

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Kansas City Southern Railway Company

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

(1) The Agreement was violated when the Carrier assigned outside forces (Caughern Construction Company) to remove and replace grade crossing panels at Hiway road crossing on November 11 and 12, 1987 [Carrier's File 013.31-320(283)].

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. L. Gully and G. A. Naylor shall each be allowed twenty (20) hours of pay at their respective straight time rates."

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.

A threshold issue to be disposed of by this Board is the contention that the Organization did not appeal the denial decision of Carrier's Division Engineer to Carrier's Vice President-Personnel within 60 days of the date of receipt of denial. The Division Engineer denied this Claim on June 8, 1988. The Appeal to Carrier's Vice-President Personnel was dated August 9, 1988. When confronted with an allegation that the appeal was untimely, the Organization responded that while the Division Engineer's denial was dated June 8, 1988, the letter transmitting the denial was post-marked June 10, 1988, and was not received until June 13, 1988. It did not however, submit a copy of the envelope to Carrier at the time, nor has it done so in its Submission to this Board.

A letter is presumed to have been mailed on the day it is dated. If it is contended that a letter was not mailed on the day it was dated, the party advancing this contention has the burden of overcoming this presumption. In this case the Organization has argued that while the letter was dated June 8, it was not postmarked until June 10 and was not received until June 13. If this was factual, the Organization had the evidence in its possession to overcome the presumption that the denial was not mailed on the day it was dated. It was incumbent upon the Organization to submit this evidence as proof in support of its contentions.

The date shown on the Division Engineers denial is June 8, 1988. The date shown on the appeal to the Vice President is August 9, 1988. The two dates are clearly more than 60 days apart. And even if we subscribe to the notion that the denial letter took three days for delivery it could also take three days for the appeal to be delivered, thus it would still be out of time.

The dates of the letters demonstrate that the appeal was out of time. The Organization has not satisfied its burden that Carrier's denial was not mailed on the date of the letter. Accordingly, the Board must conclude that the appeal of the Organization was out of time. The Claim will be dismissed without consideration of its merits.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of September 1992.