

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36048
Docket No. MW-35971
02-3-00-3-60**

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 Agreement was violated when the Carrier failed to allow Repairman B. Funderburk to perform overtime service in connection with protection work on October 3, 1998 (System File NEC-BMWE-SD-3930 AMT).**
- (2) The claim referenced in Part (1) above as presented by Local Chairman J. Crandley on December 1, 1998 to Mr. W. D. Hatfield, shall be allowed as presented because said claim was not disallowed by Mr. W. D. Hatfield in accordance with Rule 64.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. B. Funderburk shall be compensated for nine (9) hours' pay at the repairman's time and one-half rate.”**

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 initial issue raised in this case is whether the Organization timely presented its claim to the Carrier's designated Officer, and whether the Carrier properly disallowed it, in compliance with the requirements of Rule 64(b) which states, in pertinent part:

"All claims or grievances must be presented in writing by or on behalf of the employee involved, to the designated officer of AMTRAK authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim is based.

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 a Repairman in preference to the Claimant on October 3, 1998, was dated December 1 and sent by certified mail on December 2, 1998 as evidenced by a certified receipt stamped by the U.S. Postal Service. In its January 29, 1999 denial, the Carrier acknowledges that the claim was postmarked December 2, 1998, the 60th day, but asserts that it was not received within that time frame, therefore denying the claim on that procedural basis alone. It further states that the claim is excessive in that it requests the punitive rate which is inappropriate on this property. It does not address the underlying merits of the claim.

In its March 1, 1999 appeal, the Organization asserts that the claim was timely presented in that it was delivered to the post office within 60 days, and contends that because the Carrier's denial did not address the merits, it was foreclosed from addressing them requiring the claim to be paid as presented under Rule 64. The Carrier's April 23, 1999 response again bases its denial on the procedural defect of non-

timely filing, noting that the claim was not received by the Carrier's designated Officer until December 9, 1998, some 67 days after the occurrence complained of.

After holding a conference on June 17, 1999, the Carrier's denial from its highest designated Officer addressed the merits, indicating that the junior employee had performed the work in issue during his regular tour of duty on straight time and that the overtime involved was continuous to his regular tour of duty, thereby permitted by Rule 55.

The Organization argues that it timely presented this claim as the 60-day time limit is counted from the date it was delivered to the U.S. Postal Service, here December 2, 1998, citing Third Division Awards 11575, 14695, 16370, 24440 and 32550. It contends that the Carrier did not timely disallow the claim, as its January 29, 1999 response did not address the merits or give a reason why the Claimant, the senior employee, was not awarded the disputed overtime. The Organization asserts that, under Rule 64(b) the Carrier is foreclosed from later addressing the merits and the claim must be allowed as presented.

The Carrier contends that it has been held on this property that the date the claim is presented is the date it is received by the designated Carrier Officer, here December 9, 1998, citing Third Division Awards 25208 and 29259. As such, it is untimely under Rule 64(b) and must be dismissed. The Carrier also argues that the Organization failed to establish a violation of Rule 55 because it did not dispute that the junior employee was assigned the overtime as a continuation of his regular tour of duty. The Carrier asserts that the only appropriate measure of damages on this property for this type of violation is at the pro rata rate of pay, not the penalty rate, citing Public Law Board No. 4549, Award 1; Third Division Awards 27701, 28180, 28181 and 28349.

A careful review of the record convinces the Board that, under the circumstances of this case and the result, it would be unwise to find that the Organization failed to present its claim within the required 60-day time limit set forth in Rule 64, as interpreted on this property. There is no doubt that the Board had found that, under certain Agreements, the date the claim is presented is the date it is mailed, and that time in transit is not counted for purposes of determining timeliness. See, e.g., Third Division Awards 32550, 24440, 16370. The two cases addressing this issue directly on this property, Third Division Awards 25208 and 29259, hold that it is the date of receipt by the Carrier's designated official that is the determinative date.

In Third Division Award 29259 the claim was submitted by certified letter dated May 21, 1986 and signed by a Baggage Room employee on Saturday, May 25, 1986. The Division Engineer did not receive it until his office opened on Monday, May 27, 1986. The timeliness issue arose in the context of whether his denial met the 60-day time limit in Rule 64. There the Board held that it is the date of receipt by the Carrier's designated official that is determinative for the purpose of calculating timely disallowance of the claim.

In Third Division Award 25208 the claim was dated May 12, 1980 and date stamped by the Carrier as being received on May 29, 1980, some 17 days later. In holding that the claim should be considered filed on the date received by the Carrier, the Board noted that there was no evidence of when the claim was mailed, no certification, no statement as to when it was posted and no envelope indicating postmark. The only evidence the Board had was the date of the letter (which it found to be insufficient to sustain the Organization's burden) and the time stamp when it was received by the Carrier. The Board also stated:

"Ordinarily, the date a document is deposited in the U.S. Mails would be sufficient to at least lock in the date the action was initiated in disputes based solely on the date received as evidenced by the date stamps."

As can be seen, these two prior on-property Awards dealt with different circumstances as that presented herein. In Third Division Award 24440, the Board noted that the term "presented" did not have a clear and unambiguous meaning, and recognized that the purpose of a negotiated grievance procedure is to vindicate rights achieved by the agreement. It stated that:

"... we deem it sound labor-relations policy that doubts as to the precise boundaries of time limits which shut off access to those procedures should, in general, be resolved against forfeiture of the rights sought to be vindicated."

It concluded that a reasonable reading of the Rule is that a properly addressed claim is effectively "presented" when delivered to the U.S. mails.

It appears that, under the policy noted above, it may very well be that the appropriate moment for calculating timely claim presentation (e.g., proof of proper

mailing) is different from the reasonable date of filing for purposes of calculating timely disallowance of the claim (when received by the designated Carrier Officer). Because such matters have not been conclusively resolved on this property, the Board deems it appropriate to address the merits of the claim.

We reject the Organization's contention that the Carrier is precluded from raising an argument on the merits because it did not do so timely in its initial disallowance of the claim. It is clear that the Carrier properly disallowed the claim based on timeliness and excessiveness issues, but, eventually on the merits as well. The correspondence on the property from the highest designated Carrier officer states clearly that the disputed overtime was a continuation of the junior employee's regular tour of duty assignment, thereby negating any possible Rule 55 violation. The Organization did not rebut this assertion or present other evidence concerning the work performed by the junior employee assigned to this overtime. Accordingly, we find that the Organization failed to sustain its burden of proving that the Carrier violated Rule 55 in this case.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 21st day of May, 2002.