

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34997
Docket No. MW-31072
00-3-93-3-46**

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Claim as presented to Division Engineer T. C. Tierney on March 26, 1991, shall be allowed as presented because the claim was not disallowed by Division Engineer T. C. Tierney in accordance with Rule 26(a) (System Docket MW-2286).**

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 case involves a claim by the Organization that a claim it filed on behalf of the Claimant for a lost work opportunity must be allowed by virtue of the Carrier's alleged failure to respond to the claim within 60 days after it was filed. The Organization bases its claim on Rule 26(a), which reads as follows:

RULE 26 - CLAIMS AND GRIEVANCES

“(a) A claim or grievance must be presented, in writing, by an employee or on his behalf by his union representative to the Division Engineer or other designated official within sixty (60) days from the date of the occurrence on which the claim is based. The Division Engineer or other designated official shall render a decision within sixty (60) days from the date same is filed, in writing, to whoever filed the claim or grievance (the employee or his union representative). When not so notified, the claim will be allowed.” (Emphasis supplied.)

The Organization maintains that the District Chairman presented the claim by letter dated March 26, 1991, and that the Carrier never disputed that the letter was received. The Organization asserts that after no response to the claim was received for nearly six months, the District Chairman sent the Manager of Labor Relations a letter asking that the claim be listed for discussion at the October 10, 1991 monthly meeting, and it was. At the October 10, 1991 meeting, according to the Organization, the District Chairman asked that the claim be paid as presented on account of the Carrier's failure to deny the claim within the Rule 26(a) time limits. The Organization asserts that it was not until December 10, 1991, eight and one-half months after the claim was submitted, that the Manager of Labor Relations denied it.

The Organization argues, therefore, that the Carrier is in default under Rule 26 for failure to respond to the claim in a timely manner. It asserts that the claim must be allowed as presented without consideration of the merits.

The Carrier, on the other hand, asserts that the Division Engineer denied the claim in a letter dated and mailed May 23, 1991. The Carrier argues, therefore, that it timely responded to the claim 57 days after it was filed.

Citing Third Division precedent (see, e.g., Award 22036), the Carrier argues that the Organization's non-receipt of the May 23, 1991 denial does not constitute evidence that the Carrier did not deny the claim. Rather, according to the Carrier, its reliance on the United States Postal Service was acceptable and, in the absence of direct evidence that the denial was not sent, the Board must presume the veracity of the Carrier's assertion that the denial was mailed on May 23, 1991. See Third Division Awards 24232 and 22903.

After carefully reviewing the record evidence, we have determined that the claim must be denied. Under Third Division Awards cited by the Carrier, there is a presumption of veracity that attaches to the Carrier's assertion that it mailed the denial letter on May 23, 1991. Under those same Awards, the Organization's assertion that it did not receive the May 23 letter, which we also credit, does not defeat the presumption.

Accordingly, we find that the May 23, 1991 denial letter was timely submitted within 60 days after the claim was filed. Because there is no basis for sustaining the claim on the procedural grounds asserted by the Organization, it must be denied.

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 20th day of September, 2000.