Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 45152
Docket No. MW-47766
24-3-NRAB-00003-220851

The Third Division consisted of the regular members and in addition Referee Diego Jesús Peña when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

(1) The discipline (dismissal) imposed upon Mr. J. Mucha, by letter dated June 1, 2018, for violation of EI 14.3.3 Maintaining Roadway Equipment and MWSR 1.2.5 Safety Rules, Mandates, Instructions, Training Practices and Policies was not fair and impartial or in accordance with due process rights under the Agreement (System File B-M-3622-Z/11-22-0296 BNR).

(2) The claim* shall be allowed as presented because the initial letter of claim was not disallowed in accordance with Rule 42.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. Mucha:

'… shall be reinstated to service with all seniority rights restored and all entitlement to, and credit for, benefits restored, including vacation and health insurance benefits.

The claimant shall be made whole for all financial losses as a result of the violation, including compensation for:

4) straight time for each regular work day lost and holiday pay for each holiday lost, to be

paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service);

5) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service;

6) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been removed from service;

7) health, dental and vision care insurance premiums, deductibles and co-pays than he would not have paid had he not been unjustly removed from service.

All notations of the dismissal should be removed from all carrier records.'

***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.

Factual Background

Claimant Jeff Mucha worked as a Gang/Selection Foreman assigned to a mobile gang in Montana for approximately 12 years prior to his dismissal in 2018.

On April 26, 2018, the Claimant was operating a tamper with a surfacing gang in Zurich. Montana. After the gang had staged in the siding, some of the Claimant's coworkers reported a concern with the tamper the Claimant was operating. The roadmaster inspected the Claimant's tamper and found irregularities, specifically that the drum-like part of the machine to the right of the stairway was not in the locked position and that the left rear receiver was not engaged on a hook. As the machine operator, the Claimant was responsible for locking up/pinning up these parts of the machine. Failure to lock up/pin up is considered serious and is classified as a critical decision. At the time of the incident, the Claimant was working under a 12-month review period resulting from a Level S suspension assessed on October 11, 2017.

The Carrier conducted an investigation on May 4, 2018 in Tacoma, Washington. On June 1, 2018, the Carrier dismissed the Claimant for failing to properly lock up/pin up equipment on the tamper, which the Carrier determined violate Maintaining Roadway Equipment Rule 14.3.3 and Maintenance of Way Safety Rule 1.2.5.

On July 25, 2018, the Claimant's hearing representative, Mr. Shaun Ellestad, notified the Carrier representatives by email that he had not received any decision from the Carrier regarding the May 4 investigation and had not received the hearing transcript. Later that day, Ms. Kathy Brough forwarded the notice of dismissal and a copy of the transcript to Mr. Ellestad by email.

The facts described above are undisputed.

Position of Organization

The Organization contends that this claim should be dismissed because the Carrier failed to timely respond to the Organization's initial letter of claim. The Organization maintains that Mr. Ellestad, the Claimant's hearing representative and Vice General Chairman, sent a letter dated July 27, 2018, by certified mail to Mr. Gabriel, the General Manager North West Division, asserting a grievance on behalf of the Claimant. The Organization states that the Carrier never responded to Mr. Ellestad's July 27, 2018 letter. For this reason, the Organization argues that under Rule 42 of the Parties' Agreement, the July 27, 2018 grievance should be sustained, and the Carrier's objections be disregarded.

Carrier's Position

The Carrier insists that it never received the Organization's July 27, 2018 letter containing the Claimant's grievance.

According to the Carrier, the record shows it mailed the notice of dismissal to the Claimant and the Organization on June 1, 2018. While it disputes the Organization's assertion that it did not receive the notice of dismissal, the Carrier maintains it responded to the Organization's July 25, 2018 email, and sent the notice of dismissal and investigation transcript to the Organization by email on July 25, 2018.

The Carrier states that it did not receive any communication regarding the Claimant's dismissal until April 12, 2021, when it received a letter from Mr. John Mozinski, General Chairman, dated April 9, 2021 claiming that because the Carrier failed to respond timely to the July 27, 2018 letter, it was obligated under Rule 42 to reinstate the Claimant and make him whole. The Carrier disagrees with the allegations made in Chairman Mozinski's letter.

The Carrier concludes its argument by asserting that the Organization failed to timely appeal the Claimant's dismissal and for that reason the claim should be dismissed.

