

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36047
Docket No. MW-35970
02-3-00-3-59**

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
(National Railroad Passenger Corporation
((Amtrak - Northeast Corridor)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The appeal as presented by District Chairman S.D. Manning on February 25, 1999 to Manager, Labor Relations B. J. Blair shall be allowed as presented because the claim was not disallowed by Manager, Labor Relations B. J. Blair in accordance with Rule 64 (System File NEC-BMWE-SD-3934 AMT).”

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 issue raised by this claim is whether the Carrier timely denied the Organization's appeal in compliance with the requirements of Rule 64(b) which states, in pertinent part:

“Should any such claim or grievance be disallowed, AMTRAK shall, within sixty (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. . . .”

The claim, alleging a violation of Rule 55 in the assignment of a junior employee to perform the duties of material man on the second shift in preference to the Claimant, was filed on November 11, 1998, and denied by the Division Engineer on January 14, 1999. By letter dated February 25, 1999 Vice Chairman Manning filed an appeal to Division Manager - Labor Relations Blair.

By letter dated May 4, 1999 Blair notified Manning that the denial letter, dated April 28, 1999, was mailed on that date by certified mail but, for some unknown reason, was returned to the office on May 3, 1999. She noted that the original denial letter remained unopened in the file for review by the Organization, and enclosed a copy of the envelope and certified mail receipt, bearing a time stamp of April 28, 1999. The enclosed April 28, 1999 denial letter set forth the Carrier’s position on the merits of the claim.

The Organization appealed the denial by letter dated June 9, 1999 arguing, in addition to the merits, that the Carrier violated Rule 64 because the denial was not mailed properly until May 4, 1999, and is untimely and payable as presented. The case was discussed in conference on June 17, 1999. The denial from the Carrier’s Director of Labor Relations dated July 30, 1999 does not address the Organization’s timeliness argument.

The Organization argues that this is a simple default case, as neither the properly mailed denial on May 4 nor the original April 28, 1999 denial letter met the 60-day time limit requirements of Rule 64, mandating that the claim be sustained as presented, citing Public Law Board No. 4768, Award 30; Third Division Awards 17085, 20900, 21755, 27640, 28403, 30596, 30974.

The Carrier contends that the envelope and mailing receipt for the response from the Division Manager - Labor Relations proves that the decision was timely rendered. The Carrier asserts that it is not responsible for ensuring receipt of the decision and cannot be held liable for errors of the U.S. Postal system. It argues that the Organization’s timeliness argument on the property related to the May 4 mailing date, and the Board should not consider its belated claim that the April 28 date was similarly untimely. Because the Organization abandoned its appeal on the merits, the Carrier requests denial of the claim.

A careful review of the record convinces the Board that the Carrier failed to respond to the Organization’s February 25, 1999 appeal within the required 60-day time limit set forth in Rule 64. In this case it is immaterial whether the May 4 date of successful mailing is the one considered in determining timeliness, as contended by the Organization, or the April 28, 1999

date of the original denial letter, due to the Carrier's contention that it followed proper procedures in delivering it to the post office and the fault lay with the U.S. Postal Service. The fact remains that even April 28, 1999, the admitted date of the original denial letter, is outside the 60-day time limit agreed to by the parties in Rule 64. The Organization raised timeliness at its earliest possible opportunity. Even if it referred to the May 4 date in arguing a violation of the time limits in its appeal, and not the April 28, 1999 date, it did contend that Rule 64 required that the claim be sustained without consideration of the merits. The Carrier had an opportunity to respond to this argument on the property and failed to do so. It cannot now assert that the Organization should be foreclosed from also noting that April 28, 1999 was similarly untimely.

We therefore conclude that the claim must be sustained on the ground that the Carrier defaulted by not timely denying the claim that had been filed with the Division Manager - Labor Relations on February 25, 1999. This decision is based solely on the procedural violation by the Carrier, and expresses no opinion on the merits of the claim, including the Carrier's argument that payment at the overtime rate is excessive.

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 21st day of May, 2002.

CARRIER MEMBER'S DISSENT TO AWARD NO. 36047, DOCKET MW-35970

The majority opinion, that Amtrak violated Rule 64 by failing to timely respond to the Employees' appeal to the Division Manager - Labor Relations was clearly reached despite the absence of proof of such a violation and without consideration of the facts in this case.

As indicated in the record, the appeal in this case was mailed to the Carrier on February 25, 1999, by Certified Mail, Return Receipt Requested. Amtrak responded within sixty (60) days of receipt of that appeal. Through no fault of the Carrier, that response was returned by the Postal Service and was immediately forwarded to the Employees with copies of the original mailing receipts. Throughout the handling of this case on the property, the employees contended that the May 4, 1999, forwarding of the returned response was untimely. At no time during the handling of this case on the property did the employees even raise the argument that the April 28, 1999, response was also untimely. Clearly, having the mailing receipts for their original appeal, they could have and should have raised such contention if they believed the initial response was untimely. They did not, and accordingly, Amtrak did not respond to the contention that was never raised. The Majority erred in allowing such contention to be raised at the Board and in crediting such contention without supporting proof that the agreement was violated.

This Division has previously recognized in Award Nos. 25208 and 29359 on this property that the time limits for the Carrier's response do not commence until the claim or appeal is actually received by the designated Carrier officer. In fact, the same members of the Board in this case recognized the established precedent on this property in Award No. 36048. The majority opinion in this case was reached without proof by the employees that the time limits were actually violated and ignores the established precedent regarding application of Rule 64.

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For these reasons, we respectfully dissent to the decision and view the instant award as simply a momentary lapse of judgement by the majority which has absolutely no precedential value in resolving future disputes.

A handwritten signature in cursive script, reading "L. D. Miller". The signature is written in black ink and is positioned above a horizontal line.

L. D. Miller
Carrier Member