

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31394
Docket No. MW-30685
96-3-92-3-471

The Third Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad
(Company)

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

- (1) The Agreement was violated when the Carrier used an outside concern (J&M Excavating) to perform machine operating work in connection with the removal of concrete foundations at Sparta, Wisconsin on April 15, 16, 17, 18, 19, 20 and 21, 1991 (System File C-14-190-C080-04/8-00062 CMP).
- (2) The Agreement was further violated with the Carrier failed to give the General Chairman advance written notice of its plan to contract out the work involved here in accordance with Rule 1.
- (3) The claim as presented by General Chairman M. S. Wimmer on June 5, 1991 to Division Manager D. J. Lyons shall be allowed because said claim was not disallowed by Division Manager D. J. Lyons within the required sixty (60) day time limit set forth in Rule 47.
- (4) As a consequence of the violations referred to either Part (1), Part (2) and/or Part (3) above, Machine Operators L. L. Zwiefel and A. G. Pelischek shall each be allowed sixty (60) hours' pay at their pro rata straight time rate of pay."

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.

On June 5, 1991, Organization's General Chairman M. S. Wimmer submitted a claim to Carrier's Division Manager D. J. Lyons "... for sixty (60) hours straight time each" for Claimants L. L. Zwiefel and A. G. Pelischek because Carrier allegedly improperly subcontracted work to the J&M Excavation Company on April 15, 16, 17, 18, 19, 20 and 21, 1991, in violation of Organization's Rule 1 Scope Rule.

The work in question consisted of "... the excavation and removal of the cement foundations at Sparta, Wisconsin on the Carrier's property."

Organization mailed the aforesaid time claim to Carrier by means of Certified U.S. Mail on June 6, 1991, with a Return Receipt Requested card properly attached thereto. According to the Return Receipt, Carrier received said time claim on June 10, 1991.

On September 16, 1991, General Chairman Wimmer corresponded with Carrier's Vice-President of Labor Relations C. S. Frankenberg requesting that the subject claim be paid as presented in accordance with Schedule Rule 47 because Carrier allegedly failed to deny said claim within the sixty (60) days time limit period as specified within the cited Rule.

In a letter to General Chairman Wimmer dated November 15, 1991, Ms. Frankenberg responded to Mr. Wimmer's September 16, 1991 inquiry by alleging that Mr. Lyons denied the claim on July 31, 1991. A copy of said denial letter was attached to Ms. Frankenberg's November 15, 1991 letter to General Chairman Wimmer. Also attached to that same letter was a handwritten copy of a note from Personnel Steno Darlene M. Bruscato to Ms. Frankenberg in which she claims to have typed Mr. Lyons' July 31, 1991 denial letter to General Chairman Wimmer and that said denial letter " ... was mailed on Aug. 1, 1991 via U. S. Mail to Mr. Wimmer."

The matter was progressed by the parties throughout all of the remaining steps of the parties negotiated grievance procedure. Thereafter, the matter remained unresolved, and it was appealed to

the Third Division of the National Railroad Adjustment Board for final resolution.

According to Organization, before we determine the merits portion of this case, we must first determine whether or not the pending claim should be paid in accordance with the provisions of Schedule Rule 47 which, in pertinent part, reads as follows:

"RULE 47
TIME LIMIT - CLAIMS OR GRIEVANCES

1. All claims or grievances shall be handled as follows:

- (a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

Organization argues that Carrier has failed to establish that management timely declined the subject claim as is required by Third Division and general railroad industrial relations precedent; and, therefore, Rule 47 requires that this claim be paid as presented.

Carrier, in counterpoint to Organization's position, contends that the subject claim was timely denied as evidenced by the written attestation by Personnel Steno Bruscato.

The Time Limit Rule, as noted in the parties' respective written Submissions, has been extensively litigated within the

railroad industry. Intermittently, the parties challenge whether on not each other has failed to comply with the dictates of the applicable Time Limit Rule. In the instant case, Schedule Rule 47, the Soo Line/BMWE Rule, is very much the same as all other such Time Limit Rules which exist in the industry. When the National Railroad Adjustment Board's Third Division is presented with disputes involving compliance/noncompliance with the applicable time limit rule, the party who can present the most probative evidence in support of its position usually succeeds. In Third Division Award 28504, it was concluded that:

"When one party places correspondence in the U. S. Mail, there is a presumption that it was received by the addressee. This presumption may be rebutted by the mere denial of the addressee that the correspondence was received in which case the sender has the burden of proving that it was, in fact, received."

In the instant case, it is believed that the documentation provided by Organization meets that burden. The U. S. Postal Service Return Receipt (PS Form 3811) acknowledges that Carrier received the envelope which contained Organization's claim letter of June 5, 1991. Although Carrier suggests that the envelope so identified contained something other than the claim letter, there is no evidence to support this assertion. Further, the certification numbers on the letter and the return receipt match.

In addition, in its Award 25309, the Third Division enunciated the following policy when assessing the parties' contentions concerning actual receipt of correspondence indicating compliance with Time Limit Rules:

"Carrier's assertion 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 also: Third Division Awards 10173, 10742 and 17291).

Applying the principles articulated in the Third Division's precedential decisions, we find that we must sustain the pending claim as presented as required by the provisions of Rule 47.

The facts which have been presented herein establish that Organization timely filed its June 5, 1991, claim and mailed it to Carrier with the appropriate Certified Mail Return Receipt Request attached. Organization, therefore, proved that it filed the claim. Unlike Organization, however, Carrier took no such precaution regarding its July 31, 1991 response/denial letter, and Carrier's

proffer of proof of mailing (i. e. - the written attestation of Personnel Steno Bruscato) is, by virtue of precedent, inadequate proof of Carrier's compliance with the requirements of Rule 47.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of February 1996.