

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award No. 29891
Docket No. MW-28934
93-3-89-3-324

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

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

- (1) The Agreement was violated when the Carrier recalled junior Trackman S. Seaman instead of Mr. J. Kane to fill a trackman position on Gang TO-134 at Rutherford, Pennsylvania effective April 6, 1987 (System Docket CR-3820).
- (2) The claim as presented by District Chairman R. F. Kent on April 15, 1987 to Division Engineer D. J. Kreiss, shall be allowed as presented because Division Engineer Kreiss failed to disallow the claim as contractually stipulated within Rule 26(a).
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. J. Kane shall be compensated for all time worked by Mr. S. Seaman beginning April 6, 1987 and continuing as per Rule 26(f) of the Agreement."

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 employe 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 Claimant contends that the Agreement was violated when the Carrier recalled a junior Trackman instead of Claimant to fill a trackman position on Gang TO-134 at Rutherford, Pennsylvania beginning April 6, 1987. The Claimant also contends that the Claim should be allowed as originally presented because the Carrier failed to disallow the Claim as contractually stipulated within Rule 26(a).

The dispute regarding this issue involves interpretation of Rule 3, Section 4, Rule 4, Section 3 and Amendment 4. The Organization contends that the Carrier was obligated to recall employees in seniority order regardless of work zone preference. The Carrier contends that the position in question was in work zone 2 as was the junior employee, and that the Claimant was in work zone 3. Since the junior employee was an automatic bidder for the position, because it was in his work zone and the Claimant was not, Claimant had no right to recall if he did not bid on the position.

The central issue in this case, however, lies in the procedural issue of the alleged time limit violation.

The Organization argues that the Carrier did not deny the Claim within the 60 days required by Rule 26(a) and accordingly, the Claim must be allowed.

Rule 26(a) provides:

"A claim or grievance must be presented, in writing, by an employee or on his behalf by his union representative to the Division Engineer or other designated official within sixty (60) days from the date of the occurrence on which the claim is based. The Division Engineer or other designated official shall render a decision within sixty (60) days from the date same is filed, in writing, to whoever filed the claim or grievance (the employee or his union representative). When not so notified, the claim will be allowed."

"(e) The time limits specified in paragraph (b), (c) or (d) may be extended by agreement in any particular case. When the U. S. Mail is used, the postmark will govern in determining compliance with the various time limits."

The Carrier argues that it denied the original Claim in a letter to the Organization dated May 28, 1987. The Carrier has

submitted a copy of this letter. The Carrier further argues that the appeal was not listed with the Labor Relations office within the time limits of Rule 26(B). The Carrier contends that the original Claim was denied May 28, 1987, and the denial was not appealed until June 21, 1988, well beyond the sixty day time limit under Rule 26.

The Carrier contends that the issue of whether the Carrier denied the Claim in a timely manner cannot be resolved by this Board because the issue involves one factual assertion against another which this Board cannot resolve.

This Board has been very clear in its resolution of this issue involving the same agreement provisions and these same parties.

In Third Division Award 25309, a case in which the Carrier did not respond within the time restrictions under 26(a) the Board sustained the Claim,

"In ruling on this procedural issue, this Board must consider both precedent and substantial evidence of record. There is considerable past precedent that it is the responsibility of Carrier to unequivocally assure that letters of declination are properly delivered to the appropriate Organization official within the Stated time limits (Third Division Awards 10173; 11505; 14354; 16163; 25100). With respect to substantial evidence, this Board has long held that assertions alone that letters have been mailed will not suffice. Specific to the case at bar where such problems have already occurred, it is even more incumbent that attention be paid to the issue of meeting the evidence test that such letters were sent as argued. Carrier assertions alone that letters were mailed, even when copies of such letters are produced, do not provide the necessary evidence required in cases of dispute which come before this Board (see Third Division Awards 17291, 10173, 10742."

See also Third Division Award 27017.

In Third Division Award 17227 where the Carrier failed to deny the Claim within the time prescribed by the agreement, this Board held,

"Just as Employees 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 Employees 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 communication 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.

Employees cannot be held responsible for the handling of Carrier's mail by the Post Office Department. It was the responsibility of the Carrier to be certain that the letter of disallowance was properly delivered to the Employees Local Chairman."

It is clear that the burden of proof with respect to this issue is on the Board and submission of the denial letter alone does not satisfy that burden. Moreover, while this Board is not punishing the Carrier for errors it may have made in the past, this Board has made clear that where similar problems have already occurred, as they have with these parties, it is even more important that the Carrier meet the evidence test that the letter of denial was sent. The Carrier has not met its burden in proving that the Claimant was properly notified of the denial of the Claim within the time limits of Rule 26.

Since, in light of the appropriate burdens of proof, the Carrier has not demonstrated that the Organization was notified as to the denial within the requirements of Rule 26(a), the time requirements for appeal mandated by Rule 26(b) do not come in to play.

The Claim must be sustained on procedural grounds.

A W A R D

Claim sustained.

Form 1
Page 5

Award No. 29891
Docket No. MW-28934
93-3-89-3-324

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.