

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36095
Docket No. CL-36443
02-3-00-3-668**

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

**(Transportation Communications International Union
PARTIES TO DISPUTE: (
(CSX Intermodal Terminals, Inc.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12661) that:

**The following claim is hereby presented to the Company in behalf of
Claimant Mr. T. H. Rieder**

- (a) The Carrier violated the Clerks' Rules Agreement effective July 1, 1979, particularly Rules 1, 24, 40 and other rules, when it failed to call and work Claimant Mr. T. H. Rieder for the Programmer, Symbol 353, hours 11:00 p.m. to 7:00 a.m. on July 31, 1999 located at the Trail-Van Terminal, Columbus, Ohio and instead assigned and permitted junior clerk Mr. M. G. Martin to work this position at the punitive rate of pay.**
- (b) Claimant Mr. T. H. Rieder must now be allowed eight (8) hours pay at the appropriate punitive rate of pay for July 31, 1999 on account of this violation.**
- (c) Claimant is qualified was available and should have been worked in accordance with Rules 24, 40 and other rules.**
- (d) This claim has been presented in accordance with Rule 45 and must be allowed.**
- (e) Carrier is in violation of Rule 45(a) when it did not answer the claim within 60 days at the initial level.”**

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.

The issue in this case is, does the postmarked date on the envelope containing the Carrier's denial letter constitute the material date for applying the 60-day time limit in Rule 45(a) of the Agreement?

In the record before us, the Carrier and the Organization differ on the date the Carrier received the claim and the date of the denial letter, but these discrepancies are not relevant to deciding the above stated issue. The parties concur that October 12, 1999 was the 60th day after the Carrier received the Organization's claim. There is also no dispute that the envelope containing the Carrier's denial letter is postmarked October 12, 1999. The Organization received the Carrier's denial letter beyond 60 days after the Carrier's receipt of the Organization's claim.

The substance of the claim concerns whether the Carrier called an employee junior to the Claimant to work the third shift Programmer position at the Carrier's Trail-Van Terminal at Columbus, Ohio, on July 31, 1999. During the on-property handling, the parties disregarded the merits of the claim and concentrated solely on the time limits. Indeed, the time limit issue is the single issue before the Board. Thus, the Board dismisses the merits of the claim for want of prosecution.

Rule 45(a) of the applicable Agreement, which the parties adopted verbatim from the former TCU-Conrail Agreement, states:

“(a) All claims or grievances must be presented in writing by either the employee or a duly accredited representative on his behalf to the employee's

immediate supervisor authorized to receive same within sixty (60) days from the date of occurrence on which claims or grievances are based, except:

- (1) Time off duty on account of sickness, vacation, leave of absence, suspension or reduction in force, will extend the time limit specified in paragraph (a) of this Rule by the period of such time off duty.
- (2) When a claim for compensation alleged to be due is based on an occurrence during a period the employee was out of active service due to sickness, vacation, leave of absence, suspension or reduction in force, it must be made, in writing, within sixty (60) calendar days from the date the employee resumes duty.

When a claim or grievance has been presented in. [sic] accordance with this paragraph (a), including exceptions (1) and (2), and is denied, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative), in writing, of the reason for such disallowance. If not so notified, the claim or grievance will be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances."

The Carrier cites and relies on Rule 45(h) which reads:

"The time limits specified in paragraphs (b), (c), (f), and (g) may be extended by agreement in any particular case. When the U.S. Mail is used, the postmark will govern in determining compliance with the various time limits."

The Organization argues that the limitation period is calculated from the date the Carrier receives the claim until the day that the Organization receives the Carrier's denial letter. The Organization asserts that if the 60 days run before it receives the Carrier's denial letter, the Carrier violates Rule 45(a). The Carrier agrees with the Organization that the 60-day time period starts to run when the Carrier receives the claim but, it contends

that it complies with the time limit so long as its denial letter is postmarked within 60 days of the date that the Carrier received the claim.

The Board initially concludes that the Carrier misplaces its reliance on Rule 45(h). By its express terms, Rule 45(h) refers only to subsections (b), (c), (f) and (g) of Rule 45. If the parties had wanted Rule 45(h) to apply to Rule 45(a), subsection (a) would appear among the subsections listed in subsection (h). The absence of subsection (a) evinces the parties' intent that subsection (h) does not apply to subsection (a). Therefore, the language in subsection (h) providing that the postmark shall govern when determining compliance with the various time limits is inapplicable to interpreting how the 60-day time limit set forth in Rule 45(a) operates.

The last paragraph of Rule 45(a) mandates that the Carrier "... notify whoever filed the claim or grievance . . ." of the reason for disallowing the claim. The term "notify" is somewhat ambiguous inasmuch as the parties use different language to describe the filing of a claim. The first paragraph of Rule 45(a) requires claims to be "presented" to the employee's immediate supervisor within 60 days. The term "presented" certainly connotes that the time period begins to run when it is received by the appropriate Carrier Officer, that is, the claim is "presented" to the Carrier. The parties did not use the same term when referring to how the Carrier denies a claim. This is logical because presenting a denial does not make any sense. So, the parties chose the word "notify" to describe the process of communicating the Carrier's denial. Unlike "presented," the word "notify" is vague because it could mean personal notification (the Organization must receive the denial) or constructive notification (by dispatching the denial in the mail).

The Board is aware that two lines of authority have developed on the issue herein. Compare, for example, Public Law Board No. 2263, Award 54 (BRAC vs. Conrail) with Second Division Award 8833. The former implicitly adjudged that the time limits are computed from receipt by the Carrier to receipt by the Organization. In Award No. 54 Conrail conceded that hand delivery of its denial to the Local Chairman was more than 60 days after it received the claim.) Award 8833 held that the Carrier complies with the time limits when it posts the letter in U.S. Mail on the 60th day.

Regardless of the two lines of authority, the Board concludes that the claim should be resolved by following the most significant precedent in the record before us. Award 10, Public Law Board No. 4304 (TCU vs. NRPC) interpreted language identical to the language contained in the applicable Agreement. In Award 10, the Board held that "notify" means that the denial letter must be received by the person or organization filing the claim. The

Board reasoned that notification cannot occur merely by dispatching the denial letter in the U.S. Mail. The Board determined that "notify" means that the denial must be physically conveyed to the Organization. To bring predictability to their labor-management relationship, the parties should adhere to the precedent established under the time limit rule that the parties carried forward from the TCU-Conrail Agreement to this property regardless of whether opposite precedents may be controlling on other properties. In the Board's view, Public Law Board No. 4304, Award 10 is the controlling precedent and therefore, we will follow it.

In accord with Award 10 and Rule 45(a), the instant claim must be sustained "as presented" because the Organization did not receive the Carrier's denial letter until more than 60 days after the Organization presented the claim to the Carrier. To reiterate, we dismiss the merits of this claim.

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 22nd day of July 2002.