Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30991
Docket No. MW-31642
95-3-93-3-662

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad
(Company)

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

(1) The Agreement was violated when the Carrier arbitrarily terminated Machine Operator J. Lockhart, Jr. when, by letter dated December 18, 1992, it advised him that he had forfeited his seniority rights under the Agreement (System File C-02-93-A380-02/8-00119 CMP).

(2) The Agreement was further violated when Division Manager Mr. D. J. Lyons failed to notify the General Chairman in writing of his reasons for disallowing the initial claim * filed under date of January 5, 1993.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operator J. Lockhart, Jr. shall be reinstated to service and he shall be allowed all straight time, overtime, vacation and benefits lost from December 18, 1992 and continuing.

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.

Claimant did not work December 14, 15, 16, 17 & 18, 1992. Apparently, Claimant did not seek and was not granted permission to be absent on those days.

On December 18, 1992, Carrier advised Claimant, in writing that he had voluntarily forfeited his seniority rights as provided in Rule 17(e) which reads:

> "(e) An employee accepting a leave of absence other than as specified in preceding sections (a), (b) and (c) will forfeit all seniority rights."

On January 5, 1993, the Organization presented a claim to the Carrier Officer designated to handle claims and/or grievances in the first instance, seeking reinstatement and pay for all time lost.

On April 1, 1993, the Organization appealed the claim to the highest Carrier Officer designated to handle claims and/or grievances on final appeal. In that letter, not only were the merits appealed, but the Organization raised a procedural violation in that they contended they had never received a response from the Carrier Officer to whom the claim was presented in the first instance. The Organization contended the claim was thus payable as presented and that Claimant's seniority should be reinstated immediately.

The Carrier responded on May 28, 1993, to the Organization's letter of April 1, 1993, but the argument raised to offset the alleged procedural mishandling was lacking in substance.

On October 15, 1993, following conference on August 20, 1993, the Organization again wrote Carrier expanding their basic position on the merits and furnished a number of documents it intended to use to support their position. In a letter dated November 9, 1993, the Organization filed its notice of intent to bring this dispute before the Board.

On November 15, 1993, the Carrier wrote the Organization stating, simply, that it intended to respond to the Organization's letter of October 15, 1993, shortly and on November 17, 1993, it did just that.

Suffice to say, the matter has remained unresolved and that it

is left to this Board the chore of adjudication.

First and foremost is the question of the alleged procedural error. When the Organization raised the procedural argument, stating the specifics it had established a prima facie case. To defend against that charge, Carrier was obligated to produce sufficient evidence to show that they complied with the agreement.

To reiterate, their first reaction and/or response to the claim of a procedural error was extremely sparse in detail. The Carrier did not even go so far as to say when the first Carrier Officer did respond nor was a copy of that letter even furnished. Even if that would have been done, it would not have been sufficient as it would be only assertions of facts, not evidence.

Carrier's letter of November 17, 1993, that is being protested as material never handled on the property prior to the date the dispute was moved off the property, did address the procedural question, somewhat. It did not offer a copy of the first declination, nor even mention the date thereof, but simply says that if the Employees want proof of the timely declination they would furnish a statement from the employee who typed and then mailed the declination after it was signed. This offer, of and by itself is insufficient. A statement would be evidence. It is sufficient for this Board to have proof of mailing. Receipt can be, literally, any time thereafter.

This is not the first time this Board has been called to adjudicate the same procedural question. In Third Division Award 25309 it was held:

> "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)."

In Third Division Award 29891 found, as follows:

> "It is clear that the burden of proof with respect to this issue is on the Board and submission of the denial letter alone does not satisfy that burden. Moreover, while this Board is not punishing the Carrier for errors it may have made in the past, this Board has made clear that where similar problems have already occurred, as they have with these parties, it is even more important that the Carrier meet the evidence test that the letter of denial was sent. The Carrier has not met its burden in proving that the Claimant was properly notified of the denial of the Claim within the time limits of Rule 26."

