

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33452
Docket No. MW-32523
99-3-95-3-420

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Western Maryland
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned B&O employes B. Ward and M. Alt to perform welding work on the W. Va. Jct. on the Hampshire Subdivision, W.M. Eastern Seniority District on January 24, 26, 27, February 2, 7, 8 and 17, 1994 and continuing, instead of assigning its qualified furloughed employes, Mssrs. G. A. Harbaugh and T. L. Lynch, to perform said work (WMR).**
- (2) The claim referenced in Part (1) above as presented by Local Chairman G. A. Harbaugh on February 19, 1994 to Engineer/Coordinator W. E. Freels shall be allowed as presented because said claim was not disallowed by him in accordance with Rule 16(a).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. A. Harbaugh and T. L. Lynch shall each be allowed eight (8) hours' pay per day at their respective welder's and welder helper's rates beginning January 24, 1994 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 were given due notice of hearing thereon.

This claim involves the use of two B&O employees to perform welding work on the Hampshire Subdivision in the Eastern Seniority District on seven specified dates in January and February 1994 rather than recalling the Claimants. The parties agree that only procedural issues of compliance with the time limits set forth in Rule 16 are properly before the Board for resolution. In pertinent part, Rule 16 provides:

- “(a) All claims or grievances must be presented in writing by or on behalf of the employee 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 employee 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 employees as to other similar claims or grievances.”

The record reflects that the instant claim was sent on February 19, 1994 by certified mail return receipt requested. There is no dispute that it was received by Carrier. The next time this matter was brought forward by the Organization was to list it and 15 other “unanswered” claims as a default issue for discussion at a November 17, 1994 conference. During this conference, Carrier contended that it had timely answered this claim, producing a copy of an undated, unsigned letter from Engineer/Coordinator Freels to Local Chairman Harbaugh from its files responding to the claim. The remaining correspondence on the property reveals Carrier’s position that it was unaware of the Organization’s timeliness issue until the November 17, 1994 conference, and its contention that the Organization’s appeal itself was untimely.

The Organization argues that Carrier never proved that the claims were answered and properly dispatched in a timely fashion, and that it was Carrier’s burden to do so, citing Third Division Awards 10173, 10742, 14354, 17291, 25100, 25309, 28504. It contends that because it authorized certified mail return receipt requested as the channel of communication, Carrier’s failure to use the same method places the risk of nonreceipt with it, relying on Third Division Award 21373. The Organization asserts that the language of Rule 16 requires the claim to be allowed as presented, relying on Third Division Awards 33320, 31208 and 29163.

Carrier contends that it timely denied the claim and produced proof of such denial when it first learned of the Organization’s assertion that it did not receive it at the conference in November 1994. Carrier asserts that Rule 16 does not require use of certified mail, and that it is not customary for it to respond in such fashion. Carrier avers that the Organization must not be permitted to sit idly on its hands after the 60 day time limit has elapsed and fail to appeal the claim, either on the basis of the merits or on timeliness grounds, as it did in this case, noting that the Organization itself admitted that its system for processing claims was not very efficient. Carrier argues that the Organization’s claim must be dismissed for its failure to appeal the claim in accord with the provisions of Rule 16(b).

Awards on this property have upheld the strict application of the time limit provision in Rule 16 as well as the necessity for the party asserting the sending of a letter

to offer proof of timely mailing. See Third Division Awards 31208, 29163. We find the following rationale of the Board in Third Division Award 25309 (recently relied upon in Third Division Award 33320) to be applicable herein:

“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 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).”

The record in this case reveals that Carrier did not sustain its burden of proving that the declination letter herein was actually sent to, or received by, the Organization. Producing a file copy of an undated, unsigned letter is insufficient evidence to prove that it was actually timely sent. See Third Division Awards 25100, 25309. While it is true that Carrier is not required by Rule 16 to use certified mail, when it chose not to do so in this case, it ran the risk of nonreceipt and was unable to rebut the Organization's assertion that the declination letter was never received. See Third Division Award 21373. Accordingly, the clear language of Rule 16 requires that the claim be “allowed as presented.” Because the Organization clarified that the claim was not continuing, we direct compensation for the seven dates specified in paragraph (1).

AWARD

Claim sustained in accordance with the Findings.

Form 1
Page 5

Award No. 33452
Docket No. MW-32523
99-3-95-3-420

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 23rd day of August 1999.

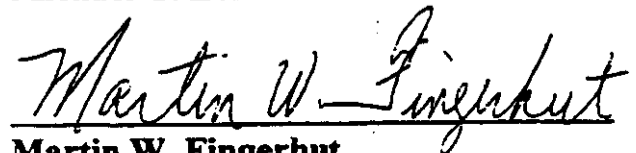
**CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 33452; DOCKET MW-32523
(Referee Margo R. Newman)**

The underlying issues and arguments contained in the record before the Board in this case are essentially identical to those contained in the record before the Board in Docket MW-32317 that resulted in Third Division Award 33417 (Referee Marty E. Zusman) which was adopted on July 13, 1999.

For the sake of brevity, our Dissent to that Award is incorporated herein by reference.

We strenuously dissent to this **PALPABLY ERRONEOUS** Award.


Michael C. Lesnik


Martin W. Fingerhut


Paul V. Varga

August 23, 1999