

PUBLIC LAW BOARD NO. 4669

PARTIES)
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
) BOSTON AND MAINE CORPORATION

STATEMENT OF CLAIM

1. The claim as presented by Assistant General Chairman Bradley Winter on behalf of Road Electric Welding Foreman P. O'Reilly to Manager-Work Equipment & Welding D. J. MacDonald under date of July 8, 1986 shall be allowed as presented because the claim was not timely disallowed as set forth within Article V of the August 21, 1954 National Agreement.
2. The claim as presented by Assistant General Chairman Bradley Winter on behalf of Road Electric Welder M. Pelland to Manager-Work Equipment & Welding D. J. MacDonald under date of July 8, 1986 shall be allowed as presented because the claim was not timely disallowed as set forth within Article V of the August 21, 1954 National Agreement

OPINION OF BOARD

The history of this dispute and resolution of general arguments common to the cases before this Board are set forth in *Award 1* of this Board and are incorporated herein.

The relevant portion of the record

developed on the property shows that while proceedings were winding their way through the courts, individual claims were filed on behalf of the numerous affected employees. With respect to these particular Claimants, the Organization asserts that claims dated July 8, 1986 signed by Assistant General Chairman B. A. Winter and addressed to Manager-Work Equipment & Welding D. J. MacDonald were filed along with the other numerous claims for the other employees alleging that, among other things, Claimants were improperly placed out of service as a result of incidents arising out of the labor dispute which has been the subject of the cases before this Board.

With respect to these claims, by certified letter dated September 29, 1986 the Organization filed an appeal asserting that the Carrier Officer to whom these claims were sent "failed to answer this claim within the prescribed time limits of the claim and grievance procedure". The Organization further asserted in that letter that because of the failure to respond, these specific claims had to be

allowed as presented.

By letters of November 26, 1986 the Carrier's Assistant to Vice President-Engineering J. J. Shay wrote the Organization stating:

Please refer to your appeal dated September 29, 1986 on behalf of Mr. Mike Pelland [and Mr. Peter O'Reilly] which results from your original claim dated July 8, 1986 to Mr. D. J. MacDonald - Manager, Work Equipment & Welding. Your appeal is based on the allegation that the original claim was never answered.

I have discussed this with Mr. MacDonald and he cannot recall receiving the original claim. I cannot locate the original claim among the many claims you have forwarded lately.

Would you please forward a copy of the original claim to me directly and I will ensure that Mr. MacDonald responds accordingly.

The other numerous claims for the other employees continued to be processed. With respect to the specific Claimants in this matter, by letters dated December 15, 1986 the Organization pressed appeals asserting the grounds which were discussed in *Award 1* of this Board.

By letter dated February 19, 1987 the Carrier further denied appeals on the numerous claims filed for other employees listing the names of the employees. Claimants in this matter were not listed in that letter.

By letter dated September 1, 1987 from General Chairman J. P. Cassese to the Carrier's Director of Labor Relations

R. F. Lamphier, in its efforts to bring the disputes arising out of the labor dispute to a board for resolution, the Organization stated:

In addition, as per your discussion with Vice-President W. E. LaRue on August 5, 1987, the Organization has noted that the Carrier has not denied the appeals of M. Pelland and Peter O'Reilly, who were included with the other 146 identical appeals dated December 15, 1986, which we believe was merely an oversight in the Carrier's denial of February 19, 1987. You agreed to respond in writing to this matter. Therefore, it is the Organization's intent to list the above claims as cases to be docketed.

The threshold question is whether the record shows that claims were filed on behalf of these two Claimants. We find that the record adequately demonstrates that claims were filed. The Organization has produced copies of the claims and the record sufficiently shows that those claims were filed along with the other numerous claims brought as a result of the labor dispute. That demonstration is sufficient to shift the burden to the Carrier to demonstrate that the claims were not received or to at least raise sufficient doubt as to their filing. The Carrier has not met its shifted burden. All that has been demonstrated by this record is the November 26, 1986 contention by the Carrier's Assistant to Vice President - Engineering Shay to Assistant General Chairman Winter that "I have discussed this with Mr. MacDonald and *he cannot recall* receiv-

ing the original claim [and] I cannot locate the original claim among the many claims you have forwarded lately" [emphasis added].