Concerning the argument about the lateness of Carrier's material contained, more specifically, in its letter of November 17, 1993, from the file; the only correspondence besides the parties submissions, is the notice of intent of the Organization to file this dispute with the Board dated November 9, 1993. The Carrier in its Submission asserted the Organization "...attempted to docket this dispute on November 15, 1993..." and before this Board it was argued that the Carrier did not receive official notification of the filing until November 18, 1993. One could speculate when the Board advised the Carrier of the filing and when the Carrier may have received the notification, but facts, not speculation, is what carries the day.

From the record before this Board, it is evident that this dispute was advanced off the property on November 9, 1993. When the Carrier received notification from the Board is an unknown. November 18, 1993, is nine days after the filing of the notice of intent and could be considered late, but then, with the Post Office's current track record, not unbelievable. But again, this would be speculation.

The Carrier has failed to furnish substantial evidence that it did, indeed, respond to the initial claim in a timely fashion, as obligated by Rule 47 of the Agreement. This Board, basing its decision solely upon the procedural issue, sustains the Claim as presented.

The argument made concerning National Disputes Committee Decision No. 16 in an effort to mitigate damages and allow the Board to rule on the merits comes too late to be considered.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.

SERIAL NO. 364

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 30991

DOCKET NO. MW-31642

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: (Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad
(Company)

The Organization has requested an Interpretation with respect to the Award in this matter. The issue raised deals with the amount of compensation due Claimant.

It is the Organization's position that when the claim was sustained solely upon a finding that Carrier was in violation of the Time Limit On Claims Rule that the language obligating the Carrier to "allow the claim as presented" is clear and unambiguous: that it is not susceptible to any other meaning. In this instance, from the Organization's standpoint, the Carrier cannot deduct any other earnings that the Claimant may have had during the period of time he was out of service.

The Carrier, on the other hand, argues that since it was the Organization's position that the Carrier violated the Discipline Rule, among others, and the Board sustained the claims, Rule 18(e) (the Discipline Rule) becomes valid.

Through the application of Rule 18(e), the Carrier argues it can deduct outside earnings and that they do not have to include any overtime the employee(s) earned who may have filled the vacancy created by Claimant's termination.

The Carrier further argues that the phrase "shall be allowed as presented" if interpreted literally, could readily lead to absurd results. For instance, if the claim was for a boat and the Carrier defaulted in replying, the Carrier would be obligated to buy the Claimant a boat.

The language "shall be allowed as presented" first appeared in Article V of the August 21, 1954 Agreement which most Class I Carriers and non-operating Unions were a party to. Since that date, the language in Article V, in many instances, has been incorporated into a rule that appears in Schedule Agreements revised since August, 1954. Of the plethora of awards furnished by both parties in support of their respective arguments, not one single award was furnished that sustained a claim on a procedural basis that awarded anything other than what had been claimed in the thousands of claims adjudicated by Section 3 Committees formed pursuant to the Railway Labor Act. In fact, in over 32 years in this industry, this neutral has never read an award with such absurd results as the Carrier argues. However, as stated in Third Division Award 20900:

> "...we have held repeatedly where the claim is deemed 'fanciful' or 'without merit', Carrier is required to reject within the time limit set forth in the Rule...."

Since the question before the Board is what amount of compensation it intended to be awarded Claimant when it sustained the claim, it is necessary to review, together, the claim that was not timely rejected, to determine what was actually claimed and the position of each party in the on-property handling that transpired prior to the request for an interpretation. The claim that was not timely rejected is found in the Organization's letter of January 5, 1993, and reads as follows:

> "...reinstatement to Carrier service retroactively effective to December 18, 1992 and continuing for all straight time, overtime, vacation and benefits lost to which he is entitled but was disallowed as a result of the Carrier's arbitrary method of terminating Mr. ***." (Emphasis added)

As is obvious, the Findings in Award 30991 was based solely upon the interpretation and application of the Time Limit on Claims Rule. The Board did not review Rules 1, 2, 3, 4, 5, 17 nor 18. It cannot do so now. It has no authority to exceed the remedy set forth in the Rule that the parties negotiated.

Of all the awards presented by either party in support of their various arguments, only a very few dealt with claims that the Carrier failed to timely reject. These are

found referenced and/or quoted from the Organization's letter in the on-property handling.