Analysis

The Board must first determine whether the Organization filed its grievance challenging the Grievant's dismissal timely. Rule 42A states:

> **All claims or grievance must be presented in writing by or on behalf of the employee involved to the officer of the Company authorized to receive same, 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 Company 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 the Company as to similar claims or grievances.**

The Organization contends that it mailed the grievance on July 27, 2018 by certified mail; the Carrier maintains it never received the grievance.

The Board has carefully studied the Organization's arguments and the awards contained in its submission supporting the proposition that when the Carrier fails to respond timely to a grievance, the Carrier's objections must be disregarded as untimely. The awards cited by the Organization in its submission, however, are distinguishable because in those cases the Carrier received the Organization's grievances timely. (See Third Division Awards 37811, Referee Meyers, 42698, Referee Helburn, 42966, Referee Whelan, 43643, Referee VanDagens and Public Law Board No. 7738, Award No. 30). In this case, the Carrier claims it did not receive the grievance.

In situations such as this, where the Organization claims it mailed the grievance timely, the burden is on the Organization to prove it actually mailed the grievance timely and properly. Because of the difficulty in proving receipt of a mailed grievance, a presumption exists that a grievance, placed in a correctly addressed envelope with proper postage and placed in the mail for delivery by the U.S. Postal Service is presumed to have been delivered to the Carrier within a reasonable time. This presumption is known as the mailbox rule.

To establish the mailbox rule presumption, the Organization must prove that the grievance was placed in an envelope with the correct address and proper postage. It

must also prove how the envelope was mailed—i.e., that the letter was either placed in a mailbox at a post office location or picked up by an authorized person to place the letter with the postal authorities. Generally, existence of a written letter—or in this case a written grievance—standing alone is insufficient to prove that it was properly mailed.[1] To establish the presumption of delivery and receipt, the sender must produce evidence that the grievance was placed in a properly addressed envelope with proper postage, and that the correctly addressed and posted envelope was actually mailed. This is consistent with prior Board decisions that require proof of actual posting and not relying solely on the date the grievance was written. (See Third Division Award No. 43643, Referee VanDagens).

The Board has carefully examined the record for evidence supporting the Organization's claim that it properly mailed the July 27, 2018 grievance. The record reflects the possible existence of the July 27, 2018 grievance, but there is insufficient evidence the grievance was properly mailed to the Carrier's representative. There is no evidence in the record that the envelope in which the July 27, 2018 grievance was placed was properly addressed or contained the proper postage. There is also no evidence of how or when the July 27, 2018 grievance was posted or mailed.

The July 27, 2018 letter contains a USPS number, reflecting the possibility that it may have been sent certified mail, return receipt requested. But there is no evidence in the record of a signed return receipt—commonly referred to as a green card—confirming that the Carrier's representative received the grievance. The Board concludes that there is insufficient evidence that the Organization timely appealed the Carrier's June 1, 2018 dismissal of the Claimant.

At the hearing, the Organization strongly objected to the Carrier's claims that it did not receive the July 27, 2018 grievance and insists that the Board should have disregarded the Carrier's arguments to the contrary. The Board respectfully disagrees. A party cannot respond to a notice that it does not receive. It is precisely for this reason that the party asserting that a notice was mailed has the burden of proving by substantial evidence that the notice was mailed or by establishing the presumption of delivery under the mailbox rule.

For the reasons stated herein, the Board denies the Organization's claim.

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[1] ***See*** **HILL, MARVIN F., AND SINCROPI, ANTHONY V.,** ***Evidence in Arbitration, Second Edition*****, (BNA 1987), pp. 23-24.**

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of February 2024.

LABOR MEMBER'S DISSENT
TO
AWARD 45152, DOCKET MW-47766
(Referee Diego Peña)

In this case, the Organization asserted that the claim was timely sent to the Carrier. In addition, the Organization sent an appeal claiming that the Carrier never responded to the initial claim. Finally, the claim was conferenced and the Organization sent a follow-up letter once again claiming the Carrier never responded to the initial claim. At no point did the Carrier respond to the Organization or challenge the validity of the initial claim until its submission. Notwithstanding, the Majority improperly entertained the Carrier's untimely argument challenging delivery of the claim. This is in violation of National Railroad Adjustment Board (NRAB) Circular No. 1, which requires the Carrier to "… affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute." The fact that the award has an entire section entitled "Carrier's position" is improper especially in light of the fact that they had no position in the record.

