Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37842
Docket No. MW-37188
06-3-02-3-196

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to properly bulletin a vacancy (flagman position) working in conjunction with the bridge project in the vicinity of Cottonwood, Minnesota beginning on May 3, 1999 and continuing and when it failed to call Mr. B. E. Deadrick, or another senior or furloughed sectionman, to fill the position and instead filled the position with employes assigned to the Marshall Section crew. (System File T-D-1855-B/11-99-0497 BNR).

(2) The Agreement was further violated when the claim filed under date of June 24, 1999 by Vice Chairman R. L. Bobby to Carrier Representative K. L. Parenteau was not denied by Ms. Parenteau pursuant to Rule 42 and shall now be allowed in accordance with said rule.

(3) As a consequence of the violation referred to in Part (1) and/or (2) above, Claimant B. E. Deadrick, or a senior or furloughed sectionman, shall now be compensated for eight (8) hours straight time and the overtime hours worked each day beginning May 3, 1999 and continuing until such time as the position is properly bulletined and assigned."

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.

By letter dated June 24, 1999, the Organization filed the instant claim alleging that the Carrier violated the Agreement when it failed to bulletin a Flagging job of more than 30 days duration. The letter, which was sent by certified mail, was received by the Carrier on June 28, 1999. In a letter dated August 27, 1999, the Carrier denied the claim. The declination letter was received by the Organization on August 30, 1999.

It is the Organization's position that the time limit for denying a claim is calculated from the date the claim is filed until the day that the Organization receives the declination letter. In this case, the time period between those two dates exceeds 60 calendar days. Thus, as a threshold matter, the Organization contends that the Carrier failed to make a timely declination of the claim in accordance with Rule 42 A of the Agreement, which states in pertinent part:

> "All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented. . . ."

The Carrier argues that the Organization did not establish a violation of Rule 42 A because the record reflects that the Carrier responded to the claim in a timely fashion on August 27, 1999 - the 60th day after receipt of the instant claim. In the Carrier's view, the time limitation period is calculated from the date the Carrier receives the claim until the day on which it denies the claim.

Time limit issues arise frequently in this industry and over the years there have been many situations similar to the one here involved. Precedent establishes that a claim has been "presented" to the Carrier within the 60-day time limit period when the Carrier

actually "receives" the claim. See, Public Law Board No. 3460, Award 18 (citing Third Division Award 22799 and Second Division Award 5122) as well as Third Division Award 28734.

There is a conflict of authority, however, as to what is required in order for the Carrier to comply with the requirement that it "notify" whoever filed the claim or grievance. In some cases, it appears that the Board has deemed constructive notification – posting or dispatching the denial letter – as proper notification. See, e.g., Third Division Award 32727 and Public Law Board No. 3460, Award 18. In other cases, the word "notify" has been interpreted to mean actual notification or receipt of the denial letter by the person or Organization filing the claim. See Third Division Award 28714.

We need not resolve the divergent lines of authority in this case because the Carrier failed to establish that either actual or constructive notification of the claim denial was provided to the Organization within the required 60-day time limit. Although the Carrier produced its denial letter dated August 27, 1999, there is no evidence in the record to show when or how it was dispatched. The date that the letter was written does not determine the date of denial under either line of authority.

In Third Division Award 31643, the Board reviewed several longstanding principles to be considered when reviewing disputes of this nature. Quoting from Third Division Award 10173, the Board stated:

> ". . . Just as Employes bear the responsibility of being able to prove that a claim is timely filed with a Carrier, so the burden of proof rests with a Carrier to prove that Employes are duly notified in writing of the reasons for disallowance."

Quoting from Third Division Award 23553, the Board also stated:

> "Every Division of this Board has attempted, through its decision, to be meticulously accurate and consistent in applying time limits as written in the Schedule Agreement. The parties in this industry are fully aware of the Board's position on adherence to time limits and the majority of claims have no time limit problems. We see no reason to deviate from a policy of strict adherence to time limits here. This case will be sustained on the time limit issue. The merits of the case need not be reached."

