

PUBLIC LAW BOARD NO. 6867
AWARD NO. 8
CASE NO. 8

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier refused to allow Mr. J. A. Arellano to work on November 8, 2002 after he reported to Mason City as instructed by Supervisor G. Largent and then subsequently reported to South Pekin Yards (System File UPSW-2026T/1350359).

(2) The claim* as presented by Vice Chairman S. W. Waldeier under date of December 13, 2002 to Manager J. M. Tausz shall be allowed as presented because the claim was not disallowed in accordance with Rule 49.

(3) As a consequence of the violation referred to in Parts (1) and (2) above, Claimant J. A. Arellano shall now '*** be compensated for all time lost on November 8, 2002 at the applicable rate of pay.'

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

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

This claim raises two issues. First, there is a procedural issue raised by each party with respect to the other's compliance with Rule 49, Time Limit on Claims, which provides, in pertinent part:

(a) All claims and grievances will be handled as follows:

(1) 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 sixty (60) days from the date of the occurrence on which the claim or grievance is based. The date a claim is presented is the date the claim is sent, as evidenced by postmark, when the U. S. Mail service is utilized. Should any such claim or grievance be disallowed, the Carrier will 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 will be allowed as presented but this will not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances. The date a party is notified is the date written notification is received by the party. The date claim is filed is the date the claim is received by the Carrier's designated officer.

Second, the substantive issue raised concerns whether Carrier failed to give Claimant the correct information concerning the location where he

was to report in order to execute a displacement, thereby causing him one days loss of pay when he arrived late at the gang's changed reporting site.

The correspondence on the property reveals a copy of a claim dated December 13, 2002 from Vice Chairman Waldeier to Manager of Special Projects Tausz asserting that Carrier was responsible for Claimant's reporting to the wrong location when he sought to exercise his displacement rights on Gang 9041 on November 8, 2002, and requesting compensation for loss of earnings on that date. The next letter is from Waldeier to Tausz dated March 10, 2003, enclosing a copy of said claim and indicating that it should be paid as presented since no response was received.

In 'the Organization's appeal dated March 20, 2003 General Chairman Bushman refers to a telephone call from Tausz received by Waldeier on March 18, 2003 advising him that there was no record of Carrier having received the claim. Bushman states that the claim was mailed in the normal accepted manner and was apparently misplaced or mishandled by Carrier, and requests payment under Rule 49. By letter dated May 5, 2003, Carrier disallowed the claim, indicating that it was untimely since it protested an incident occurring on November 8, 2002 and was not received by Tausz until four (4) months later.

Carrier's May 6, 2003 denial from Director of Labor Relations Ring to Bushman states that Tausz was informed on March 18, 2003 that the claim had not been received in a timely manner, attaching a written note from Waldeier to this effect, and indicating that the Organization has failed to provide any proof that the initial claim was sent or received by Tausz, and that speculation is insufficient to meet its burden of proving

that the claim was timely presented. Therein Ring asserts that the claim was appealed nine (9) days after its receipt by Carrier, who was not provided 60 days within which to respond, and that the Organization's noncompliance with Rule 49 should result in the claim being dismissed.

A conference was held on July 30, 2003. The Organization's September 18, 2003 appeal indicates that the claim was sent to Tausz on March 10, 2003 with an inquiry about its status. With respect to the timeliness issue, Bushman states: "I can assure you the claim was filed and sent to Mr. Tausz in a timely and proper manner. Why it was not received by Mr. Tausz is not known." In Carrier's December 15, 2003 denial, Ring asserts: "...your 'assurance' that the initial claim was sent does not meet your required burden of proof. The fact of the matter is that the claim was not presented within sixty (60) days of the alleged violation and as such it is not timely. You have not provided any concrete evidence to show that the claim was ever sent."

In argument, the Organization relies upon Third Division Awards 17085, 20900, 21755, 27640, 28403, and Public Law Board No. 4768, Award 30 to support its contention that the claim must be accepted as presented because it was not disallowed within the required 60 days set forth in Rule 49(a). On the other hand, Carrier cites Third Division Awards 31800, 31527, 29762 and 29105 as justifying dismissal of the claim since the Organization has failed to meet its burden of showing that it was timely filed under Rule 49(a), and, at best, has presented an irreconcilable dispute of fact.

A careful review of the record convinces the Board that this claim must be decided on procedural grounds without reaching its merits. The

Organization bears the burden of establishing that it timely filed the claim under the provisions of Rule 49(a) when that fact is disputed by Carrier. Here, in explanation as to why there had been no response to the claim, Tausz immediately advised the Organization that he had no record of having received it, thereby raising the issue of its timeliness at the earliest possible opportunity in the progression of the claim. This contention was documented by him in writing.

Despite this fact, and Carrier's repeated assertion that it had no record of receipt, the only response from the Organization was to assure Carrier that the claim was sent in the normal course. Rule 49(a) states that the date a claim is presented is the date it is sent as evidenced by postmark when U.S. Mail is used, and the date it is filed is the date it is received by Carrier's designated officer. In this case the Organization provided no specificity as to how, by whom and when it was sent, or proof by postmark or otherwise as to when it was received by Waldeier.

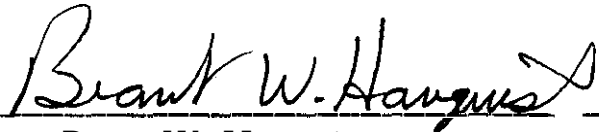
As noted in Public Law Board No. 4768, Award 30, cited by the Organization, "statements alone . . . to the effect that letters have been mailed do not sufficiently meet the evidence test." In the context of this case, it was incumbent upon the Organization to provide more than mere assertions that the claim was presented timely in order to defeat the threshold timeliness issue repeatedly raised by Carrier throughout the claim processing. Its failure to do so at best raises an irreconcilable dispute of fact, and at worst reveals that it did not meet its required burden of proof, both of which require that the Board dismiss the claim. Third Division Awards 31800, 31527, 29105; Public Law Board No. 4768, Award 30.

AWARD:

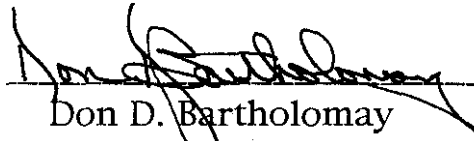
The claim is dismissed.



Margo R. Newman
Neutral Chairperson



Brant W. Hanquist
Carrier Member



Don D. Bartholomay
Employee Member

Dated: May 30, 2006

Dated: 5-30-06