Thus, the Organization has shown that it filed the claims and the Carrier only responded through a hearsay assertion by one Carrier official that the individual to whom the claims were addressed "cannot recall" receiving the claims and that the Carrier was unable to locate the claims. Given the circumstances of the filing of all of the claims demonstrated by these cases, we are unable to find that the Carrier's assertion amounts to a sufficient denial that it received the claims which we can consider as adequate to refute the Organization's demonstration that these claims were filed along with the other claims arising out of the labor dispute. We therefore find that the Organization has sufficiently demonstrated that the claims were filed.¹

The second factual determination that must be made is whether the record reveals that the Carrier denied these claims. The portions of the record set forth above clearly shows that at no time did the Carrier ever deny these specific

claims, much less within 60 days of their filing.²

Article V of the Agreement provides [emphasis added]:

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 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 carrier shall, within 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 Carrier as to other similar claims or grievances.

The rule is clear. If a claim is not disallowed within 60 days then the claim "shall be allowed as presented". We therefore have no choice in this matter. These specific claims were not disallowed within the 60 day time frame. Under the clear language of the rule, the claims "shall be allowed as presented". *See e.g., Third Division Award 17085:*

The claim was not denied ... within the 60-day period stipulated in Article V, Section 1(a) of the August 21, 1954 Agreement. Accordingly, the claim must be allowed as presented and there

¹ It does not appear that the Carrier seriously contests the Organization's assertion that the claims were, in fact, filed. *See* Car. Submission at 3 ("In the middle of the production of all this paperwork, Assistant General Chairman Winter, on July 8, 1986, submitted the instant claims").

² Again, it does not appear that the Carrier seriously contests the Organization's assertion that the claims were never actually disallowed. *See* Car. Submission at 3-4 ("For whatever reason, the Carrier officer to whom these claims were addressed never received them and was unaware of their existence until the Organization's 9/29/86 demand that they be paid due to the Carrier's failure to respond").

is no need to consider the merits.

The Carrier's argument (Car. Submission at 3) that the "mountain of paperwork" produced by the results of the strike and picketing should dictate a different result is not persuasive. Given the clarity of the rule and the lack of discretion that it affords us (or the Carrier), the amount of paperwork that had to be handled as a result of the actions taken by the Carrier cannot change the result. The phrase "shall be allowed as presented" for failure to timely disallow a claim is most compelling.

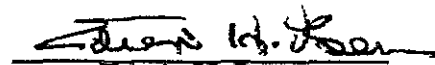
Nor can we adopt the Carrier's suggestion (Car. Submission at 5) that because of the circumstances these claims should be handled on the merits or remanded to the parties so that an on-property record of proper handling can be created. As we read the rule, we have no discretion to do as the Carrier asks. If a claim is filed and not disallowed within 60 days, the claim "shall be allowed as presented". That is what happened here and that is how this case must be resolved.

Throughout the cases before this Board, we have applied the fundamental rule of contract construction that this Board has no authority to add language to the parties' Agreement. *See Award 1* quoting *Third Division Award 27590* ("To do so is clearly insertion of additional language within the Rule, some-


thing the drafters did not see fit to insert, something we must avoid."'). We have applied that rationale to find contrary to arguments made by both parties where the parties' positions have varied with the clear language of the relevant rules. *See Award 1*. That rationale is equally applicable here. To accept the Carrier's position, we would have to change the language of Article V and ignore the requirement that when a claim is not timely disallowed it "shall be allowed as presented". We do not have that authority. The claims must therefore be sustained.

AWARD

Claims sustained.


Edwin H. Benn
Neutral Member


R. E. Dinsmore
Carrier Member


W. E. LaRue
Organization Member

North Billerica, Massachusetts

Dated: 2/8/93