

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41153
Docket No. MW-41170
11-3-NRAB-00003-100038**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)
(– Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (painting and paint prep work) at the Locomotive Shop Building 3 and the Blacksmith Shop Building 16, at the Wilmington Maintenance facility in Wilmington, Delaware, beginning on July 15, 2008 and continuing through August 4, 2008 (System File NEC-BMWE-SD-4786 AMT).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance written notice of its plans to contract out said work.**
- (3) The claim as presented by Vice Chairman S. Stearn on September 3, 2008 to Mr. J. Wood shall be allowed as presented because said claim was not disallowed in accordance with Rule 64(b).**
- (4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Claimants R. Stidham, M. Bremer, C. Pearson and T. Ruff shall now be compensated at their respective rates of pay for an equal share of the total of four hundred and twelve**

(412) hours worked by the outside forces in the performance of the aforesaid work.”

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, dated September 3, 2008, alleges that the Carrier violated the Scope and Work Classifications Rules, the advance notice requirements, when outside forces performed routine surface preparation, painting and work related thereto at the Delaware Maintenance Facility during the period of July 15 – August 15, 2008. Finally, the Organization contends that the Carrier filed a late response to the claim and, therefore, it must be sustained as presented pursuant to Rule 64(b).

In regard to the timeliness issue, the Carrier replies that it did file a timely response to the claim. The Carrier acknowledges that advance notice was not issued because “[s]upervision . . . where the disputed work was performed, was not familiar with the procedure necessary when contracting out work as provided for in the BMW Agreement.” Nevertheless, the Carrier contends that the Claimants did nothing to mitigate their losses while watching outside forces prepare and paint the facility.

The progression of the claim on the property reveals it was processed in the usual and customary manner, including placement before the Carrier’s highest officer designated to handle it. Following a conference discussion on March 19, 2009, the claim is now properly before the Board for adjudication.

Rule 64(b) states that should the Carrier deny a claim, it “shall, within sixty (60) days from the date the same is filed, notify whoever filed the claim . . . in writing, of the reason for such disallowance” and “[i]f not so notified, the claim . . . shall be allowed as presented[.]”

The claim is dated September 3, 2008; the Carrier received it on September 18, 2008. The Carrier states that it cannot be held responsible for postal delivery, so it asserts the denial of the claim dated November 12, 2008 is within the 60-day window for issuing a disallowance under Rule 64(b).

To determine the filing and presentation of the Organization’s claim to the Carrier and to address the timeliness of the Carrier’s response disallowing the claim, the Board interprets and applies Rule 64(b) consistent with on-property Third Division Awards cited herein.

Third Division Award 35461 states that the postmark on “[t]he certified mail receipt for the claim letter . . . is the date the claim was considered to have been filed when certified mail is used as the delivery system.” Certified mail was used in this claim; thus this claim was filed on the postmark date, i.e., September 3, 2008.

Third Division Award 40096 states that “[b]ased on well-established precedent . . . the date a claim is ‘presented’ is when it is mailed. See, e.g., Third Division Awards 24440 and 32550.” Thus, this claim was presented on September 3, 2008.

Further interpretative authority is on-property Third Division Award 36047, wherein the Board held:

“The Carrier contends that the envelope and mailing receipt for the response from the Division Manager – Labor Relations proves that the decision was timely rendered. The Carrier asserts that it is not responsible for ensuring receipt of the decision and cannot be held liable for errors of the U.S. Postal system. . . .

A careful review of the record convinces the Board that the Carrier failed to respond to the Organization’s February 25, 1999 appeal within the required 60-day time limit set forth in Rule 64. In this case it is immaterial whether the May 4 date of successful mailing is

the one considered in determining timeliness, as contended by the Organization, or the April 28, 1999 date of the original denial letter due to the Carrier's contention that it followed proper procedures in delivering it to the post office and the fault lay with the U.S. Postal Service. . . ."

Based on these on-property Third Division Awards, the Board finds that the Carrier's disallowance of the claim dated November 12, 2008 was untimely because it falls outside the 60-day window prescribed in Rule 64(b).

The Organization met its burden to prove that the disallowance by the Carrier was untimely. Accordingly, the claim will be allowed as presented pursuant to the requirements set forth in Rule 64(b).

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 21st day of November 2011.

**CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 41153
DOCKET MW-41170**

(Referee Patrick Halter)

The Organization submitted a claim, postmarked September 3, 2008, which all parties acknowledge was actually received by the Carrier on September 18, 2008. While the Carrier responded to the initial claim on November 12, 2008, within the 60-day window from actual receipt, the Majority determined that the Carrier failed to comply with the time limit requirements of Rule 64(b) because the response was not issued within 60 days of the date the Organization put the claim in the mail.

Although the Majority stated its decision was in conformity with prior on-property Awards, three of the cited decisions (Third Division Awards 24440, 32550 and 40096) were not on Amtrak property and, more importantly, simply confirm that mailing the claim within 60 days of the date of the occurrence constitutes compliance with the time limit requirements of the particular Rule on those other properties. The last cited Award (Third Division Award 36047) did involve Amtrak, but the Carrier Members strongly dissented to that Award. For the sake of brevity that Dissent is incorporated herein by reference.

Regrettably, the Majority elected to ignore other well established precedent, such as Third Division Awards 11575, 25208 and 29359, which recognize that the time limit for response cannot begin to run until correspondence from either party is actually received. Specifically, in Third Division Award 29259, which adjudicated a dispute between the parties to this case, the Board stated:

“After careful consideration of the issue, we find Second Division Award 8268 directly on point. Citing a long line of earlier precedent Awards, the Board concluded that it is the date of receipt by Carrier’s designated official that is determinative for the purpose of calculating timely disallowance of the claim.”

The inherent lesson in the Majority’s decision in the instant case would require that Carriers and Organizations use their crystal balls to foresee that a claim or response had been placed in the mail and immediately begin research and response preparation. Should someone’s crystal ball be cloudy, particularly where the U.S. Mail fails to deliver the correspondence, which undisputedly occurs on occasion, that party is out of luck. The Majority’s decision has absolutely no basis in reality, is clearly out of step with better reasoned Awards and does nothing to

CARRIER MEMBERS' DISSENT TO AWARD 41153

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enhance the cooperative effort necessary for harmonious labor/management relations.

Clearly, the decision in this case is palpably erroneous and for this reason, we dissent.

Richard F. Palmer

Carrier Member

Michael C. Lesnik

Carrier Member

November 21, 2011