progression of claims.' Just as Employes bear the responsibility of being able to prove that a claim is timely filed with a Carrier, so the burden of proof rests with a Carrier to prove that Employes are duly notified in writing of the reasons for disallowance. Notification connotes communication of knowledge to another of some action or event. The method of communications in the instant case was left to the discretion of the party bearing the responsibility of notification and the Carrier apparently elected to

> use the regular first class Mail service rendered by the Post Office Department. Had the Carrier elected to use certified or registered mail service offered by the Post Office Department, probative evidence of delivery would be available to support the Carrier's assertion. Employes cannot be held responsible for the handling of Carrier's mail by the Post Office Department. It was the responsibilty of the Carrier to be certain that the letter of disallowance was properly delivered to the Employes' Local Chairman."

Similarly, in Third Division Award 11505, this Board noted:

> "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."

Also see Third Division Awards 25309, 25208, 21088, 20763, 18661, 18004, 17999, 16357.

Based upon the record before us, the Board is forced to conclude that the Carrier has not proved that denial of the Claim was actually received within the requisite time frame. The statements of the two employees who claim to have typed and mailed the letter, self-serving statements at best, clearly lack the specificity, detail and probative weight necessary in order for the Carrier to meet its burden of proving that the letter was in fact sent. We find, therefore, that Carrier was in violation of the provisions of 4-K-1 of the Agreement. There are several Awards which have addressed the issue of proper remedy for such violation. In Third Division Award 24298, we held:

> "Many awards have been rendered by this Division involving late denial of claims by carriers, especially since Decision No. 16 of the National Disputes Committee. See also Decision No. 15 of the same disputes committee. Decision No. 16 of

> the National Disputes Committee and awards following the issuance of that decision, have generally held that a late denial is effective to toll Carriers liability for the procedural violation as of that date. From the date of late denial, disputes are considered on their merits if the merits are properly before the Board."

Also see Third Division Awards 26239, 25473 and 20268.

The foregoing discussion makes clear that under the facts of this dispute, Carrier's liability under the time limit provisions was stopped by its February 21, 1985, denial of the Claim. The Employees have not argued the merits of the Claim before the Board for the period subsequent to that date. Accordingly, we shall deny that portion of the Claim.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1989.