

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31237  
Docket No. CL-31608  
95-3-93-3-608

The Third Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

(Transportation Communications International  
( Union  
PARTIES TO DISPUTE: (  
(Delaware and Hudson Railway Company, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-10988)  
that:

(a) The following claim is hereby presented to the Company by L.Jones, represented by the Transportation Communications International Union.

(b) The Carrier violated the Clerks' Rules Agreement effective September 26, 1990, by assigning the duties previously performed by TCU Clerical Employees at Allentown, Pennsylvania to the Trainmen.

(c) Jobs have been advertised and awarded to the (UTU) Trainmen, and should have been advertised to the clerical (TCU) members, work for which I am qualified.

(d) Allow 8 hours punitive pay based on the pro-rata hourly rate of \$13.64 commencing on August 17, 1992 and continuing for each and every workday thereon after until this violation is corrected.

(e) That in order to terminate this claim, all clerical work at Allentown, Pennsylvania must be returned to the employee covered under the Scope of the Clerks' Rules Agreement.

(f) This claim has been presented in accordance with Rule 28-2 and should be allowed.

(g) Claim is further made that Carrier violated Rule 28-2 when timely denials were not issued at either the first or final levels by Carrier."

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 dispute involves an issue of time limits and the alleged failure on the part of the Claimant to set forth Rules allegedly violated by Carrier.

The chronology of this dispute is the following:

September 30, 1992 - Claimant with a seniority date of 1971, and a furloughed Train Clerk at the time, filed his claim alleging Carrier assigned work to UTU Trainmen previously performed by TCU clerical employees at Allentown, Pennsylvania. The claim further stated the Carrier advertised and awarded positions to UTU employees which should have been advertised to TCU clerical employees.

October 12, 1992 - Carrier admits it received Claimant's claim.

December 4, 1992 - Carrier denied claim.

December 29, 1992 - The General Chairman, inter alia, challenged Carrier's statement that it did not receive the claim until October 12, 1992 and requested the Carrier to produce the envelope in which Carrier received the claim.

January 30, 1993 - Carrier responded and produced envelope with a postmark of October 7, 1992 and a notation it was received at the Carrier's Marketing Department on October 12, 1992.

February 1, 1993 - The General Chairman requested Carrier to list this claim and others for on-property conference.

March 26, 1993 - Conference on claim and notes made at conference contain a notation "will look at T/L's".

July 14, 1993 - The Division Chairman telephoned Carrier and stated that, although the Carrier had addressed all claims on the docket at the March 26, 1993 conference, the instant claim had not been so addressed.

July 14, 1993 - Carrier responded by letter denying the claim.

July 16, 1993 - The General Chairman wrote the Carrier stating that the Carrier's response was not timely because the Carrier had to respond to any claim or appeal within 60 days; and therefore the claim must be allowed.

The Organization asserts the record reveals that the Carrier breached Rule 28-2 twice because it failed to respond timely to the Claimant's claim. It notes that while the initial claim appears to have been timely replied to, from October 12 to December 9, a closer look at the record reveals certain inconsistencies.

The Organization notes that the claim dated September 30 (Wednesday) was sent to the Carrier in an envelope postmarked October 7 (Wednesday) but which the Carrier asserts it received on October 12, the envelope being stamped "received by Marketing Department" on that date. The Organization further notes that the Carrier's denial letter is dated December 4 (Friday), postmarked December 7 (Monday) and received by the Claimant on December 9 (Wednesday).

The Organization states that if the time is measured from October 7, the postmark on the Claimant's letter, it is unlikely that it took five days, or until October 12, for the letter to be received, which in all probability arrived at the Carrier's office on October 9 (Friday). Such a time schedule would be in keeping with the above listed schedule for handling mail at the Carrier's office. If the claim did arrive in October 9 rather than October 12, then the Carrier's denial reached the Claimant on the 62nd day and exceeded the contractually stipulated 60 days.

The Organization asserts that when the claim was discussed with the Carrier on December 4, the Division Chairman attested at this meeting that the envelope in which the claim was received did not have a "received October 12" stamp on it, or any other such related note. It was only after the General Chairman appealed the claim to the General Manager on December 29 that the General Manager on January 20, 1993 produced the envelope with the notation on it.

With respect to the Carrier's second alleged violation of time limits, the Organization asserts that the claim was discussed on March 26, 1993 with the General Manager, who also stated he would review the time limit issue. The Organization stated that it did not hear from the Carrier on this case and consequently the Division Chairman telephoned the Carrier on July 14, 1993 stating the Carrier had not addressed this claim. The Carrier by a letter dated July 14 denied the claim. This denial letter was 50 days after the due date.

The Organization states numerous Awards have been rendered holding that claims should be sustained in full when the contractual time limits Rules have been violated, even by just one day.

The Organization states there is no merit to the Carrier's contention that the claim lacks validity because it did not state sufficient facts as to the nature of the alleged violation. The Organization adds the Carrier was fully aware of the clerical work to which the Claimant was alleging. The Organization asserts that several claims had been filed against the Carrier for the same violation at Allentown, Pennsylvania, and moreover, the Carrier allowed the Organization to perform an inspection of the Allentown facility relative to this and other claims.

