FoRECEIVED NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

JAN - 5 1995

Award No. 30614
Docket No. MW-29590
94-3-90-3-544

G. L. HART

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former
( Seaboard System Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement on the former Seaboard Coast Line Railroad Company, when beginning on May 30, 1989 and continuing, it assigned maintenance work on the Cedartown Subdivision between Milepost SG 646.4 and Milepost SG 674.3 of the Atlanta Division to CSX Transportation employes from various roads other than the former Seaboard Coast Line Railroad [System File 37-SCL-89-39/12 (89-874) SSY].

(2) The claim as presented by the General Chairman on July 27, 1989 to Division Manager T. M. Purvis and appealed by the General Chairman to Mr. J. B. Allred, Senior Manager Labor Relations on November 1, 1989 will be allowed as presented because Mr. J. B. Allred, Senior Manager Labor Relations failed to timely respond and give reasons in writing for his disallowance of said claim in accordance with Rule 40.

(3) As a consequence of the violations referenced in Parts (1) and/or (2) above, Messrs. W. F. Davis, E. Marshall, L. Cogman, D. Isabell, J. L. Thomas, E. B. Evans, Jr., J. L. Walden, J. J. Neal, C. Ellison, Jr., A. G. Hale, M. Wesley, E. W. Trice, W. L. Steed, B. L. Reeves, T. V. Farmer, D. L. Jones and J. C. Clements shall each be allowed pay at their respective straight time and overtime rates for an equal proportionate share of the total number of straight time and overtime hours of work outlined in Part (1) above."

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.

Claimants were employees in Carrier's Track Department on the Atlanta-Waycross Seniority District. The Atlanta-Waycross District operates several subdivisions, including the Cedartown Subdivision, which is the location of this dispute.

In December 1988, the I. C. C. granted Carrier the right to abandon approximately 28 miles of track at its Cedartown location which had fallen into "disuse." While Carrier opted to abandon the track at that location, the track itself was of high quality and Carrier retained it with the intention of relocating the track. On May 30, 1989 furloughed Maintenance of Way employees from "other CSX railroad properties" began removing the rail on the abandoned portion of track. The process took approximately 29 days to complete.

On July 27, 1989 the Organization filed a claim alleging that Carrier had violated the Scope Rule of the Agreement, which states:

> "These Rules cover the hours of service, wages and working conditions for all employees of the Maintenance of Way and Structures Department as listed by Subdepartments in Rule 5-Seniority Groups and Ranks, and other employees who may be subsequently employed in said Department, represented by Brotherhood of Maintenance of Way Employes.
>
> This Agreement shall not apply to: Supervisory forces above the rank of foremen, clerical employees and Signal and Communication Department employees."

Specifically, the Organization alleged that Carrier allowed "foreign road" employees to perform the function of removing rail and other track material from the abandoned property. The Organization asserted that work "exclusively accrues to BMWE employees on the Atlanta-Waycross Seniority District." Carrier denied the claim stating that it is a "mistaken concept that the source of the right to exclusive performance of work, covered by the Agreement, is found in the Scope Rule." Carrier maintained that it had the "privilege" of utilizing non-contract forces to perform the work, but instead chose to recall furloughed M of W employees from other CSX railroad properties.

In subsequent correspondence the Organization alleged that Carrier had not responded in a timely manner to its appeal of November 1, 1989. However, Carrier successfully refuted the Organization's claim providing a copy of its request for a 30 day extension "on time."

As this Board has frequently pointed out, the Scope Rule of the Agreement upon which the Organization relied is general in nature. While the Rule lists employee classifications, it does not describe the work "reserved" to those employees. This Board has held on numerous occasions that the Scope Rule simply does not enumerate any work which is exclusive to any individual employee group. See Third Division Awards 23852 and 15538. Therefore, it was incumbent upon the Organization to prove that it had established exclusive jurisdiction over the work at issue by a custom and practice of "traditionally and historically" performing said tasks. The Organization was unable to shoulder that burden. Carrier's assertion that it had the "privilege of utilizing non-contract forces" to perform the work at issue, and had done so "many times in the past" remained unrefuted. Based on the foregoing, this claim is denied.

## AWARD

Claim denied.

## 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 28th day of December 1994.

LABOR MEMBER'S
DISSENT
TO
AWARD 30614, DOCKET MW-29590
(Referee Eischen)

There are several reasons for which this award is palpably erroneous, any one of which, standing alone, is sufficient to make it valueless as precedent. Although the Majority erred in failing to sustain the claim on its merits, had the Majority not committed its initial error in its failure to sustain the claim on the basis of the Carrier's default, it would not have had the opportunity to err on the merits.