In this case, the Board improperly accepted a new argument before the Board. This principle is well established and has been upheld by overwhelming precedent at the division. An almost identical issue has been addressed by Referee Barry Simon in **Award 182 of Public Law Board No. 7163**, wherein he held:

> "Based upon the record before us, we find that the Carrier, during the handling of the claim on the property, had offered no defense to the Organization's allegation that no decision on the claim was rendered within the time limit. While the Carrier addressed this issue before the Board, we may not consider it as it was a new argument. We must, therefore, sustain the claim as presented, without regard to the merits."

In addition, **Award 34153 (Referee M. Zusman)** held:

> "The Organization's claim on the property and before the Board is a violation of Rule 18 as the Claimant neither received written notice that his position was abolished, nor was he displaced by a senior employee as required.
>
> There was no response to the Organization's claim on the property. It was conferenced on October 31, 1996. The only other on-property record is the letter from the Organization dated March 13, 1997 documenting the conference and stating that the Carrier 'did not dispute the facts of the claim.'
>
> The Board makes clear that while it fully read the Carrier's Submission, those arguments were never presented on the property. That includes the Carrier's argument that the parties agreed to waive procedure and rule on the merits. It is axiomatic that when either party fails to raise an argument while the dispute is on the property, it may not have such new argument later considered before the Board.

"There is no documented record on the property of the Carrier ever responding to the Organization's claim or reaching joint agreement to waive procedural issues."

In further support of the position that the Board cannot consider new arguments are the following awards:

Award 15444 (Referee J. Dorsey):

"In its Rebuttal Submission Carrier contends for the first time that the claim presented to the Board is fatally at variance with the Claim processed on the property, and for this reason moves for dismissal. This motion is denied for two reasons: (1) it was made untimely; and, (2) even if timely made it finds no support in the record- substance, not form or phraseology, is the test."

Award 27477 (Referee E. Goldstein):

"As a final matter, we take note that the Organization advanced several additional arguments in its Submission which were never raised during the handling of this dispute on the property. The Board will not entertain arguments first presented at this level. This well-established principle has been followed in many Awards, of which First Division Award 18897, Second Division Award 4296 and Third Division Award 5469 are merely representative examples."

Award 27613 (Referee E. Goldstein):

"As a final matter, we must point out that the Organization's procedural objection, that the Superintendent who rendered the discipline was not present at the hearing, has not been considered since this is a wholly new argument never before addressed on the property and therefore, inadmissible before the Board."

Interpretation No. 1 to Award 32565 (Referee E. Suntrup):

"There is numerous precedent in this industry dealing with the particular characteristics of Section 3 arbitrations under the Railway Labor Act which explicitly states that the Section 3 arbitral process is appellate. New arguments or new information are not permitted into the record after a case has been docketed for arbitration before either the National Railroad Adjustment Board or before other Section 3 Boards of Adjustment.[3] New information would include any new argument presented to the Board by either party at any stage in the process after a case had been docketed: in the Submissions to the Board; at the point of hearing or panel discussion with a Neutral Member in attendance; and certainly at any point after an Award had been issued. There are many good reasons for this time-honored policy. Certainly not the least of which is that such policy permits finality to be achieved with respect to any given claim.[4]" (Footnotes omitted)

Award 36753 (Referee M. Newman):

"Initially the Board notes that the Article 36(h) timeliness argument made by the Organization in its Submission before the Board was not raised on the property or during the Investigation, and is a new argument which, under established Board precedent, cannot be considered at this appellate stage. ***"

Award 40367 (Referee E. Benn):

"But the Organization's problem is that this alleged shortcoming in the notice was not an argument that it raised on the property. See Third Division Award 29909:

> '. . . Thus, it is new argument which, under our Rules, cannot be considered. This Board has long subscribed to the premise that matters that have not been dealt with on the property cannot be advanced for the first time before this Board . . . .'" (Emphasis in original)

Award 43761 (Referee I. Helburn):

"*** The appeal/arbitration procedure in the railroad industry is ultimately an appellate procedure that requires the Board to resolve the dispute based on the on-property record before it. Because the Board finds that the 'judge/jury' contention was not perfected on the property, it is viewed as new argument that is inappropriate for the Board's consideration."

