Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30751
Docket No. MW-30213
95-3-91-3-573

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
((Western Lines)

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

(1) The Agreement was violated when the Carrier assigned outside forces to perform rail grinding work on the Western Seniority District, Sacramento Division, in the Colfax, California area beginning June 4, 1990 and continuing (System File #1/MofW 152-1141 SPW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance notice of its intention to contract out said work as required by Article IV of the May 17, 1968 National Agreement.

(3) The claim as presented by former General Chairman D. E. McMahon, on July 23, 1990 to Superintendent J. C. Mahon, shall be allowed as presented because said claim was not disallowed by the Superintendent in accordance with Rule 44.

(4) As a consequence of the violations referred to in Parts (1) and/or (2) and/or (3) above, the Claimants listed below shall each be allowed twelve (12) hours' pay at the grinder operator's rate of pay for each day the outside contractor performed the work beginning June 4, 1990 and continuing:

W. Clark, Jr.
J. S. Ledesma
T. C. Clemens
D. R. Hawthorne
E. C. Bourgeois
J. H. Porras
R. L. White
R. N. Jones"

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.

The Organization seeks to have the claim sustained on a procedural basis. The claim herein was initially filed under date of July 23, 1990. On October 1, 1990, the Organization wrote to the Carrier stating it had received no reply to the claim and seeking to have the claim "allowed as presented", as provided in Rule 44(1)(a). The Carrier replied stating that it had replied in timely fashion on August 24, 1990, and attached a copy of such letter.

The Board notes this is one of a number of closely similar claims initiated within a narrow time frame. The Board is prepared to accept that a timely Carrier response was prepared on August 24, 1990. Difficult or impossible to determine is whether it was properly dispatched and/or whether it was received and coordinated with the applicable claim. Thus, failure to comply with Rule 44 is not sufficiently demonstrated.

The dispute involves the contracting of rail grinding work. This subject was fully discussed in Third Division Award 30180, and the Board reaches the same conclusion in this instance.

A W A R D

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 24th day of February 1995.

LABOR MEMBER'S
DISSENT
TO
AWARD 30751, DOCKET MW-30213
(Referee Marx)

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. Inasmuch as the Majority chose to focus on the procedural issues in this case and apparently did not give full consideration to the underlying violations of the Article IV contracting out rules, the discussion in this dissent will be restricted to the Majority's errors in evaluating the procedural issues and will not address those errors which do not appear to have had a significant impact on the Majority's ultimate disposition of this case. Failure to address those additional errors should not be taken as acquiescence thereto.

The Majority found, in part, that:

> "The Board notes this is one of a number of closely similar claims initiated within a narrow time frame. The Board is prepared to accept that a timely Carrier response was prepared on August 24, 1990. Difficult or impossible to determine is whether it was properly dispatched and/or whether it was received and coordinated with the applicable claim. Thus, failure to comply with Rule 44 is not sufficiently demonstrated."

This finding is patently absurd although, strictly speaking, it is partially true. There <u>were</u> a number of claims initiated within a narrow time frame over the Carrier's action of contracting out rail grinding work in violation of the Agreement. However, <u>the number is two</u> (2) and the "narrow time frame" was a period of thirty-eight

(38) days. The instant claim and one other were submitted alleging that the Carrier had contracted out rail grinding work in violation of the Agreement. One claim was filed with Superintendent J. C. Mahon on July 23, 1990 in reference to the Carrier's contracting with Loram Maintenance of Way, Inc. to perform profile grinding of main track with one of its rail grinding trains on the Western Seniority District, Sacramento Division. The other claim was filed with Superintendent R. A. Baker on August 30, 1990 in reference to the Carrier's contracting with Fairmont Railway Motors to grind switches and crossings with its switch grinding equipment on the San Joaquin Division. Each claim was properly submitted to the superintendent of the respective division on which the violation occurred. The Carrier failed to respond to either of these claims at the initial level.

The Carrier does not satisfy the time limit requirements of Rule 44 by preparing a response in a timely manner. For ready reference, the pertinent section of Rule 44 reads:

"RULE 44 - CLAIMS AND GRIEVANCES

Claims or grievances shall be handled in accordance with Article V of Agreement of August 21, 1954 as follows:

1. All claims or grievances arising shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employe 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 employe 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."

The Majority is prepared to accept that a timely Carrier response was prepared on August 24, 1990 and the Organization is not. Such an acceptance is necessarily based purely on supposition and conjecture because there is no evidence whatsoever to support it. More importantly, however, the resolution of the disagreement over when a response was prepared is totally irrelevant to the resolution of this claim. This is true because the rule clearly requires that the Carrier notify whoever files a claim, in writing, of its reasons for disallowing the claim within sixty (60) days. Hence, the resolution of the time limit violation is properly decided on the basis of whether the person who filed the claim was notified, in writing, of the reasons for disallowance within sixty (60) days. If the Majority is attempting to rewrite the rule so that the Carrier may satisfy the time limit requirements by preparing a response within sixty (60) days, without showing that the person who filed the claim was notified of its decision and the reasons therefor, such an attempt clearly exceeds the jurisdiction of this Board and the Majority's decision in this award is palpably erroneous and of no precedential value on that account.

The Majority compounds its error when it goes on to state that it is "difficult or impossible to determine" whether the response was properly dispatched and/or whether it was received and coordinated with the applicable claim and concludes from this uncertainty that "*** failure to comply with Rule 44 is not sufficiently demonstrated."

During the handling of this claim on the property, the General Chairman plainly stated, in a letter dated October 1, 1990 and undisputedly received by the Carrier, that he had received no response to the claim. Along with its response to the October 1, 1990 letter, dated January 17, 1991, the Carrier did enclose a copy of a denial letter dated August 24, 1990, but it never so much as asserted, much less proved, that such letter was ever mailed prior to the mailing of the January 17, 1991 letter. Likewise, the Carrier never even attempted to prove that the General Chairman had been notified that the claim was denied prior to his receipt of said January 17, 1991 letter.

The Carrier's burden of proof that it complied with the contractually mandated time limits in the claim handling process is well established by a long line of awards, 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 requirements 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 44 and, as a result, this award is palpably erroneous on that account.

In addition to failing to meet its burden of proof during the handling of this dispute on the property, it should be noted that the Carrier abandoned its contentions concerning its denial of the initial claim. That is in its Submission to the Board, the Carrier never once asserted that it had complied with Rule 44(a) in the handling of this matter. Hence, the fact of the Carrier's default was essentially undisputed before the Board. The Majority's reliance on a position the Carrier had abandoned in its presentation to the Board also renders this award palpably erroneous.

Inasmuch as the Majority chose to rely on supposition, conjecture and irrelevant side issues, while ignoring established precedent of this Division in reaching its decision, this award is palpably erroneous and without value as precedent.

Respectfully submitted,

G. L. Hart
Labor Member