

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31208
Docket No. MW-31540
95-3-93-3-552

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
(
(CSX Transportation, Inc. (former
(Western Maryland Railway Company)

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

- (1) The twelve (12) claims as presented by Vice Chairman R.L. Caldwell on July 19, 1991 to Division Engineer M.D. Ramsey, concerning various violations of the Agreement during the period of May 20 to June 14, 1991, shall be allowed as presented because said claims were not disallowed by him in accordance with Rule 16(a) [Carrier's File 12(92-1128) WMR].
- (2) The four (4) claims as presented by Vice Chairman R.L. Caldwell on July 25, 1991 to Division Engineer M.D. Ramsey, concerning the assignment of B&O employees to perform Maintenance of Way work on Western Maryland Railway Company's property from May 31 through June 10, 1991, shall be allowed as presented because said claims were not disallowed by him in accordance with Rule 16(a) [Carrier's File 12(92-1126)].
- (3) The two (2) claims as presented by Vice Chairman R.L. Caldwell on September 13, 1991 to Division Engineer M.D. Ramsey, concerning the assignment of outside forces or a B&O employee to perform Maintenance of Way work on Western Maryland Railway Company's property on July 12 and 26, respectively, shall be allowed as "presented because said claims were not disallowed by him in accordance with Rule 16(a) [Carrier's File 12(92-1125)].

- (4) The three (3) claims as presented by Vice Chairman R.L. Caldwell on September 23, 1991 to Division Engineer M.D. Ramsey, concerning the assignment of outside forces for a B&O employee to perform Maintenance of Way work on Western Maryland Railway company's property during the period of July 26 through September 12, 1991, shall be allowed as presented because said claims were not disallowed by him in accordance with Rule 16(a) [Carrier's File 12(92-1123)].
- (5) The three (3) claims as presented by Vice Chairman R.L. Caldwell on November 22, 1991 to Division Engineer M.D. Ramsey, concerning the assignment of employees of the City of Hagerstown, a B&O employee and outside forces to perform Maintenance of Way work on Western Maryland Railway Company's property between September 23 and November 1, 1991, shall be allowed as presented because said claims were not disallowed by him in accordance with Rule 16(a) [Carrier's File 12 (92-1124)].
- (6) The four (4) claims as presented by Vice Chairman R.L. Caldwell on January 21, 1992 to Division Engineer M.D. Ramsey, concerning various violations of the Agreement during the period of November 21, 1991 through January 15, 1992, shall be allowed as presented because said claims were not disallowed by him in accordance with Rule 16(a) [Carrier's File 12(92-1121)].
- (7) The four (4) claims as presented by Vice Chairman R.L. Caldwell on January 29, 1992 to Division Engineer M.D. Ramsey, concerning various violations of the Agreement during the period of December 2, 1991 through January 24, 1992, shall be allowed as presented because said claims were not disallowed by him in accordance with Rule 16(a) [Carrier's File 12(92-1127)]."

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.

As is evident by the Statement of Claim, 32 claims are before this Board for adjudication based solely upon a procedural argument. If the Carrier failed to timely respond to timely and properly filed claims, they will be sustained as provided for in the Agreement. If they were timely denied, then they were appealed too late and will be dismissed.

The only handling of the claims on final appeal that is in the record is a handwritten notation on a Form entitled "Carrier Conference Reply." The form is dated December 14, 1992, and has been accepted both as declination by the final appeal Officer and as a confirmation of a conference.

Each of the handwritten declinations is identical in nature and reads somewhat as follows:

"Claims allegedly not answered within time limits.
Carrier responded within time limits. Organization
states it did not receive response. Not timely appealed.
Copy of responses furnished Organization. Claim Denied."

Each of the seven groups of claims has to be examined individually to achieve adjudication.

The claims grouped in Item 1 of the Statement of Claim were filed on July 22, 1991. In October 1992, when this group of claims was appealed, the Organization's representative, to whom the first claim declinations were directed, stated that he never received the declinations. Therefore, Carrier's argument that since the Organization remained mute following their December 14, 1992 conference wherein the Carrier furnished copies of the declinations, that this Board must accept the oft repeated principle that un rebutted assertions of facts, become facts is not well received.

To the contrary, once the individual who filed the claim states the declination was not received, the Carrier must furnish evidence of timely mailing. It did not. The claims grouped in Item 1 of the Statement of Claim were not responded to as provided for in Rule 16(a) of the Agreement.

