

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39332
Docket No. SG-38859
08-3-NRAB-00003-050292
(05-3-292)

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

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of M. D. Valandingham, for the difference between the Signalman’s rate of pay (\$20.93) and the Signal Foreman’s rate of pay (\$24.91) for 220 hours straight time and six hours overtime, account the Carrier violated the current Signalmen’s Agreement, particularly Rule 28 and 80, when it failed to assign the Claimant the duties of relieving the Signal Foreman and instead assigned those duties to a junior man. Carrier compounded the initial violation by failing to respond to the original Claim within the time limit provisions of Rule 69. Carrier’s File No. 1401146 (S4-UP078). General Chairman’s File No. N 26 444. BRS Case File No. 13131-UP.”

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 Organization's contention that the Claimant was improperly passed over for a temporary higher level assignment during the medical leave of absence of the Gang Foreman. It seeks the higher rate of pay based on the hours worked in the Foreman capacity by an employee junior to the Claimant.

It is undisputed that the Claimant was employed in active service by the Carrier during the period relevant to the claim (i.e., March 8 thru April 17, 2004). Thereafter, he was on personal leave and/or vacation in anticipation of his retirement, which took effect on May 1, 2004. The claim was initially presented to the Carrier on April 21, 2004.

The threshold question is whether the Claimant is entitled to relief based on the Carrier's alleged failure to respond to the claim within 60 days of its presentation. Rule 69 – Claims and Grievances governs the rights and obligations of each party in the presentation of grievances. It reads, in relevant part, as follows:

“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 be disallowed, the Carrier will, 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 will be allowed as presented, but this will not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.”

The Carrier argues 1) it timely responded to the claim and 2) even if it did not timely respond, the Board is constrained to review the merits of the claim in their entirety and make a determination of an Agreement violation before granting relief on the basis of a Rule 69 violation. It cites a number of past decisions that it

contends supports its position, particularly those where the Board found Organization claims void ab initio – i.e., a valid claim was never made from its commencement.

Although such a defense sometimes has merit, it is more limited in scope than the Carrier suggests and does not apply here. Read together, the Awards cited by the Carrier can be distilled into a fairly common sense rule: In order for the claim to be considered void ab initio, we would have to find that the claim was untimely filed, was too vague on its face, or had no colorable basis in the Agreement. Here, there is no question the claim was timely filed, was specific as to time, place and claim and based on existing Agreement language, could have entitled the Claimant to relief on the merits.

Additionally, the Agreement language itself supports a more limited review of whether the initial claim should be rejected on procedural grounds without resort to any analysis of an alleged procedural failure on the Carrier's part. Stated another way, if it were the case that the Carrier could ignore the 60-day time limits expressed in Rule 69 (a) and the Organization was nevertheless obligated to prevail on the merits of the dispute in order to get relief based on a violation of Rule 69, the last sentence of Rule 69 (a) would be rendered superfluous. This we are neither inclined nor authorized to do.

For those reasons, Rule 69(a) standing on its own can, in these circumstances, operate to require relief.

The Organization claims it failed to receive a response to its April 21, 2004 claim until after the 60-day time limit for response had passed. The Carrier responds by showing evidence of the date of drafting of the response – June 8, 2004 – which it asserts is the date the Board should find as the date of delivery to the Organization.

Missing here, however, is the actual date of mailing. There is no evidence in the record of the date on which the response was actually mailed, at least until the Carrier was alerted by the Organization that it had not received a response. The Carrier relies on the “mailbox rule” – i.e., that a document is considered delivered on the date of mailing – but offers only evidence of either the date of the document's

creation or completion, not its mailing. The only record evidence is the Organization's claim that it did not receive the decision timely.

Although addressed here as if raised on the property as a defense, the Carrier asserted at least one important defense to the claim not asserted on the property i.e., the claim was void ab initio. While the Board addressed that defense for clarity's sake, it is well accepted based on precedent that the Board is limited to a review of the record established on the property.

The claim here is sustained for the reasons outlined above. Pursuant to Rule 69(a) this Award does not establish a precedent for the merits of any future dispute between the parties as it relates to the underlying substantive claim presented.

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 29th day of September 2008.