

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned Mechanical Department forces instead of Bridge and Building Department forces to paint the 'Rip Track Toilet facility' at North Fond du Lac, Wisconsin, on February 22 and 23, 1985 [System File 1 45(c,e) 4(o)/800-46-B-166].

(2) Regional Engineer G. A. Nilsen failed to disallow the claim presented to him by General Chairman G. G. Western on February 28, 1985 as contractually stipulated within Agreement Rule 13 1.(a).

(3) As a consequence of either or both (1) and/or (2) above,

'... the equivalent of 32 hours pay at the pro rata rate should now be distributed among the members of B&B Crew 602.'

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all evidence, finds that:

The carrier or carriers and the employee and 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 waived right of appearance at hearing thereon.

The Claim before this Board contends that the Organization's Agreement was violated when Carrier used Carmen to paint a toilet in its North Fond du Lac Rip Track facility. The Carmen's Union was joined as a Third Party and filed a brief contending that assignment of Carmen to paint the toilet was proper under its Agreement. However, before considering the merits of the matter and the Third Party involvement of the Carmen we must first dispose of the issue of whether this Claim is to be allowed as presented because it was initially denied by an Officer other than the individual with whom it was filed.

On February 28, 1985, the initial Claim was filed with Carrier's Regional Engineer located at Stevens Point. Around this time the Officer filling that position had been promoted to Chief Engineer and transferred to Minneapolis. On March 18, 1985, the Claim was denied by the Assistant Regional Engineer.

Rule 13(a) of the Agreement provides that:

"All claims or grievances must be presented in writing ... to the officer of the Company authorized to receive same 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 ... in writing the reasons for such disallowance." (Emphasis added)

This Rule had its genesis in Article V of the August 21, 1954 Non-Ops National Agreement. Since that time this Board, as well as a number of PLB's, reviewed time limit issues identical in substance to that here involved. Our decisions have not been uniform. On occasion we have ordered that claims be allowed as presented when a carrier officer other than the one with whom the claim was filed, or to whom appealed, effected a denial. On other occasions we have concluded that the Rule does not require that the reply must come from the officer authorized to receive the claim, only that the carrier notify the organization or the claimant that the matter is denied within the time allowed.

There are two recent decisions of this Division which highlight this inconsistency, Third Division Awards 26328 and 26572. In Award 26328 we rejected the notion that only the individual authorized to receive a claim or appeal could properly effect an answer. Here we stated:

"[The Rule] does not state or require that the reply must come from the officer of the Carrier authorized to receive same, presumably the Carrier is free to designate any of its personnel to act officially on its behalf."

Conversely, in Award 26572 we held:

"The Organization maintains that the responsibility of disallowing claims is coexistent with the authority to receive claims. On the other hand, the Carrier's position is that Rule 42 does not stipulate which individual is required to reply to a claim Both parties recognize that the issue presented here has come before the Board on prior occasions; they cite Awards in support of their respective position.

The weight of authority supports the position advocated by the Organization. ... "

After detailed study of this matter, we become skeptical of the Awards which maintain, as a generality, that only the individual authorized to receive claims may properly deny claims. For one thing, to universally hold that responsibility for disallowing claims is coexistent with the authority to receive claims and only the individual that received the claim has authority to answer the matter ignores distinct language differences in the Rule. For another, the very predicates for "the weight of authority" for this line of decision is faulty and often times misread.

Examination of the Awards cited by the Organization vividly illustrates this last point. The earliest Award cited by the Organization is Third Division Award 4529. While certain language in that Award most surely supports the Organization's notion on the application of the Rule under review here, we, nonetheless, have difficulty in giving it much weight because Award 4529 decided a claim that occurred seven years before Article V was adopted.

Third Division Award 11374 is the next Award relied on by the Organization. At first blush, it seems to support the conclusion sought by the Organization. In this regard the organization mainly relies on our comments suggesting that:

"[It] has the right to rely upon Carrier's freely made designations of Carrier's representatives authorized to process claims from inception through appeals on the property. Consequently, any decision, relative to the claim, communicated to Petitioner by the Division Engineer, is not material."

But this is not the issue on which we decided that case. The claim in Award 11374 was sustained because the Carrier Officer authorized to receive the claim at the first level failed to proffer "the reasons for such disallowance." What happened was that shortly after he received the Claim, the Chief Carpenter wrote the Organization that he was forwarding the Organization's letter to Carrier's Division Engineer. The Division Engineer responded. Later, but still within the time limits within which to answer, the Chief Carpenter denied the Claim, but the denial failed to state his reasons.

