Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30412
Docket No. CL-29762
94-3-91-3-136

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications
(International Union
(
(CSX Transportation, Inc. (former Seaboard
(Coast Line Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-10547) that:

1. Carrier violated and continues to violate the current Clerical Agreement when it permitted conductor F. C. Brown to write up a list of cars to be interchanged at Durham, North Carolina and directed train crews to deliver Inbound Papers to R. J. Reynolds Tobacco Company in Durham, North Carolina, i.e., six (6) cars tobacco from Morehead City, North Carolina, and allowing outside companies to sign Mobile Agent's name to waybills, or bills of lading, which comes under the Scope of the Clerical Agreement and previously on a daily basis by the Mobile Agent until discontinued effective February 16, 1987, by Trainmaster J. F. Anderson, Raleigh, North Carolina.

2. Beginning on February 16, 1987, and continuing for each work day thereafter, Carrier shall compensate the Senior Extra Clerk eight (8) hours' pay at the straight time rate and if no Extra Clerk is available, eight (8) hours' pay at time and one-half rate of the Mobile Agent's position for the Senior Clerk standing for overtime."

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 waived right of appearance at hearing thereon.

There exists in this dispute a fundamental procedural situation which must be addressed and resolved before any consideration can be given to the merits arguments which have been advanced by the parties.

The on-property correspondence which forms the basis of the dispute reflects that a bulletin board notice was issued by an appropriate Carrier official on February 11, 1987, in which he outlined certain work functions along with detailed instructions relative to who should perform these work functions. Because of the issuance of this bulletin board notice, the representative Organization allegedly prepared and submitted to Carrier on April 7, 1987, a penalty time claim in which it was contended that Carrier was in violation of the Scope Rule by requiring other than Agreement-covered employees to perform work which, in the Organization's opinion, accrued to employees covered by the Agreement. When no response was received from Carrier to the April 7, 1987 claim letter, the Organization, on June 22, 1987, addressed another letter to Carrier which made specific reference to the April 7, 1987 claim letter and of the absence of a reply from Carrier thereto. This June 22 letter from the Organization prompted a response from the Carrier on July 8, 1987, which categorically denied receipt of the April 7, 1987 claim letter and rejected the claim contention in the June 22 letter on the basis that the claim was not "in accordance with Rule 37 of your current working agreement."

The claim was subsequently pursued by the Organization through all of the normal on-property levels of handling with the contention at each level of handling that, in addition to the various merits arguments which were advanced, the Carrier was in violation of the time limits for handling claims Rule because of its alleged failure to timely reject the April 7, 1987 claim letter. At all levels of handling, the language of the claim remained exactly the same as was contained in the April 7 claim letter -- a copy of which the Organization supplied to the Carrier. Throughout the on-property handling, Carrier persisted in its denial of ever receiving the April 7 claim letter.

The applicable Rule to be considered in this situation is Rule 37 which reads as follows:

"RULE 37 - Time Limits - Claims and Grievances

(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 sixty (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 notify, within sixty (60) days from the date same is filed, 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.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance; and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed; but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties, by agreement at any stage of the handling of a claim or grievance on the property, may extend the sixty (60) day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest officer shall be barred unless, within nine (9) months from the date of said officer's decision, proceedings are instituted by the employee or his duly authorized representative before the appropriate Division of the National Railroad Adjustment Board or a system, group or regional Board of Adjustment that has been agreed upon by the parties hereto, as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case, extend the nine (9) month period.

(d) A claim may be filed at any time for an alleged continuing violation of any agreement; and all rights of the claimant or claimants involved thereby, under this rule, shall be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation continues. However, no monetary claim shall be allowed retroactively for more than sixty (60) days prior to the filing thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

(e) Claims or grievances must be presented in writing first to the employee's immediate superior and, if appeal is to be taken, it will be handled within the applicable departments through the same channels as provided in Rule 39.

(f) This rule recognizes the right of representatives of the Organization to file and prosecute claims and grievances for and on behalf of the employees it represents.

(g) This agreement is not intended to deny the right of the employees to use any other lawful action for the settlement of claims or grievances, provided such action is instituted within nine (9) months of the date of the decision of the highest designated officer of the Carrier.

(h) This rule shall not apply to requests for leniency."

In its progression of this aspect of the dispute, the Organization cited with favor Awards of the Board which have held that the "parties have a right to rely on the regularity of the mail." Representative of this is Third Division Award 10490 which held as follows:

> "...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 usual handling of claims is by mail. See Second Division Award 3541, where that Board held:
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> > 'This presumption being that both parties are telling the truth, 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.'"

On the basis of this Award, and others cited by the Organization in its presentation to the Board, it contends that the April 7 claim letter was properly addressed and, therefore, must be presumed to have been delivered and, therefore, was "presented in writing" to the Carrier as required by Rule 37(a). Therefore, it says that because Carrier did not reject the claim within the time limits stipulated in Rule 37(a), the claim should be "allowed as presented."

To be sure, there are some few Awards which have held as was concluded in Award 10490. However, such Awards are in the minority and do not diminish in any way the overpowering logic and reasoning as was set forth in Third Division Award 11505 which concluded as follows:

"It is a general principle of the law of agency that a letter properly addressed, stamped, and deposited in the United States Mail is presumed to have been received by the addressee. But, this is a rebuttable presumption. If the addressee denies receipt of the letter then the addressor has the burden of proving that the letter was in fact received. Petitioner herein has adduced no proof, in the record, to prove de facto receipt of the letter by the Carrier.

The perils attendant to entrusting performance of an act to an agent are borne by the principal. Upon the record before us we find that Petitioner has not proven that it presented the Claim, to Carrier, within the time limitation agreed to by the parties; and, in the absence of such proof the claim is barred. We are compelled to dismiss."

This well-reasoned conclusion, which works for or against both parties to a dispute, has been accepted in a legion of decisions authored by a plethora of knowledgeable Referees, some of which are Second Division Awards 7591 and 8445 as well as Third Division Awards 25100, 25309, 26675, 27787 and 28168. The mere existence in the record of a copy of the original claim letter is not a substitute for tangible proof that the original claim letter was, in fact, either placed in the regular mail or was actually received by the addressee. There is nothing in this record which supports either the Organization's position that the April 7 claim letter was, in fact, placed in the regular mail or its contention that the claim letter should be presumed to have been received by the Carrier.

We must, therefore, conclude that the claim was not presented in accordance with the provisions of Rule 37(a) and is dismissed on procedural grounds without consideration of the merits or lack thereof.

AWARD

Claim dismissed.

O R D E R

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 8th day of August 1994.