Award No. 10490
Docket No. SG-9546

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Frank J. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

WABASH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Wabash Railroad Company in behalf of C. W. Shank, Signal Maintainer, at Peru, Ind., for two hours at overtime rate of August 22, 1955, and a call for two hours and forty minutes at overtime rate on August 23, 1955, for Scope work improperly performed Signal Supervisor D. O. Ritchie on August 22, 1955, and Track Supervisor J. Nipple on August 23, 1955. [Carrier's File 116.5, 123.27.1]

EMPLOYES' STATEMENT OF FACTS: Signal Maintainer Shank, located at Peru, Ind., submitted a claim for time slips rejected by the Carrier for August 22 and August 23, 1955, to General Chairman Markley for further handling in line with the agreements applicable and in effect on the property.

Under date of October 12, 1955, General Chairman Markley wrote to G. A. Rodger, Supt. Signals and Communications, Decatur, Ill., and requested that claims for C. W. Shank be allowed.

Under date of December 17, 1955, General Chairman Markley again wrote Supt. Signals and Communications Rodger and stated that since his letter of claim dated October 12, 1955, had not been answered, the payment of the claim in full was required as the sixty-day time limit had expired as provided for in the National Agreement, Article 5, paragraph (a), signed at Chicago, Ill., dated August 21, 1954.

Under date of December 22, 1955, G. A. Rodger wrote M. G. Markley and stated that he had answered Markley's letter of October 12, 1955, and enclosed a duplicated copy of a letter supposedly written and dated November 15, 1955, in which he denied the claims for Maintainer Shank.

Markley then progressed the claims through the highest officer of the Carrier and could reach no satisfactory settlement on the property.

There is an agreement between the parties to this dispute bearing an effective date of September 1, 1944, which has been amended and supplemented by the National Agreement of August 21, 1954. The agreements, by reference, are made a part of the record in this case.

POSITION OF EMPLOYES: It is the position of the Brotherhood that the merits of the claim giving rise to the question here presented for determination are not a matter of further consideration. The question to be decided is whether the Carrier has complied with the provisions of Article 5 of the August 21, 1954 Agreement.

The applicable provisions of the above-referred to agreement are quoted here for ready reference:

"ARTICLE V — CARRIERS' PROPOSAL NO. 7

1. All claims or grievances arising on or after January 1, 1955 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 such 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."

All material used in this submission was known or presented to the Carrier's representatives.

It is our contention that the claim is now payable as presented, due to the failure of the Carrier to comply with the applicable provisions of the National Agreement of August 21, 1954. We respectfully request the Board to sustain our position.

CARRIER'S STATEMENT OF FACTS: Mr. C. W. Shank was regularly assigned as Signal Maintainer with headquarters at Peru, Indiana, hours 7:00 A. M. to 4:00 P. M. with one (1) hour meal period, Monday through Friday. Mr. Shank ordinarily maintained the territory between Peru (Milepost 202) and Logansport (Milepost 217.5) and the CTC Machine located in the Dispatcher's Office at Peru.

The position of Signal Maintainer, on which Mr. Shank was regularly assigned to perform work, is paid on an hourly basis and is subject to the overtime and call rules of the Agreement between the Carrier and the Brotherhood of Railroad Signalmen of America, effective September 1, 1944, copy of which is on file with this Division.

Signal Maintainer Shank submitted a time report dated August 22, 1955, on which he claimed two (2) hours overtime from 5:00 A. M. to 7:00 A. M., stating thereon:

Facts, on August 23, 1955, a brakeman reported to the Dispatcher that he had difficulty in relining an electrically locked switch in the East Yard at Peru, Indiana. The brakeman subsequently tried to reline the switch and succeeded but failed to notify the Dispatcher of his success. Track Supervisor Nipple was informed of the alleged trouble by the Dispatcher and threw the switch to see if it was in working order. He found nothing wrong with the switch, and in throwing it was only observing whether there was any obstruction in the switch itself which prevented it from lining up properly.