The Organization asserts that the Claimant was qualified and available and therefore should be allowed to perform the claimed clerical duties at Allentown, and he should be allowed eight hours pay at the pro rata rate for each day until the violation is corrected.

The Carrier stated the claim is invalid because it did not violate the time limits provision of Rule 28-2 and moreover, it maintained that the claim was also invalid because the Claimant did not identify the clerical work which he mentioned in his claim, and therefore the Carrier had no way of knowing what work was covered by the claim that was allegedly assigned to the Trainmen.

Concerning the first alleged time limit violation, the Carrier asserts that under Rule 28 no claim can be considered "presented" until it is received by the Carrier's officer authorized to receive claims. In this case the evidence shows that the claim was received on October 12, 1992 by Manager Notro, the officer authorized to receive these claims and the envelope in question is the proof. Since the Carrier had 60 days to reply, i.e., until December 11, 1992, it properly declined the claim in its December 4, 1992 letter. It adds that even though the letter's envelope shows a postmark of December 7, the claim was still timely declined under the Rule.

With respect to the second alleged time limits violation, i.e., that the Carrier failed to confirm in writing within 60 days of the March 26, 1993 on-property conference held to discuss the claim, this somehow validates and requires the claim be allowed as presented. The Carrier states there is no provision either in the Railway Labor Act or Rule 28-2 or any Award that requires either the Carrier or the Organization to outline their respective positions to each other after the on-property conference. The Carrier adds that as a courtesy it furnished the Organization a confirmation letter outlining the position of each party at the conference, but it was not required to do so by the Railway Labor Act, and that letter did not bind it to any time frame or subject it to any penalty for failure to provide same. The Carrier asserts that the letter it supplied should not be construed as a requirement.

The Carrier states that after the March 26 conference the claim remained unresolved and the Railway Labor Act provided the proper vehicle to pursue the claim through arbitration.

The Carrier further maintains that the claim also lacks merit because the Claimant failed to identify the work which he alleged was assigned to a Trainman, although he was asked to do so. The Organization did not identify what Rule was allegedly violated.

The Carrier stated it could not investigate the claim because of the failure to furnish the requested data. The Carrier adds under the circumstances it can only assume that the Claimant was referring to work which was either non-exclusive or performed by Trainmen as being incidental to their other duties and was in accordance with the Trainmen's Agreement. The Carrier adds except for the General Chairman's reference in his December 29, 1992 letter to several claims submitted at Allentown for the same violation, the Claimant did not furnish any details. The Carrier further states that the Claimant alluded to bulletins which were posted to Trainmen, but he failed to identify or present them, nor has the Organization identified a Rule which provides for the penalty which it is seeking.

Upon review of the total record, the Board finds the facts of record do not support the claim. The Board finds that the facts do not support the Organization's theory that the Carrier had not timely responded to the initial complaint. The Organization requests the Board to disregard the overt and objective evidence that shows that the claim although dated September 30, its envelope was postmarked October 7, but stamped and delivered to the Carrier's Marketing Department on October 12. The Organization states that the period from October 7 to October 12 is just too long a period for a letter to arrive at the Carrier's office.

The Organization requests the Board to find that the claim arrived on October 9 and not on October 12, basing its theory that this should have been the normal time for the letter to reach the Carrier's office.

The Board finds that it is bound by the overt and objective evidence of record absent any credible showing that the Carrier manipulated the delivery date that it received the claim. The Board accepts the objective and concrete data rather than an invidious theory advanced by the Organization with no probative evidence to support it. It is not unheard of to have the delivery of a letter delayed either in transit or in delivery to the addressee. The Board finds that it cannot accept the Organization's abstract and non-probative proof that the letter was delivered to the Carrier when it normally should have been delivered as against the objective proof as to when it was delivered. In short, the Board finds as to the initial claim that its claim was received on October 12, denied on December 7 and the denial was received by the Claimant on December 9. This covered a period of 59 days and was within the permissible ambit of 60 days. There was no merit to the Organization's abstract theory as to what might have happened at the Carrier's office with respect to the claim as opposed to the probative evidence showing what did actually happen.

With regard to the second alleged violation of time limits we find no violation of Rule 28-2. The parties conferenced on the pending claims, including the instant one, and the Carrier made its decision on these claims, and gave the Organization a memorandum concerning its decision on the respective claims. We find that no requirement in the requisite Rule requires the Carrier to make a formal reply as to the results of the on-property claim conference. The Organization was at liberty to proceed to the Board after this conference if it was not satisfied with the results thereof.

We also find the claim deficient in that it lacked the necessary and essential information to enable the Carrier to determine its validity. The Board is constrained to state that we were unable to determine what specific violative acts the Carrier was purported to have committed. There is no evidence in the record as to what work the Trainmen performed that properly belonged to the Claimant's craft. The Claimant and the Organization in the record did not present any facts to support its allegations of Rule violations. In short, the Organization failed to meet its burden of proof to sustain the claim.

AWARD

Claim denied.

ORDER

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 1st day of November 1995.