The logic and reasoning expressed in the above-cited Awards is equally compelling in the matter at hand. Absent evidence to support the Carrier's position in this instance,

the claim must be sustained on procedural grounds without reaching a determination on the merits.

As noted in many of these cases presented to the Board dealing with violations of similar time limitations, the parties have agreed upon the specific remedy for such an occurrence by including language which provides: "If not so notified, the claim or grievance shall be allowed as presented." See, e.g., Third Division Awards 37269, 31643, 31394, and 28734. Although the Carrier argued for the first time in its Submission that NDC Decision 16 should limit its liability in the instant case, we cannot consider new argument not previously raised on the property. The possible consequence and effect of NDC Decision 16 is not properly before the Board for consideration. Accordingly, Paragraph 2 of the statement of claim is sustained in its entirety.

AWARD

Claim sustained.

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 August 2006.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 37842, DOCKET MW-37188
(Referee Kenis)

When Carrier and Organization representatives review a case prior to the hearing before the Referee, they have the right to presume the Referee will restrict his/her review to the positions of the parties as expressed in the record. This case illustrates that sometimes referees improperly inject new arguments and conclusions not raised or discussed on the property or in executive session by either side. The unfairness of such behavior should be apparent to all. The Referee is expressing an opinion about what arcane precedent teaches without either side having had the opportunity to prepare briefs on the new points the Referee "presumes". Had the Referee requested supplemental briefs, she may well have avoided the errors in this decision. More fundamentally, the Referee should have refrained from analyzing the case based on her own general perceptions instead of confining analysis to what the parties present.

The first error: On page three the Referee held unqualifiedly without proper precedent support that, "The date that the letter was written does not determine the date of denial under either line of authority." The Organization never argued that the date of mailing was in dispute. Many Referees have said that it is proper to presume that a letter is mailed on the day it is dated. See the recent First Division Award 26088 (Benn) which accepted a Local Chairman's unsupported assertion that he mailed the appeal on time. "A letter is presumed to have been mailed on the day it is dated." (Third Division Award 29383, Fletcher) Mr. Fletcher found that the party disputing the date the letter is mailed "...has the burden of overcoming this presumption." Here the Organization did not deny receipt and never disputed the Carrier's assertion that the letter was mailed on the day it was dated. The receipt date the Organization stamped on the Carrier's letter is consistent with a presumption the Carrier mailed the letter on the day it is dated. Third Division Award 31643, which the Board mistakenly cites, has different facts. There, the Organization denied receipt. Here we have the Organization's stamped exhibit, which proves that the letter was mailed on time. In Third Division Award 34997, Referee Scheinman held in a case where the Organization denied receipt, "...there is a presumption of veracity that attaches to the Carrier's assertion that it mailed the denial letter...." Third Division Award 34986 (O'Brien) held, "...the Board has no reason to conclude that the September 7 denial ...was not sent to the Organization."

The second error concerns the remedy. As this Board should know, the Agreement mandated remedy for a time limit violation is that liability ends with the date of a late declination. Arbitrators do not have discretion to fashion a remedy when the Agreement provides one. Disputes Committee Decision No. 16, decided without Referee, is an integral part of the Agreement. When the Board erroneously finds the declination is a day or two late, the limit of the liability is the record date of a late declination. After relying on analysis that neither side argued to sustain the claim on time limit, an extreme decision indeed, the Board jumps to the opposite extreme and throws out a proper statement on the remedy, which many have held can be raised at any time (Interpretation No. 1, Third Division Award 32485 (Perkovich). In Third Division Award 26593 (Goldstein), the Board denied the Organization's assertion that the matter of damages cannot be raised for the first time at the Board: "...the majority view, and the better reasoned awards have held that specific issues relating to damages need not be handled prior to the interpretation of the Award...." The Board reasoned that the same principle applied to the Award itself.

This Board climbed two opposite slippery slopes to avoid deciding the case on the merits, leaving the parties with nothing accomplished and the Claimant with money he is not due.

We dissent.

John F. Lange

Martin W. Fingerhut

Bjarne R. Henderson

Michael C. Lesnik