Supervisory forces, other than signalmen, have examined electrically controlled switches in the same manner as the switch herein involved was examined throughout the years.

Furthermore, employes of the Carrier covered by the Brotherhood of Maintenance of Way Employes' Agreement adjust bars between switch points, remove and replace the rails, keep the rails greased and perform any other work in connection with the rails themselves.

The switch in question is the same as any other main track switch with the exception that it has a time lock on it which compels compliance with transportation rules by requiring train and engine crews to wait a specified time after signals show an adverse signal indication for the main track before pulling out onto such track.

Track Supervisor Nipple, who was entirely unfamiliar with electric controls of the switch, did not adjust the switch, manipulate the electric controls, or perform any work at all in connection with the switch and therefore did not in any manner violate the Scope Rule of the Agreement covering Signal Department Employes. The claim of Mr. Shank for a call on August 23, 1955 is also without merit.

In view of the foregoing, the claim should be dismissed for lack of jurisdiction or denied for lack of merit under applicable rules.

The Carrier affirmatively states that the substance of all matters referred to herein has been the subject of correspondence or discussion in conference between the representatives of the parties hereto and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue is whether the Carrier complied with Article V, Section 1 (a) of the Agreement requiring Carrier to notify the Organization of a denial of a claim within 60 days from the date the claim was filed. Here the record shows the letter of denial was written on November 15, 1955 but admittedly was not received by the Organization until after 60 days had elapsed from the time the claim was filed. A copy of the letter is in the record and the Organization in its initial submission did not deny that the letter had been mailed. While the decisions seem to be split on the issue it is the opinion of this Board that both parties have a right to rely on the regularity of the mail and since the letter was mailed within the 60 day period Article V, Section 1 (a) was not violated by the Carrier. This is especially true where usually handling of claims is by mail. See Award No. 3541, Second Division where that Board held:

"This presumption being that both parties are telling the ruth, we find that carrier gave timely notices of disallowance of claim as required by the Time Limit Rule and that the local chairman failed to receive them, so neither is in default under the rule."

This principle will work both ways. Where the Organization asserts that it has mailed an appeal within the 60 day required period, producing a copy of the letter from its files, and the Carrier alleges it did not receive the letter the presumption then would be that the Organization had not violated the 60 day rule.

Since the Organization did not appeal within 60 days from the date it received the denial the claim is barred by Article V, Section 1 of the Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of March 1962.

DISSENT TO AWARD 10490 — DOCKET SG-9546

Award 10490 is in error. The issue was whether the Carrier complied with Article V, Section 1 (a) of the Agreement requiring the Carrier to notify the Organization of a denial of a claim within 60 days from the date the claim was filed. It is alleged the letter of denial was written on November 15, 1955, but admittedly was not received by the Organization until after 60 days had elapsed from the time the claim was filed. It is further shown that the Carrier cannot be sure whether the letter was posted in the U. S. Mail or company mail.

"In Second Division Award 3690 (Johnson), the Board held:

'. . . Webster's New Collegiate Dictionary defines the verb 'notify' as meaning 'to give notice to; to inform'. One is not informed, — notice is not given to him, — until he receives it. . . .' "

It is fundamental that a person is not 'notified' until he receives the communication. Posting in the mail does not meet the requirements of due notice provided in Section 1 (a), of the Article V. See Third Division Awards 9578 and 10173; and Second Division Awards 3109, 3656, and 3690, supra. It is also obvious that the burden is upon the Carrier to 'notify' the other party and where there is a question as to whether such notice was given, the burden would be upon it to prove the facts constituting its defense. See Awards 4538, 5136, 5643, 10229. Carrier offered no proof that it even mailed the letter, it merely asserted that it did so.

The majority relies on Second Division Award 3541 (Stone) which is clearly contrary to Second Division Awards 3109, 3656, 3690, supra. Whether both parties are believed or not, would not relieve the Carrier of its obligation to 'notify' the Petitioner under Section 1 (a) of the disallowance of claim. Carrier failed to meet the burden of proof necessary to overcome the General Chairman's claim that he did not receive a letter of denial. In Award 1443 (McAllister) this Division held: 'We are not inclined to conclude that the representatives of employes are guilty of fraud or prevarication merely upon such a claim of non-receipt.'

