Award No. 51
Case No. 63
TCU No. ER 398
EL No. 823

PUBLIC LAW BOARD NO. 167

PARTIES TO DISPUTE:

Transportation-Communication Division BRAC
and
Erie Lackawanna Railway Company

STATEMENT OF CLAIM:

Claim of the General Committee of the T-C Division, BRAC, on the Erie Lackawanna Railroad Company, that:

1. Carrier violated the Agreement by not assigning senior extra employee to vacancy of operator-clerk position at Greenville, Pennsylvania commencing on or about the date of September 25, 1966.

2. Carrier violated the Agreement by not assigning a junior extra operator to vacancy of operator-clerk position at Greenville, Pennsylvania commencing on October 23, 1966.

3. Carrier shall, because of violation in (1) above, be required to compensate the senior idle extra operator a day's wages at the pro-rata rate of the position at Greenville for each day of violation.

   (a) In the event that there were no extra employees available to work the position, the Carrier shall compensate the senior idle regular assigned employees on their rest days, a day's pay at the time and one-half rate of their own position for each day of violation.

   (b) Carrier shall permit joint check of records to determine number of days involved and names of claimants.

OPINION OF BOARD:

The instant claim alleges a violation of the effective Agreement in that the Carrier failed to assign the senior extra employee to the operator-clerk's position on September 25, 1966; and, further, failed to assign the junior extra employee after the second bulletin expired and no application had been received. In addition, the Organization alleges a violation of the sixty day time limit provision due to the failure of the Superintendent to respond to the claim.

An analysis of the facts involved herein indicate that the regular incumbent of the operator-clerk's position at Greenville resigned September 11, 1966, to return to college. The vacancy was bulletined three times--August 24, September 19 and October 13--without a bid, except on the last bulletin an extra operator did bid but failed to qualify and the position was finally abolished on November 29, 1966.

As the first part of the instant claim is concerned with a time limit violation, necessarily, this facet will receive our initial attention. The District Chairman filed a claim herein on November 7, 1966. On April 22, 1967, the General Chairman wrote the Superintendent that the Carrier had failed to disallow said claim within the sixty day time limit provision, therefore, he requested the Carrier advise whether the claim would be allowed as presented. The Superintendent on April 25, 1967, controverted the General Chairman's allegation of the Carrier's failure to deny the claim and alleged a denial was sent to the District Chairman on December 16, 1966, within the sixty day requirement. In turn, following a series of correspondence, the Organization on June 23, 1967, wrote as follows:

> "Superintendent Wogan indicates that claim was denied by his letter under date of December 16, 1966. However, he failed to furnish any proof that District Chairman Fair received his denial letter. District Chairman Fair states that he did not receive any denial of his claim."

Subsequently, the Carrier submitted affidavits from the Chief Division Clerk to the effect that on December 16, 1966, he dictated a letter to his Secretary addressed to the District Chairman, copy attached, denying the claim. In addition, the Secretary submitted an affidavit in support, stating that she typed said letter, addressed it properly and placed it on the Chief Clerk's desk for his signature. The latter further avers that he signed said letter and placed it in the outgoing mail box that date. Each of these affidavits were duly signed and attested to before a Notary Public.

In this posture, the Organization argues that the Carrier is required to submit proof that the District Chairman received the Superintendent's letter denying the claim. It is, thus, the Organization's contention that when the General Chairman unequivocally states that "District Chairman Fair states that he did not receive any denial of his claim", the Carrier is required to prove that the District Chairman did receive same. As indicated, the Carrier submitted duly notarized affidavits whereas the Organization stands upon a bare statement of denial. In support of its position by the Organization that the Carrier, nonetheless, is in default, it cites Award 20384, First Division, wherein the Referee held:

> "The Organization categorically denies ever having received the letter of February 6, 1961. There is a presumption that a letter sent is delivered. But this presumption is overcome by the positive denial."

It also cites Award 16000, Third Division, wherein the Referee stated:

> "We have previously held that the Organization is not charged with the burden of establishing that it did not receive the claim denial. Awards 10173 (Bailer). In this case such burden rests upon Carrier. Award 10742 (Miller), 11211 (Miller), 11893 (O'Gallagher) and 15070 (Zack)."

Ergo, predicated on these Awards and others, the Carrier is in violation. Somewhat reluctantly, we disagree with the Organization's conclusions and, therefore, feel impelled to state what we believe to be the applicable rules.

Where the Organization initiates a claim via mail, that claim is effective when actually received by the Carrier and the time limit rule begins to run from that moment. As the Organization selected the medium of communication, the Carrier's answer is effective when the denial is placed in the U.S. mail

box regardless whether the Organization receives it. At this juncture, of course, the problem is bared. A positive denial by the Organization overcomes the presumption as stated by Award 20384. We do not quarrel with that statement. Thereafter, however, when the Organization alleges a failure to receive the denial, the burden of going forward with the proof shifts to the Carrier. In the instant dispute, the Carrier submitted notarized sworn affidavits that such denial was dictated, typed, properly addressed and mailed to the District Chairman. It has met the positive denial. The burden of going forward, as distinguished from the burden of proof which never shifts, is now upon the Organization. The only statement we find thereon is from the General Chairman reiterating that the District Chairman did not receive a denial of the claim - without further substantiation or affidavit.

In Award 17227, Third Division (Supplemental), the following statement contained therein is significant:

> "The record contains affidavits from the Local Chairman, dated December 18, 1967, to the effect that he did not receive the denial letters from the Supervisor of Signals and Communications, ---."

To the extent that the Organization has failed to meet the burden which then shifted to it, it is our opinion that the Carrier has affirmatively established that it is not in violation of the time limit rule and, therefore, under the circumstances herein, the denial claim was deemed effective on April 25, 1967.

Insofar as the merits of the instant claim is concerned, the Organization alleges that there were ten extra operators available who could have been assigned under the rules. The Carrier, in turn, contends that after the regularly assigned incumbent resigned, there were only five unqualified extra men on the list--four college students and a teacher. Further,

> "Carrier was aware that they also would resign shortly to return to school, and that to force them to qualify and work at Greenville would result in their earlier resignations. Because none of these employees were at any time qualified for this position, Rule 19, as amended, was not violated by the Carrier."

Hence, the Carrier denies that there were any qualified extra employees available to fill the assignment. In lieu thereof, the Agent worked overtime 286½ hours on the operator-clerk's position--an average of 6½ hours daily overtime at the Agent's rate of pay while performing the operator-clerk's duties. Despite these facts, nevertheless, the Organization seeks additional compensation for the senior, idle, extra Operator.

In our view, under the facts prevalent herein, we recognize that the Carrier technically violated the Agreement. The parties have aptly phrased it as follows:

> "We did what we did because we had to do it."
>
> "There is a Shanghai Rule in the Agreement but the Carrier failed to comply."

FINDINGS:

Upon the entire record and all the evidence, after hearing, this Board finds that the captioned parties herein are Carrier and employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement; that the parties have had due notice of these proceedings; and that this Board has jurisdiction over the parties and the dispute involved herein.

That technically the Agreement was violated without assessing a monetary penalty.

AWARD: Claim denied per Opinion

Public Law Board No. 167

/s/ Murray M. Rohman

Murray M. Rohman, Chairman
Neutral Member

/s/ R. O. Norton - Dissenting

R. O. Norton, Employee Member

/s/ C. H. Zimmerman

C. H. Zimmerman, Carrier Member

Dissenting as to interpretation
of time limit rule.

Cleveland, Ohio
July 9, 1971