Again, quoting from Third Division Award 20900, when sustaining a claim that was not timely rejected by the Carrier:

> "...Finally, 'Carrier's obligation to deny any claim filed within 60 days of filing, giving its reasons for disallowance in writing, is . . . absolute. Since Carrier failed in this contractual obligation we are compelled . . . to sustain the instant claim as presented.' See Awards 16564 (Dorsey) and 19361 (Devine), among many others...."

In Third Division Award 18004, the claim was sustained because of Carrier's failure to respond timely. The parties could not agree on the compensation and sought an interpretation with the Carrier contending that:

> "...inasmuch as it was shut down due to strike of trainmen from July 29 to November 7, 1968, then Claimants are not entitled to compensation from July 29 to October 21, 1968...."

The Board stated:

> "...With this contention we do not agree. NDC Decision 16 concluded in a situation analogous to the instant dispute that:
>
> > 'As to the contention of the carrier that even though Article V of the August 21, 1954 Agreement was violated, the claim for payment must be disallowed inasmuch as the claimant was on leave of absence during the period involved, the National Disputes Committee rules that claimant's leave of absence does not relieve the railroad of its liability for payment of a claim arising out of the railroad's failure to comply with the requirements of Article V of the August 21, 1954 Agreement'...."

In Third Division Award 11798, claim was sustained because of Carrier's failure to timely reject the claim. The claim was in behalf of six claimants, each seeking one day's pay for each day from March to July. The Carrier sought to deduct the compensation each claimant received during the period of the claim and the Organization objected. Because of some litigation, the Board was asked twice for an interpretation. In both instances the Board held "...No amounts earned by them in other positions shall be deducted...."

In Third Division Award 21787 the Board held as follows:

> "Petitioner's contention that no offset is permitted under Rule 26(a) is supported by prior awards cited to this Board. 'As presented' has been interpreted strictly in similar cases, denying offset where the employe was unavailable for work during the time in question (NDC decision 16; Interpretation No. 1 to Award No. 18004), and denying deduction for amounts earned in another position (Interpretation Nos. 1 and 2 to Award No. 11798). This Board believes that the application of Rule 26(a) urged by claimant should be followed in this case."

Finally, reverting again to Third Division Award 20900:

> "...The simple issue before us is compliance by Carrier with Rule 42(A). A valid claim had been presented by Organization letter of June 2, 1973. Carrier's obligation was clear; i.e., to disallow the claim 'within sixty (60) days from the date same is filed' by appropriate notice to Organization. Carrier failed to do so and the consequence of such failure is clearly stated in the Rule: 'If not so notified, the claim or grievance shall be allowed as presented...'
>
> See Awards 9931 (Bailer), 15788 (McGovern), 10138 (Daly), 11174 (Dolnick), 12473 (Kane), 16564 (Dorsey), and 19946 (Blackwell), among many others."

The Organization resisted furnishing any evidence of whatever earnings Claimant may have had while terminated, and did argue that overtime should be included as it was specifically requested in the claim that was not timely rejected.

The Carrier, on the other hand, did not commit themselves in writing while arguing their position on the property. We only can gleam from the Organization's post award correspondence the position of Carrier. Carrier did, however, furnish evidence that when they received the award, they did write the following inter-office memo which seems somewhat contradictory to the position they now are taking:

> "Attached please find copy of Third Division Award No. 30991 wherein, the Neutral R. L. Hicks reinstated Machine Operator J. Lockhart, Jr. and also sustained his claim for all straight time, overtime, vacation and benefits lost commencing from December 18, 1992.
>
> "The Award itself is self-explanatory. The decision was rendered on a procedural default, therefore, please take the necessary steps to have Mr. Lockhart, physicalled (sic) and if passing, return to service as soon as possible.
>
> Payroll is directed to calculate all lost straight time, overtime, vacation and benefits lost from that date to present. Please make the necessary calculations and inform this office of the amount when made."

The Organization has presented a prima facie issue not rebutted by the Carrier. Under these circumstances, Claimant is to be paid as claimed, i.e., for all straight time, overtime, and vacation lost because of the termination without any deductions. Regarding lost benefits, the Board declines to determine what benefits were being claimed. Standing alone, the term "benefits" is too vague.

Referee Robert L. Hicks who sat with the Division as a neutral member when Award 30991 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois this 4th day of March 1997.