

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43920
Docket No. MW-45347
19-3-NRAB-00003-190242**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The claim* as submitted by Assistant General Chairman D. Beal, by letter dated October 17, 2017, to Division Engineer T. Mason shall be allowed as presented because it was not disallowed by Division Engineer in accordance with Rule 14 (Carrier’s File BMWE-621 NRP).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Valdez and D. Hawrys must be compensated for sixty-six (66) hours at their applicable overtime rate of pay.**

***The initial letter of claim will be reproduced within our submission.”**

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.

Claimants established and hold seniority within the Carrier's Maintenance of Way Department. On August 22, 23, 24, 25, 28, 29 and 31, 2017 and September 1, 2017, the Carrier assigned junior employees S. Harrington and K. Conley to perform flagging at crossings for test trains between MH 9 to MH 116 on the Michigan Line.

By letter dated October 17, 2017, the Organization presented a claim contending that the Carrier violated the Agreement by assigning the junior employees. In a letter dated November 2, 2017, the Carrier denied the claim. The denial was mailed to an outdated address for the Assistant General Chairman Beal. There is no evidence that Beal received the Carrier's denial. Thus, on January 16, 2018, Beal appealed the claim and notified the Carrier that because it had failed to respond to the grievance within the sixty-day time limit, the claim was in procedural default and must be awarded as presented. On March 9, 2018, the Carrier responded, stating that the Carrier had timely responded to the claim and attaching the delivery receipts. As the parties were unable to resolve the dispute on-property, it is properly before this Board for final adjudication.

The Organization contends that the sole issue before this Board is whether the claim must be allowed due to the Carrier's failure to timely disallow the initial Claim, pursuant to Rule 14(1):

"RULE 14 – GRIEVANCES

1. All claims or grievances other than those involving Discipline must be presented in writing by, or on behalf, of the employee(s) involved, to the supervisor within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the supervisor shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or the representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented."

The Organization contends that the Agreement was initially violated when the Carrier assigned junior employees to perform flagging at crossings for test trains between MH 9 to MH 116 on the Michigan Line. The Organization contends that it properly presented a claim to the Carrier's initial designated officer but did not receive a timely response. The Organization contends that it provided proper notice of the Assistant General Chairman's new address, so the Carrier had no excuse for failing to properly mail the denial.

The Carrier concedes that it sent its denial to an outdated address but contends that this claim should not be allowed due to a simple clerical error. The Carrier contends that it responded to the claim at the first level and the Organization had the opportunity to respond to the Carrier's denial and address the merits of the claim.

The Carrier contends that the Claimants had no entitlement to the work claimed, because flagging duties were not ordinarily and customarily performed by Claimants. The Carrier contends that the Organization failed to provide any evidence in support of its contention that the Claimants were entitled to the overtime. The Carrier contends that the employees who were assigned to the flagging duties were the only employees who were qualified to perform the disputed work. Finally, the Carrier contends that the claim is excessive.

As mentioned, the Carrier official denied the claim in a letter but sent the letter to the wrong address, even though two months earlier, the Organization had notified the Carrier of the new address, which appears on the face of the filed claim. The Organization presented evidence that when the Carrier was asked to share the information, its officials replied, "Thanks, David. Noted and will do so."

Because it did not initially receive the Carrier's denial, the Organization appealed and asked that the claim be granted on procedural grounds. The Carrier argues that it made a good faith effort to comply and the Organization was able to reply to the denial.

There is precedent that a simple clerical error should not cause a claim to be allowed when a good faith effort to comply was shown. Fourth Division Award 4602. There, however, the Board found that the error occurred due to the actions of both parties because there was no evidence that the Organization had notified the Carrier of the General Chairman's new address. The on-property record here shows that both the

Carrier's file and the letterhead contained the Assistant General Chairman's new address, but the Carrier official did not send the denial there.

The Organization raised the timeliness argument at its earliest opportunity and again at each appeal. When the Carrier's denial fails to comply with the specific requirements set forth in Rule 14, the parties' Agreement requires that the claim shall be allowed as presented. Third Division Award 39957; Third Division Award 36047.

We therefore find because the Carrier failed to timely deny the claim, the claim must be sustained. This decision is based solely on the procedural violation by the Carrier and expresses no opinion on the merits of the claim.

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 28th day of January 2020.