Award 10490 is in error and should be so recognized.

/s/ W. W. Altus

W. W. Altus
Labor Member — Supplemental

ANSWER OF CARRIER MEMBERS TO DISSENT TO AWARD 10490 DOCKET SG-9546

The dissent states that:

". . . Posting in the mail does not meet the requirements of due notice provided in Section 1 (a), of the Article V. See Third Division Awards 9578 and 10173; and Second Division Awards 3109, 3656, and 3690, supra. . . .

"The majority relies on Second Division Award 3541 (Stone) which is clearly contrary to Second Division Awards 3109, 3656, 3690, supra.". . .

Neither the Awards here cited by the Dissenter nor any other Award cited during the handling of this case is inconsistent with **Second Division Award 3541** (Stone) on the point that a Carrier has complied with the requirement to notify a Claimant or his representative of disallowance of a claim under Article V of the 1954 National Agreement when within the prescribed time it has duly mailed a letter of disallowance.

Second Division Award 3690 (Johnson), from which the Dissenter has quoted brief extracts out of context, did not involve the giving of notice under Article V, of the 1954 National Agreement, nor did it involve the giving of notice in a similar situation where delays of a few days resulting from mishandling in the mails would not be detrimental to either party. To the contrary, it involved the calling of an employe for service under a rule requiring that the employe be recalled by **notice at his last known address.** Delay in the actual receipt of the notice in that case necessarily resulted in loss of work to the employe.

Second Division Award 3109 (Carey) also did not involve the giving of notice under Article V, but the giving of advance notice of a force reduction. Delayed receipt of this notice would clearly result in loss to the employe in many circumstances. Like the rule in **Second Division Award 3690,** the rule requiring notice was so worded that when read in the light of its manifest purpose, it supported the conclusion that personal notice was required and use of other means such as the mail as a substitute was at the risk of the Carrier.

Clearly, the different wording and purpose of Article V, the absence of loss to either side where actual receipt of a notice of declination or appeal is delayed a few days after a timely deposit thereof in the mail (time does not run against the recipient until actual receipt), and the general practice of handling such matters by mail distinguish **Second Division Award 3541** (Stone) and **Award 10490** from **Second Division Awards 3109** (Carey) and **3690** (Johnson) so that there is no material conflict.

Second Division Award 3656 (Bailer) involved the contention that the Carrier had failed to disallow a claim within 60 days, the contention apparently being based on the fact that the date of the letter of disallowance was more than 60 days later than the date of the appeal letter. The Award simply held that the 60-day time limit commenced running against the Carrier from the time of actual receipt through the mails; hence the Award contains nothing that is inconsistent with **Second Division Award 3541** (Stone) and **Award 10490.**

Award 9578 (Johnson) misses the point here involved. The Opinion in that case states with reference to this subject:

> "Therefore, we have no occasion to consider whether by a denial dated on the 59th day and received on the 62nd, the Representative is 'notified in writing of the decision within sixty days.' . . ."

Award 10173 (Bailer) likewise misses the point for in that case the employes based their case on the contention that: ". . . the decision denying the claim here involved **was not mailed** to the General Chairman within the sixty days allowed . . ." (See paragraph (b) of the Statement of Claim.) Thus, by necessary implication, the petitioning Organization in **Award 10173** conceded that Carrier's obligation to notify under Article V would be satisfied by duly placing a letter of declination in the mail within the time limit.

Accepted rules pertaining to burden of proof, also the presumption that the parties are honest which was applied in favor of the Organization in **Award 1443** (McAllister) support **Award 10490** for the reasons clearly stated in the Opinion. Also see **Award 10037** (Daly).

There is no error in **Award 10490.**

/s/ G. L. Naylor
/s/ O. B. Sayers
/s/ R. E. Black
/s/ R. A. De Rossett
/s/ W. F. Euker