

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44962  
Docket No. MW-46814  
23-3-NRAB-00003-210751**

**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)  
(-Northeast Corridor**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement when it allowed outside forces to perform Maintenance of Way work (building office structures) in Wilmington Shop Building 25 beginning February 7, 2020 and continuing (System File BMWE-158548-TC AMT).**
- (2) The Agreement was further violated when the Carrier failed to comply with advance notification and conference provisions in connection with the Carrier’s intent to contract out the subject work.**
- (3) The claim\* as presented by Vice Chairman G. Anirina, by letter dated April 6, 2020, to Mr. Daniel Ruppert shall be allowed as presented because said claim was not disallowed in accordance with Rule 64.**
- (4) As a consequence of the violations referred to in Parts (1) and/or (2) and/or (3) above, Claimants A. Gliniak, D. McGrory, J. Perillo, Mark Petrillo and Michael Petrillo (Structures Department employees assigned to Gangs C302 who are headquartered at the Wilmington Yard in Wilmington, DE) shall now receive compensation for “\*\*\* 564 hours, split equally among the claimants, at their proper straight time and overtime rates of pay. This claim is herein presented, as defined in Rule 64(e) on a “continuing” basis, in addition to the 564 hours listed herein in the event the contractors continuing doing this**

**BMWED Scope protected work.'**

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

**The Claimants have established and maintain seniority within the Carrier's Maintenance of Way and Structures Department. On the dates giving rise to this dispute, the Claimants were assigned to the Carrier's Structures Department in Gang C302, headquartered at the Wilmington Yard in Wilmington, Delaware.**

**On June 6, 2019, the Carrier notified the Organization that it intended**

**to engage a contractor to replace the concrete floor in Building 25 (Power House) of the Wilmington Maintenance Facility in Wilmington, DE.... This location will be used for a new maintenance personnel break room and meeting room and space for supervisory staff. The former location of these personnel was condemned, and they are currently located in temporary sheds.**

**The contractor will perform concrete slab removal and installation. They will also remove existing shoring, demolish existing and install new stair treads, paint and prep existing steel beams, install concrete deck and concrete sealant, and provide a ventilation system for painting. This project is expected to begin the summer of 2019 and last about 120 days.**

**Amtrak employees responsible for this location are fully engaged in the performance of their regularly assigned duties. It cannot be expected that they could continue with their ongoing functions, as well as complete this project in the time frame required....**

**A conference was scheduled for June 26, 2019, after the Organization requested one. At the outset of the meeting, the Organization requested a site visit, instead. Despite several attempts, no conference ever took place.**

**On August 9, 2019, the Carrier sent a proceed letter to the Organization:**

**In May and June, I provided notice of the two above-referenced projects in the Wilmington Maintenance Facility. These were projects to replace the floor and roof of the powerhouse building so Maintenance Department employees could be moved into it. The buildings where these employees were previously housed were condemned and they are currently working out of temporary sheds.**

**\*\*\***

**Given the fact that Amtrak is at risk of not completing this project in the required time frame, the Wilmington Maintenance Facility Roof (04-LCR-0 1-0419) and Floor (04-LCR-02-0519) projects will proceed as outlined in my May 8, 2019 and June 6, 2019 letters, respectively. It is imperative that this work be completed as soon as possible and that these projects be coordinated to allow employees to move into the building.**

**BMWE-represented employees at this location do not generally perform work of this scope and magnitude in this facility. They are currently fully engaged in their day to day duties and cannot take on tasks of this size, complete it in the necessary timeframe, and continue with their regular duties. Additionally, a workforce with licensing and qualifications to install roof material is required to ensure a 35-year warranty.**

**Beginning on February 7, 2020 and continuing, the Carrier assigned or otherwise allowed outside forces to build the office structures in Wilmington Shop Building 25.**

**In a letter dated April 6, 2020, the Organization filed a claim on behalf of the Claimant(s) by mailing a claim via the United States Postal Service ("USPS"). The USPS tracking notice indicates, "Notice Left (No Authorized Recipient Available)" at**

the Carrier's address on April 9, 2020, at 12:16 PM. It is undisputed that the Carrier did not respond to this letter.

By letter dated June 25, 2020, the Organization reiterated its initial claim that the Carrier violated the Agreement when it assigned scope-covered work to outside forces instead of Agreement employees. The Organization added an additional assertion that the Carrier violated Rule 64 of the Agreement when it failed to timely respond to the Organization's initial claim. By letter dated August 28, 2019, the Carrier denied the Organization's claim. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Organization contends that the Carrier committed a fatal procedural violation when it failed to timely notify the Organization in writing of its disallowance of the Organization's initial claim letter within the contractually required sixty days specified within Rule 64. The Organization contends that Rule 64 requires that the Board fully sustain the claim as presented without regard to the merits.