Award 44267 (Referee I. Helburn):

"*** The parties have structured their long-standing appellate procedure used for arbitration so that Boards are to consider only the evidence and the contentions that come into the record during the on-property progressing of claims filed by the Organization. The Board has no choice but to find that the contention based on the parties' March 5, 2013 settlement is new argument that comes too late to be considered by this Board."

See also, Third Division Awards 22843 (Referee G. Larney), 31351 (Referee E. Wesman), 35388 (Referee M. Zusman), 37315 (Referee A. Kenis), 37602 (Referee E. Goldstein), 40806 (Referee G. Wallin) and 43433 (Referee P. Betts).

The Majority further compounded its error when placed an unprecedented burden on the Organization to establish a fact with additional evidence when never challenged by the Carrier. In fact, the Carrier's silence on the issue should have been deemed acceptance. Instead, the Majority not only adopted the Carrier's new arguments, it shifted a burden back on the Organization on

behalf of the Carrier. The principle that unrefuted assertions are accepted as fact is well settled by this Board.

Award No. 35 of PLB No. 7163 (Referee G. Wallin):

"It has been well settled in railroad arbitration, for decades, that when assertions of material fact are not refuted, they become accepted as proven fact for purposes of analysis of the record. **Therefore, such unrefuted assertions do not require any supporting evidence**; they stand as proven by the lack of any effective challenge to them. On the record before us, therefore, and without more, the Organization's assertions that were unrefuted by the Carrier establish all of the requisite factual detail necessary to determine the merits of the claim."

Award 32089 (Referee J. Mason):

"*** First is the principle that material assertions made by either party on the property which are not refuted, rebutted or denied on the property must be accepted as established fact. Third Division Awards 25358, 20083 and 11660, among others, so hold. ***"

Award 37475 (Referee J. Javits):

"*** The Board has repeatedly stated that failure to refute a parties position contentions leave them to be material fact (See for example Third Division Awards 14385, 15503, 16431, 20083, 21277, 22775 and 24758). It is clear to the Board that the Carrier did not refute the Organization's position. Therefore, the Board rejects the Carrier's procedural argument on this matter."

Award 37832 (Referee G. Wallin):

"***It is well settled that unrefuted assertions of material fact become established as actual fact without further need for support. ***"

Award 41443 (Referee P. Halter):

"The Board finds that the Organization's unrebutted assertion is a fact of record. Crediting this unrebutted assertion is consistent with decisional authority set forth in Third Division Award 36852 wherein the Board held:

> 'It is well settled that unrefuted assertions of material fact become established as fact for purposes of evidentiary analysis.'"

Award 41879 (Referee W. Miller):

"The record is not clear as to whether the Claimant performed an HLCS test or whether the HLCS was performing correctly. What is clear is that the Organization argued that HLCS failures were not unusual and the Carrier did not refute the statement. Therefore, in accordance with the long-established principle in the industry that unrefuted assertions must be accepted as being factually correct (Third Division Awards 12840, 16430, 20041 and 20083) the Board concludes that the Claimant's argument constituted a valid defense. ***"

Award 44301 (Referee K. VanDagens):

"This statement was not refuted by the Organization. It is well-settled that 'material assertions made by either party on the property which are not refuted, rebutted or denied on the property must be accepted as established fact.' Third Division Award 32089. ***"

See also, Awards 21654 (Referee D. Randles), 38122 (Referee M. Zusman), 39644 (Referee S. Brown), 37901 (Referee A. Kenis), 40892 (Referee M. Newman) and 42188 (Referee A. Knapp).

This principle is not just the Organization's position. The former Chairman of the NRAB and employe of the National Railway Labor Conference, Mike Lesnik, wrote in dissent to Award 31498:

"Simply stated, the Carrier's on-property assertion went unrefuted on the property and should have been accepted as fact. Absent the Referee succumbing to the Organization's **new affirmative defense argument** we trust this claim would have been denied in its entirety." (Emphasis in original)

The fact that the claim was sent, was unrefuted in the on-property record. This same logic applies here. The Organization's assertions went unrefuted. Absent the Board succumbing to the Carrier's new defense, the claim would have been sustained. The Carrier should not get to live by a different set of rules than the Organization. Accordingly, with the NRAB precedent and position that the Carriers have previously taken, this Board should have accepted that as fact and sustained the claim. By considering arguments which were not properly before the Board, the Board exceeded its appellate jurisdiction.

For all of these reasons, I must respectfully dissent.

Zachary C. Voegel
Labor Member