The handling of claims is subject to the rules of the Agreement as a matter of contract. In its analysis of the Carrier's violation of Rule 40 of the Agreement, the Majority found, in part, that:

> "In subsequent correspondence the Organization alleged that Carrier had not responded in a timely manner to its appeal of November 1, 1989. However, Carrier successfully refuted the Organization's claim providing a copy of its request for a 30 day extension 'on time.'"

This finding is wrong. While it is undisputed that the Carrier sought and was granted a thirty (30) day extension of time to respond to the Organization's appeal, it did not notify the General Chairman of its decision to deny the claim (and its reasons for such denial) within the extended time limit.

The Carrier does not satisfy the time limit requirements of Rule 40 by preparing a response in a timely manner and it cannot prove compliance with the rule merely by providing a copy of a letter which it alleges was prepared within the time limit. The pertinent section of Rule 40 reads:

"RULE 40

TIME LIMIT ON CLAIMS AND GRIEVANCES

Section 1

(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.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 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 may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 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 designated 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 to 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) months period referred to herein."

This rule clearly requires that the Carrier notify whoever files an appeal, in writing, of its reasons for disallowing the claim within sixty (60) days. In this case, the parties had agreed to a thirty (30) day extension of the time limit for the Carrier to respond to the appeal of this claim, extending the time limit to ninety (90) days from the date the appeal was filed. Hence, the resolution of the time limit violation in this instance is properly decided on the basis of whether the person who filed the appeal was notified, in writing, of the reasons for its disallowance within ninety (90) days of November 1, 1989. That is, the notification had to be on or before January 30, 1990. The General Chairman plainly stated, in a letter dated February 26, 1990 and hand delivered to the Carrier, that he had received no response to his appeal. In response to the February 26, 1990 letter, the Carrier sent a copy of a denial letter dated January 26, 1990. However,

during the subsequent handling of this claim on the property, the Carrier never so much as asserted, much less proved, that such letter was ever mailed prior to February 26, 1990.

The Carrier's burden of proof that it complied with the contractually mandated time limit in the claim handling process is well established by a long line of awards of this Division, including the following small sampling of the precedent on this issue:

AWARD 10173:

"Article V, Section 1 places correlative obligations upon the parties with respect to the progression of claims. Once a claim is properly filed, the Carrier has the responsibility for making a timely denial thereof, if it is to be denied. The Organization bears the obligation of making a timely appeal from the denial if it desires further progression of the claim. When either party is charged with failure to discharge the responsibility placed upon it by the Agreement in this regard, that party has the burden of proving it properly met its responsibility. The Carrier cannot be expected to prove it failed to receive a claim or an appeal. Likewise, the Organization cannot fairly be charged with the obligation to establish that it did not receive a claim denial.

In the instant case the Carrier has not presented proof that a denial letter was mailed on or about December 30, 1955 or at any other time within the prescribed time limit. ***"

AWARD 14354:

"As we stated in Award 10173, 'Article V, Section 1 places correlative obligations upon the parties with respect to the progression of claims.' Just as Employes bear the responsibility of being able to prove that a claim is timely filed with a Carrier, so the burden of proof rests with a Carrier to prove that Employes are duly notified in writing of the reasons for disallowance.

"Notification connotes communication of knowledge to another of some action or event. The method of communication in the instant case was left to the discretion of the party bearing the responsibility of notification and the Carrier apparently elected to use the regular first class Mail service rendered by the Post Office Department. Had the Carrier elected to us (sic) certified or registered mail service offered by the Post Office Department, probative evidence of delivery would be available to support the Carrier's assertion.

Employes cannot be held responsible for the handling of Carrier's mail by the Post Office Department. It was the responsibility of the Carrier to be certain that the letter of disallowance was properly delivered to the Employes' Local Chairman."

AWARD 16163:

"We believe that our best reasoned and most recent Awards place the responsibility on the Carrier to be certain that a letter of disallowance is properly and timely transmitted and delivered. The Carrier has the burden of proof in this regard, and in the instant claim we cannot conclude this burden of proof has been met. Reference is made to Award 14354 and same is cited with approval."

AWARD 17291:

"We do not find in the record, sufficient evidence that Carrier complied with its obligation to notify the Claimant of reasons for disallowance within 60 days from the date the claim was filed. The display of a copy of such alleged disallowance, timely dated and stamped as timely received by Carrier's supervisory personnel, is not sufficient proof of timely mailing of notice to Claimant. (Awards 10173 and 10742).

We find therefore that Carrier has not met its burden of proving timely notification and Claimant must therefore be sustained."