Regarding the settlement, however, it is noted that in each of the 12 claims, there is not only a request for a specific number of hours at a specific rate (straight time or overtime) but also a stand alone request that Claimant(s) be made whole. The "made whole" phrase standing alone as it does in each claim carries a connotation that the Claimant is to be kept whole financially. Thus, the Claimant could be paid the difference between what he actually earned on the date or dates of the claim and what he would have earned had he been assigned as requested in each claim. This would satisfy the claim. The choice of payment is the Carrier's.

Regarding the claims grouped in Items 2, 3 and 5 of the Statement of Claim, what is said regarding the Item 1 claims is equally applicable.

The claims in Item 4 were responded to. Each response was dated November 25, 1991. Each claim, however, was presented on September 24, 1991. The 60 day window to respond expired November 23, 1991. The settlement of the claims in Item 4 is as outlined for Item 1 claims.

The claims contained in Item 6 were responded to in letters dated March 19, 1992. The Organization, however, stated that the responses were contained in an envelope postmarked March 30, 1992. Since the claims were filed on January 21, 1992, the response, to be timely, had to be in the mail no later than March 21, 1992. The settlement of the claims in Item 6 is as outlined for Item 1 claims.

The claims contained in Item 7 were handled in the same manner as the claims in Item 1. The monetary settlement for each of the four claims is as outlined for the claims grouped in Item 1 of the Statement of Claim. However, the fourth and last claim grouped in Item 7, in addition to the monetary portion, requested that:

"*** Claimant, J.E. Hill will receive a December 2, 1991 seniority date as a track foreman.

Claimant R. Smith will receive a December 2, 1991 seniority date as an assistant foreman.

Any claimant who does not have WMR seniority as a Class "A" operator prior to December 2, 1991, will acquire same with a December 2, 1991 date."

Seniority status can be enhanced or achieved in any number of ways, but not through a procedural default in claim handling.

The claims are sustained as outlined herein.

AWARD

Claim sustained in accordance with the Findings.

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.

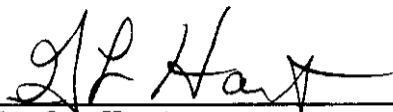
NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of November 1995.

LABOR MEMBER'S CONCURRING AND DISSENTING OPINION
TO
AWARD 31208, DOCKET MW-31540
(Referee Hicks)

The handling of claims and grievances under the effective Agreement is governed by Rule 16. 1(a) which, like most claim and grievance handling rules in the industry, specifies that if a claim or grievance is to be disallowed, the Carrier must notify the person filing the claim of the reasons for such disallowance within the time limits and if not so notified, the claim or grievance shall be allowed as presented, without precedent as to the parties contentions on the merits of the claim or grievance. Hence, the Board was correct to sustain the claims based on the Carrier's violation of the time limits. However, it is clear from the record that the parties to this dispute knew full well what remedy was being sought and understood what the remedy would be if the claims were to be allowed. The only dispute before the Board was whether the claims must be allowed on the procedure default of the Carrier. Hence, the Majority's ramblings concerning the remedy are not well taken, inasmuch as they represent new issues never raised on the property. The Majority's decision to inject a new issue in order to attempt to limit the Carrier's liability is simply unconscionable and renders this award palpably erroneous insofar as the remedy is concerned.

Respectfully submitted,



G. L. Hart
Labor Member

**CARRIER MEMBERS' DISSENTING OPINION TO
THIRD DIVISION AWARD 31208, DOCKET MW-31540
(Referee Robert L. Hicks)**

The Majority committed a serious error in partially sustaining the 32 claims as set forth in Award 31208. By concluding the claims were not responded to by the Carrier as provided for in Rule 16(a) of the Agreement, the Majority ignored the facts of the dispute as established on the property and turned a "blind eye" to core principles of this Board.

The Organization alleged the original claims were not timely declined and the Majority mistakenly agreed. During the on-property handling, this argument was confronted and the Organization was presented copies of the declination letters in conference as evidence substantiating the fact that the claims were timely declined. Rather than offer any rebuttal as a challenge to this evidence, the Organization remained silent until it raised new arguments before the Board.

The Majority's neglect of this evidence and acceptance of the Organization's belated arguments does severe harm to the established principles of this Board relative to resolution of minor disputes; hence, this Award is palpably erroneous and has no precedential value.

Michael C. Lesnik

Michael C. Lesnik

Martin W. Fingerhut

Martin W. Fingerhut

P. V. Varga

Paul V. Varga