The next Award, in date sequence, cited by the Organization, Third Division Award 16508, involved a situation where a claim was appealed to the Division Engineer but was answered by the Chief Engineer. The Rule there involved specifically provided that claims must be initially filed with the Division Engineer and when declined by him appealed to the Chief Engineer and then to the Director of Personnel "in that order." Now, looking at what we did then, it seems that our main consideration at that time was that the:

"... right of appeal to which the parties had agreed, has been abrogated by Carrier's action in referring the claim to the Chief Engineer, without a denial by the Division Engineer." (Emphasis added)

Third Division Awards 11374 and 16408 are cited as support to the conclusions reached in some of the other decisions relied on by the Organization. Several of these later Awards, though, appear to cite 11374 and 16508 without any basic understanding of their complete context. For example in Third Division Award 22710 it is stated:

"A dispute similar to this one was adjudicated by this Division some fifteen years ago. In that Award # 11374, the authorized officer was a chief carpenter - the response to the claim was made by Carrier's Division Engineer..."

without mention of the fact that the Chief Carpenter did in fact timely deny the claim and that we sustained the grievance only because this denial failed to state its basis, a clear requirement of the Rule.

Also in Award 22710 we wrote:

"Other Awards that have followed the same principle are Nos. 4529 ... 18002 ..."

without noticeable acknowledgment that Award 4529 preceded the adoption of Article V of the August 21, 1954 Agreement and that Award 18002 involved specific agreement language which not only set forth the appeal process but also the specific officer involved, a requirement not present in Article V Rules which allow the Carrier to designate the individual authorized to receive claims.

Article V Rules require that claims are to be filed with a specifically designated officer and that they are to be answered by the Carrier. If it was intended that the designated officer and only the designated officer be the one that could properly respond then it would have been a simple matter to state this result in the Rule, or some other accepted instrument, as was done by letter in the claim involved in Third Division Award 16508, another case as contributing to the weight of authority favoring the Organization's position. In that case the Carrier had specifically directed that claims:

" ... must initially be filed with the Division Engineer.
Having been declined by him, they should be appealed to the
Chief Engineer and the Director of Personnel in that order."
(Emphasis added)

Accordingly, from our present examination of the "weight of authority" on this matter we are not persuaded that the decisions holding that only the individual that received the claim can answer the claim are a correct application of those Article V Time Limit Rules that have not been altered in some fashion so as to express this specific intent. Unaltered Article V Time Limit Rules can not, in our judgement, be read so as to replace "Carrier" with "officer" in the second sentence of paragraph (a). To do so is clearly insertion of additional language within the Rule, something the drafters did not see fit to insert, something we must avoid.

Notwithstanding the above, it must be noted that several months ago, these same parties were before this Board in a case involving identical issues under the same Agreement at the same location. Here, too, the issue of filing a claim with one officer and having it denied by a different officer was present. In Third Division Award 27179 we stated:

"This Board has reviewed the evidence in this case, and we find that there is no merit to the procedural claims raised by the Organization."

More tortuously, we reach the same result here.

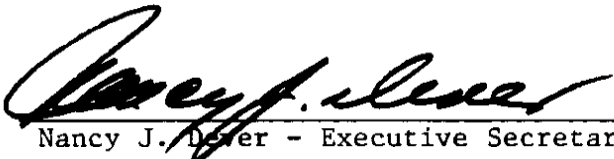
In looking at the merits of the Claim, we note that in our Award 27179 we also concluded that the Organization had not established a violation of its Agreement when Carrier used Carmen to paint interior walls in the east end of the North Fond du Lac Roundhouse ten months before they were used to paint the toilet, the painting involved in our Claim. We do not find Award 27179 to be in palpable error. After examination of the evidence before us we are not persuaded that a sufficient showing has been made to conclude that Agreement was violated when Carrier used Carmen to do the work involved.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1988.

LABOR MEMBER'S DISSENT
TO
AWARD 27590 - DOCKET MW-27231

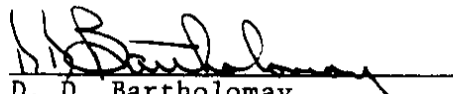
To say that the Majority in this Award "tortuously" went out of its way to undermine the orderly handling of claims under the applicable Agreement would be an understatement. But rather than delve into the confusion that will come from this Award, I will only redirect the Majority's attention to the established interpretation of the time limit rules, i.e., Third Division Award 25091.

"This issue, the question of the authorized Carrier officer to receive and respond to claims on this property, was resolved by Third Division Award 23943 (Lieberman), wherein it was determined:

'All the authorities cited by the parties have been reviewed and it is clear that the great weight of authority in closely related circumstances supports the Organization's position. Those awards hold that the officer of the Carrier who had been previously designated as the individual to receive claims or appeals must be the officer who responds to such claims or appeals. For example, this Board in Award 22710 stated:

"We have reviewed the authority submitted by the parties. The great weight of authority supports the position of the Organization that the Carrier committed a procedural error when an official other than the one designated to receive and process the claims responded to the claim.""

Therefore, I dissent.


D. D. Bartholomay