

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31759
Docket No. MW-30711
96-3-92-3-489**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Junior Foreman R. Taylor to perform rest day overtime service with Gang TB119 installing rail on the Hi-Line on Friday, September 21, 1990 instead of calling and using Foreman C. Adams (System Docket MW-1899).**
- (2) The claim as presented by District Chairman John Dvorak to Division Engineer J. R. Beard under date of September 24, 1990 shall be allowed because said claim was not disallowed within the time limits set forth in Rule 26(a).**
- (3) As a consequence of the violations referred to in either Part (1) and/or (2) above, Foreman C. Adams shall be allowed eleven (11) hours pay at his time and one-half overtime 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 were given due notice of hearing thereon.

On Thursday, September 20, 1990, the Claimant was assigned as a Track Foreman supervising the work of Gang TB119. On that date, the Claimant inquired whether the gang would be working on the following day. He was advised that a gang would be working the Hi-Line installing rail on September 21, 1990.

The Claimant stayed overnight in order to work overtime the next day. When he reported to work the next morning, he discovered that the Carrier assigned Track Foreman Taylor, supposedly junior to the Claimant, to direct the work of Gang TB119. On Friday, September 21, 1990, Foreman Taylor worked 11 hours supervising the gang.

The Organization filed the claim on behalf of Foreman Adams in a letter dated September 24, 1990, sent via certified mail and received by the Carrier on October 2, 1990. According to Rule 26(a) the time limits rule, the Carrier had until December 1, 1990 to notify the District Chairman of its decision to allow or deny the claim.

In a letter dated December 28, 1990, the Organization informed the Carrier that it failed to properly respond to the September 24, 1990 claim. The Carrier rebutted on the property that it had indeed responded to the District Chairman in a letter dated November 7, 1990.

Nevertheless, the Organization persisted in its contention that the Carrier failed to properly notify the District Chairman as required by Rule 26(a).

Rule 26 - Claims and Grievances, Paragraph (a) reads as follows:

"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 was 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."

Before we can even consider the parties' arguments regarding the merits of this case, the Board must first resolve the procedural question of whether the Carrier failed to timely deny this claim as required in Rule 26.

The Organization argues that the Carrier is under contractual obligation to notify the person who submitted the claim within 60 days of its decision to allow or deny the claim, otherwise, it will be allowed as presented. In this situation, the Organization argues that the District Chairman presented his claim via certified mail and therefore, established that the claim was presented within the time limit rule requirements. The Organization further argues that the Carrier failed to establish that the District Chairman ever received the purported November 7, 1990 letter of declination. The Organization argues that it is well established by this Board that the party claiming that pertinent correspondence is sent bears the burden of proving that the other party received the correspondence in a timely manner.

The Carrier argues that it amply proved that the November 7, 1990 letter of declination was sent. First, it refers us to the fact that a copy of the letter was received by the Director of Labor Relations and Personnel for the Eastern Lines on November 8, 1990. Furthermore, the Carrier argues that all of its correspondence is sent via first class mail, a common business practice in the industry. Therefore, the Carrier asserts that the Organization bears the burden of proving that the November 7 letter of declination was not received by the District Chairman within the contractual time limits.

The Carrier also urges the Board to apply a balancing test to assess which parties' evidence of compliance or non-compliance with time limit rules is more probative.

After considering the record, we find that the facts do not indicate that the relevant issue before us is sufficiency of evidence as suggested by the Carrier. In this situation, the Organization took the precaution to mail its time sensitive correspondence via certified mail and hence, could prove that the claim was timely received.

Unfortunately, the Carrier took no such precaution and must bear the burden as established by this Board of proving that, in fact, its time sensitive correspondence was duly received by the appropriate person as required by Rule 26(a).

In this situation, since the District Chairman submitted the claim, the rule mandates that the Carrier's letter of denial be presented to him. The Carrier offered no evidence on the record that proved that the November 7, 1990 letter of declination was ever received by the District Chairman as required by the rule.

Consequently, since it has been held by the Board that the party sending time sensitive material bears the burden of proof that the document was actually sent and received and because the Carrier failed to offer such proof upon the record we must uphold this claim as presented.

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 24th day of October 1996.