AWARD 25100:

"When dealing with issues such as this the Board must rely on both precedent and substantial evidence of record. There is considerable precedent emanating from this Board, by means of prior Awards, wherein the Board

"has held that it is the responsibility of Carrier's to be certain that letters of declination are properly delivered to the appropriate Organization officer under Agreement time rules (Third Division 10173; 11505; 14354; 16163). With respect to substantial evidence, which has been defined as such 'relevant evidence as a reasonable mind might accept as adequate to support a conclusion' (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229), this Board has ruled in the past that statements alone on the part of Carriers to the effect that letters have been mailed do not sufficiently meet the evidence test even when copies are produced and even, which evidence is lacking in the instant case, when copies are 'stamped as timely received by Carrier's supervisory personnel' (Third Division 17291; also Third Division 10173; 10742).

On procedural grounds, therefore, the claim must be sustained. Objection by the Carrier that the Claimants named in this case are not the proper ones because others had a better right is dismissed. Such objection does not relieve the Carrier of penalties arising from the violation of the Agreement (Third Division 18557)."

AWARD 25309:

"In ruling on this procedural issue, this Board must consider both precedent and substantial evidence of record. There is considerable past precedent that it is the responsibility of Carrier to unequivocally assure that letters of declination are properly delivered to the appropriate Organization official within the stated time limits (Third Division Awards 10173; 11505; 14354; 16163; 25100). With respect to substantial evidence, this Board has long held that assertions alone that letters have been mailed will not suffice. Specific to the case at bar where such problems have already occurred, it is even more incumbent that attention be paid to the issue of meeting the evidence test that such letters were sent as argued. Carrier assertions alone that letters were mailed, even when copies of such letters are produced, do not provide the necessary evidence required in cases of dispute which come before this Board (see Third Division Awards 17291, 10173, 10742)."

AWARD 29891:

"Since, in light of the appropriate burdens of proof, the Carrier has not demonstrated that the Organization was notified as to the denial within the require-

"ments of Rule 26(a), the time requirements for appeal mandated by Rule 26(b) do not come in to play."

AWARD 30241:

"It is the date of mailing of the denial, not the date it is written, that is determinative. As required by that Rule, the claim will be sustained as presented."

Inasmuch as the Carrier failed to prove that the General Chairman was timely notified of its decision to deny the claim and its reasons therefor, the Majority erred in finding that the Carrier had complied with Rule 40 by supplying a copy of a letter allegedly written within the agreed time limit and, as a result, this award is palpably erroneous on that account.

In addition to failing to meet its burden of proof of compliance with Rule 40 during the handling of this dispute on the property, the Carrier made the following statement within its submission to the Board:

"*** The Carrier has little doubt that the General Chairman, being a respectable and honest man, did not receive the January 26, 1990, letter as he alleges. ***"

Hence, the Carrier obviously does not dispute that the General Chairman was not timely notified of the disallowance of his appeal. In view of this fact, the Majority's refusal to sustain the claim on the basis of Rule 40's clear and unambiguous requirements is

especially egregious and destroys any precedential value this award may otherwise have had.

In deciding a dispute involving the assignment of Maintenance of Way employes across seniority district boundaries under this Agreement in Third Division Award 28524, the Board held:

> "Beginning on November 18, 1985, Carrier assigned an employee holding seniority on the former L & N Railroad to operate a crane (termed a pile driver by the Organization) to assist a Seaboard Coast Line Railroad Bridge Gang to remove a bridge on the Atlanta Division of the former Seaboard Coast Line. ***
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> * * *
>
> *** The Board finds that Carrier improperly used an employee with no seniority on the property for the work in question (this regardless of the good motivation of keeping the particular gang working). ***"

Inasmuch as the Carrier agreed that it had assigned L&N and B&O employes to perform the subject work across seniority district boundaries, there was no dispute as to the facts involved in this claim. Hence, the Majority should simply have applied the doctrine of stare decisis and sustained the claim on the basis of the Carrier's violation of the seniority district rules of this Agreement, just as in Awards 28524 (which also involved the assignment of an L&N employe to perform work on a Seaboard Coast Line seniority district) and 29353, claims where the Carrier did not default during the handling on the property.

In the handling of this dispute on the property, the Carrier never contended that the subject work was not scope covered. However, it did argue that the work involved here was not "exclusively reserved" to Maintenance of Way employes under the Scope of the Agreement and such alleged lack of exclusive reservation excused it from complying with the Maintenance of Way Agreement. Notwithstanding that "exclusivity" has been laid to rest by this Board except in class and craft disputes, the Carrier's exclusivity argument is simply a red herring. Whether or not work is reserved "exclusively" to Maintenance of Way employes, the rules of the Agreement require that work assigned to Maintenance of Way employes be assigned to employes holding seniority in the seniority district where the work is performed. The inescapable fact in this case is that the Carrier assigned Maintenance of Way employes to perform Maintenance of Way work and it was contractually obligated to assign such work in compliance with the rules of the Maintenance of Way Agreement. The Majority's finding to the contrary is totally absurd and certainly erroneous.

Respectfully submitted,

G. L. Hart
Labor Member