Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30831
Docket No. CL-31156
95-3-93-3-233

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
(
(Southern Pacific Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-10945) that:

1. Carrier violated rules 20, 21, 33, and 34 of the agreement for 39 days starting July 8, 1991 and through and including August 30, 1991 when it established a position by the use of a GEB to perform duties of formerly abolished position in excess of 30-days as set forth in Rule 34.

2. Carrier shall compensate J. Gonzales for sixteen (16) hours at the time and one-half rate each of the thirty-nine (39) days starting July 8, 1991 and through and including August 30, 1991."

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.

This case involves a procedural argument which, when resolved, will be dispositive of the claim as outlined above. The initial claims as presented by the Claimant were denied by the Carrier in a letter dated September 16, 1991. The Organization, by letter dated November 12, 1991, and addressed to Carrier's Superintendent allegedly appealed Carrier's initial claim denial. Subsequently, by letter dated January 25, 1992, again addressed to the same Superintendent, the Organization contended that they had not received any reply to their November 12, 1991 letter of appeal and therefore, they said, Carrier was in violation of the provisions of Rule 24. On February 10, 1992, Carrier's Superintendent responded to the January 25, 1992 Organization letter and asserted that the November 12, 1991 letter from the Organization had never been received. Thereafter, by letter dated May 20, 1992, some ninety-nine days after the issuance of the Carrier's letters denying receipt of the November 12, 1991 appeal letter, the Organization progressed the claim to Carrier's highest appeals officer. Carrier, by letter dated July 17, 1992, denied the claim on the basis that it had not been timely appealed to the second level of claim handling. The parties, according to the correspondence record, conducted telephone conferences relative to the claim without reaching a satisfactory resolution of the dispute.

The above referenced chronology of exchanges of correspondence constitutes the entire on-property case record of this dispute.

The negotiated Rule provision which is central to a resolution of this dispute reads, in pertinent part, as follows:

"RULE 24
TIME LIMIT ON CLAIMS AND GRIEVANCES
SHORTAGE ON PAYROLL VOUCHER

(From Article V of August 21, 1954 National Agreement)

(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 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.

(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 employes 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 Sections (a) and (b), pertaining to appeal by the employe 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 9 months from the date of said officer's decision proceedings are instituted by the employe 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 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months period herein referred to."

The sole issue to be decided in this case is whether or not the Organization properly appealed the denial decision of the initial claim officer to the Superintendent's level.

The Organization says that they made such appeal by letter dated November 12, 1991. There is nothing in the case record to indicate that the initial claims officer was ever notified in writing of the rejection of his decision. However, inasmuch as Carrier has not addressed that issue, it must be presumed as being waived by Carrier.

As for the letter of November 12, 1991, Carrier infers without proof that perhaps the letter "might have been addressed directly to the Superintendent, West Colton." This contention appears to the Board to be specious at best inasmuch as both the November 12, 1991, and the January 25, 1992, letters from the Organization both contain the same address, neither of which suggests having been sent to West Colton. In Carrier's reply to the January 25 letter, they insist that the November 12 letter "was never received by this office." Therein lies the problem.

In their presentation of this case to the Board, the Organization argued that the appeal to the second level officer on the property was handled in "the usual and customary manner adopted by the parties for handling of claims and grievances ..." The Organization cited with favor the decision of Award No. 2 of a Special Board of Adjustment involving these same parties which ruled as follows:

> "None of the correspondence in this case was handled by certified mail. Apparently, it is the practice of the Carrier and the Organization not to use certified mail when denying or appealing claims. The record indicates that the secretary who prepared the Carrier's November 22, 1989 letter located the Carrier's file copy of the letter and certified that the letter had been handled in the usual manner. In the absence of any agreement provision requiring that a denial of a claim be made by certified mail, and in view of the parties' practice of using regular mail to deny and appeal claims, we find no basis for granting the claim in this case upon Rule 24."

While this Award No. 2 held for the Carrier, the Organization argued that the same rationale applies in this case for the Organization. They insisted that this Award established an on-property procedure for claims handling which should be followed in this case.

For their part, the Carrier contended that the November 12, 1991 letter of appeal had never been received by them and that the Organization had failed to prove that it had even been sent.

Carrier referred the Board to Third Division Awards 22507, 24433, 24107, 25178 and Second Division Award 10157 in support of their position relative to the issue of claims appeals and/or an alleged non-receipt of a piece of correspondence.

The Board has read and studied all of the cited precedents. It is noted that Awards 22507, 24433 and 24107 cited by the Carrier have nothing in common with the fact situation which exists in this case. They are of no assistance in our determinations in this instance.

Our review of the award cited by the Organization reveals that it clearly does involve the same parties and a somewhat similar fact situation as is present in this case with one significant distinction. In Award No. 2 of the S.B.A., it was held that:

> "The record indicates that the secretary who prepared the Carrier's November 22, 1989 letter located the Carrier's file copy of the letter and certified that the letter had been handled in the usual manner."

The case record in this case is devoid of any probative evidence from the Organization to support in any way their bare assertion that the letter had been sent.

The Board recognizes the fact that there are decisions which have held that "both parties have a right to rely on the regularity of the mail" (Third Division 10490) and that there is a basic presumption "that both parties are telling the truth" (Second Division 3541). However, in the final analysis, we are left with the sound logic of Second Division Award 10157 which held:

> "Therefore, the issue presented to this Board is whether or not the Carrier timely notified the Local Chairman, in writing, that the Carrier was disallowing the Organization's July 31, 1979 claim within the sixty-day limitation period set forth in Rule 30, Section 1(a). The Carrier contends that it timely declined the claim on or about September 7, 1979. However, the most objective evidence in the record clearly discloses that the Local Chairman did not receive the Superintendent's rejection until early December, 1979. The burden of proof rests squarely with the sender of correspondence to demonstrate that the writing was conveyed within the applicable time limitations. Second Division Award Nos. 8089 and 4851; and Third Division Award No. 14354. The sender, not the recipient, of a correspondence selects the mode of communication. The Superintendent chose to utilize company mail for sending his denial letter. Under the clear and unambiguous terms of Rule 30, Section 1(a), the Carrier must bear the responsibility for the unreliable mail system since the Local Chairman was not notified that the Carrier was denying the claim within the time limit."

This same burden of proof requirement is also found in Third Division Awards 11505 and 30412.

Therefore, the Board once again concludes on the basis of the record in this case that the claim as initially denied was not appealed to the second level of claim handling in a timely manner as required by the provisions of Rule 24. We must, therefore, dismiss this claim on procedural grounds without considering the merits or lack thereof of the claim situation.

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 not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of April 1995.