

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39716
Docket No. SG-39018
09-3-NRAB-00003-050049
(05-3-49)**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 that:

Claim on behalf of G. J. Engelken, M. J. Kennedy, L. D. Lovgren and R. S. Stryker, for 64 hours straight time and 12 hours overtime each at their respective rates of pay, account Carrier violated the current Signalmen’s Agreement, particularly Rules 1 and 69 when it failed to allow the Claimants the opportunity to perform construction work on the number 1 and 2 main lines at Z148 from October 6, 2003 to October 27, 2003, causing the Claimants a loss of work opportunity. Carrier compounded this violation failing to deny the appeal within the 60 day time limit provisions of Rule 69. Carrier’s File No. S3-UP 359. General Chairman’s File No. N 1 396. BRS File Case No. 13113-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.

The claim was filed by the Organization in this matter by letter dated November 22, 2003 over an alleged violation of the Agreement commencing October 6, 2003.

By letter dated January 16, 2004, the Carrier denied the claim.

By letter dated February 12, 2004, sent certified mail (Certified No. 7003 1010 0001 8796 3068) the Organization appealed the Carrier's denial.

By letter dated June 24, 2004, the Organization advised the Carrier that it had not received a response to its appeal within the 60-day requirement provided in the Agreement and requested that the Claimants be compensated and the claim be allowed as presented.

By letter dated July 13, 2004, the Carrier advised the Organization that it had not received the Organization's appeal of the first level denial of the claim.

By letter dated August 12, 2004, the Organization forwarded to the Carrier the correspondence from the Organization's file, which included a certified mail receipt dated February 12, 2004 (Certified No. 7003 1010 0001 8796 3068) and a signed PS Form 3811 signed by the Carrier on February 17 for the Organization's February 12, 2004 certified letter with the designation 7003 1010 0001 8796 3068.

We do not reach the merits of the dispute.

RULE 69 - CLAIMS AND GRIEVANCES 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 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.

- 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 will be notified in writing within that same time of the rejection of his decision. Failing to comply with this provision, the matter will be considered closed, but this will not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. . . .**
- C. The requirements outlined in paragraphs A and B, pertaining to appeal by the employee and decision by the Carrier, will govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer will be barred unless within nine (9) months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties. . . ."**

The dispute arose on October 7, 2003. The Organization filed a timely claim (within 60 days as required by Rule 69(A)) by letter dated November 22, 2003. At the first level, the Carrier timely denied the claim (again, within 60 days as required by Rule 69(A)) by its letter dated January 16, 2004.

The Organization then filed a timely appeal of the Carrier's January 16 denial by its letter dated February 12, 2004 (within 60 days from receipt of the Carrier's January 16 denial, as required by Rule 69(B)). The Carrier asserts that it did not receive the Organization's February 12, 2004 appeal within the required 60-day period. However, the record sufficiently shows that the Organization timely appealed the Carrier's February 12 denial and the Carrier did receive that appeal. The Organization's February 12 appeal is designated as Certified No. 7003 1010 0001 8796 3068 and the Organization produced a certified mail receipt dated February 12, 2004 (Certified No. 7003 1010 0001 8796 3068) as well as a signed PS Form 3811 signed by the Carrier on February 17, 2004 with the designation 7003 1010 0001 8796 3068. The Carrier therefore received the Organization's February 12 appeal on February 17, 2004. Under Rule 69(C) ("[t]he requirements outlined in paragraphs A and B, pertaining to appeal by the employee and decision by the Carrier, will govern in appeals taken to each succeeding officer . . .") at the outside, the Carrier had 60 days from February 17, 2004 to respond to the Organization's February 12 appeal. The Carrier did not do so within that 60-day period.

Because the Carrier did not timely respond to the Organization's February 12 appeal, Rule 69(A) as incorporated by Rule 69(C) dictates the result - "[i]f 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." On that basis, the claim shall be sustained as presented.

The Carrier's arguments do not change the result. The Carrier argues that even if the Carrier did not respond in a timely manner, the Organization cannot prevail because it did not file an appeal in a timely manner. The premise of that argument is that the Organization did not timely appeal the Carrier's January 16, 2004 denial. However, the certified mail receipts prove that the Organization did so.

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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 26th day of June 2009.