

*Defunct -
Carrier Defunct*

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32334
Docket No. MW-32027
97-3-94-3-394

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The two (2) claims* as presented by Vice Chairman H. Wise on January 11, 1993 to Division Engineer T. C. Tierney shall be allowed as presented because the claims were not disallowed by Division Engineer T. C. Tierney in accordance with Rule 26(a) (System Dockets MW-2979 and MW-2980).

***The initial letters of claim will be reproduced within our initial submission."**

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.

The underlying dispute concerns Carrier's contracting of handrail replacement on two bridges in New Jersey in November, 1992, after service of notice and conference occurred. Two separate claims were filed by the Organization on January 11, 1993 on behalf of specifically identified Claimants alleging that such bridge work violated the Scope Rule of the Agreement.

The instant claim seeks payment of the original claim amounts under the following provision of Rule 26(a):

"RULE 26 - CLAIMS AND GRIEVANCES

(a) 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."

During the handling of this matter on the property, and again before the Board, the Organization contends that it never received any response to its January 11, 1993 claims, which resulted in it sending a letter dated July 8, 1993 seeking payment under Rule 26(a). In its letters confirming the appeal meeting on the claims dated July 23 and August 5, 1993 respectively, Carrier states its position that a timely denial letter was issued by the Division Engineer on March 2, 1993. During the processing of this claim on the property, Carrier never indicated the manner in which the letter was sent to the Organization nor forwarded a copy of the denial letter to the Organization. Rather, it stated that "A copy of that letter was received in this office on March 10, 1993 and therefore further validates that the first level response was within the time limits prescribed by Rule 26(a)."

The only issue before this Board is the procedural issue of the alleged time limit violation. The Organization contends that it never received any denial letter and Carrier asserts that one must have been sent since it had a copy in its Human Resources file time-stamped March 10, 1993. Carrier included a letter dated March 2, 1993 with a

stamp that the original was signed by Division Engineer Tierney in its record on the property.

A review of the record, and consideration of the awards cited by both parties, leads the Board to conclude that the following rationale adopted by it in Third Division Award 25309 between these parties is equally applicable herein:

“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. 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).....

Therefore, the claim must be sustained on procedural grounds....”

This rationale is particularly appropriate where Carrier failed to produce any evidence on the property that the March 2, 1993 letter was actually sent or mailed in the normal course, or what the accepted practice was between the parties for delivery of declination letters. There is no dispute that the claims were hand-delivered. The only position Carrier takes in its correspondence on the property is that the apparent receipt of a copy of the letter by Human Resources which was retained in its files establishes timely denial. In fact, there is no proof that Carrier ever included copies of the March 2, 1993 declination letters with any of its correspondence to the Organization during discussion on the property. Such circumstances clearly distinguish this case from those relied upon by Carrier, which either predate Third Division Award 25309 (see Third Division Awards 22036, 24232, 22903), are between different parties and rely upon an established practice for delivery between the parties, see Special Board of Adjustment

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1011, Awards 7 & 8; Public Law Board No. 2945, Award 70; Public Law Board No. 3775, Award 55.

Under such circumstances, the claim is sustained on procedural grounds.

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 13th day of November 1997.