Rule 64(b) provides,

Should any such claim or grievance be disallowed, AMTRAK shall, within sixty (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 shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of AMTRAK as to other similar claims or grievances.

The Organization contends that the Carrier is responsible for managing its operations and for having an authorized recipient available, even recognizing that the claim was filed during the early days of the COVID pandemic. The Organization recognizes that the pandemic disrupted the parties' normal way of doing business but contends that it cannot be held responsible for the Carrier's failure to make arrangements to collect its mail. It cites several on-property awards where the Carrier's failure to timely disallow a claim led to a sustaining award, such as Third Division Awards 41153, 36047, 35461, 40096, 38347, and 37068.

In support of its position, the Organization cites to Board decisions holding that a claimant who fails to accept delivery of an Investigation notice has nonetheless been timely notified. In Third Division Award 24129, this Board quoted from Third Division Award 15575:

This Board has previously held that a Carrier cannot be held to be an insurer of the receipt of notice (Award 13757) and that an employee has the responsibility not to avoid service of such notice. (Award 13757). We have further determined an employee may not frustrate the service of such notice by absenting himself from his proper address or by delaying in some other manner a response to a Post Office Notice without offering a reasonable explanation. (Award 15007).

That Board considered the failure of a claimant to timely file a claim after notice of dismissal was sent to the address on file.

The notice was sent to the last address of the Claimant known to the Carrier. Notably this address had been given to the Carrier only a few months before the investigation. The Carrier can do little more than send the notice by registered mail to the address provided to them by the Claimant. If the address was improper or the Claimant was unknown at the address he gave the Carrier, it is beyond the control of the Carrier and they cannot be held responsible.

The Organization contends that this principle should be applied now that the “shoe is on the other foot.” The Organization contends that April 6, 2020, the postmark date, is the date that the claim was considered to be filed. *See*, Third Division Award 35461. The Organization sent the claim to the Carrier’s proper address. It provided evidence that a notice was left at the Carrier’s address. It contends that it cannot be responsible for the Carrier’s failure to pick up its mail.

The Carrier contends that the Organization has failed to provide any evidence that the claim was received by the Carrier, or that the Carrier refused the claim. The Carrier contends that the only evidence that the Organization provided was that the claim was deemed “unclaimed” and returned to sender on June 15, 2020. The Carrier contends that it never received the claim or notice that mail needed to be picked up.

The Carrier contends that the tracking documentation for the initial claim shows that the letter was never actually delivered. The tracking indicates that the notice was

left but does not show where or how it was left. The Carrier contends that delays by the USPS were common, especially during the early days of the pandemic.

The Carrier contends that Third Division Award 18599 supports its position that a USPS notice does not constitute receipt of a claim. There, the Board wrote,

At the outset it should be noted that the inquiry on this point differs from those cases dealing with the question of whether the date of mailing or date of receipt of a notice is to be considered the applicable date for applying limitations. Here there was no receipt by the Carrier of a notice of appeal. Carrier did receive a notice from the Post Office Department that a certified letter had been addressed to it. However, such a notice does not constitute notice of appeal...

The Carrier contends that following this precedent does not penalize either party for the failure of the USPS to deliver the claim. The Carrier contends that it cannot be expected to respond to mail that it never received or knew about.

In Third Division Award 36047 (an on-property award), this Board sustained a claim against the Carrier when it failed to respond to an appeal within the contractual time limit. *See also*, Third Division Award 37068.

The Organization provided proof that the claim was delivered to the USPS on April 7, 2020 for delivery to the Carrier. The USPS attempted delivery on April 9, 2020, and left a notice with the Carrier that it had mail to be retrieved. The Carrier never retrieved the mail and did not notify the Organization within 60 days of the date the claim was filed that the claim was disallowed. There is no question that regular business practices were disrupted during the pandemic, but this Board does not have the authority to ignore the clear contractual language, when the parties did not agree to do so.

In Third Division Award 38347 (an on-property award), this Board wrote:

The Carrier points to certain equitable considerations and asserted practices between the parties concerning claims handling that it asks this Board to consider. When clear contract language exists as it does here requiring the Carrier to respond within 60 days else the claim be allowed as presented, this dispute can only be decided on the basis of that clear language and not upon equitable principles or past practices.

Just as in Third Division Award 38347, this claim must be sustained “as presented.” The parties’ collective bargaining agreement allows no other result. This finding does not address either the merits of the Carrier’s defense or the merits of the Organization’s claim to the overtime payment involved.

The parties are directed to engage in a record review process to determine which Claimants are entitled to compensation and all employees shall be compensated accordingly as requested in the claim dated April 6, 2020.

**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 24<sup>th</sup> day of May 2023.