Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8725
Docket No. 8575
2-B&O-CM-'81

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Baltimore and Ohio Railroad Company

Dispute: Claim of Employes:

No. 1. That carrier violated the terms of the controlling agreement when Manager of Labor Relations, Mr. Swann, did not make reply to the Organization's appeal dated October 10, 1978, until December 15, 1978, which is (61) days after date said claim was filed.

No. 2. That under the controlling Agreement, the provisions were violated on the date of June 2, 1978, when the Carrier utilized the services of an outside contractor, Donahue Brothers, to perform rerailing and wrecking work at Boulder, W. Va., thus permitting said contractor to use it's own ground forces in lieu of utilizing the service of it's own Cowen "assigned wrecking crew", who were in fact, reasonably accessible and available.

No. 3. That accordingly, the Carrier be ordered to compensate the following Claimants, members of the Cowen, West Virginia, "assigned wrecking crew", as follows:

Claimant, H. T. Bragg, for twenty-two and one-half hours pay at the time and one-half rate and eight hours pay at the doubletime rate; D. Greenleaf, C. L. Bean Jr., and C. H. Groves for fourteen and one-half hours pay each at the time and one-half rate and eight hours pay each at the doubletime rate; T. G. Taylor, J. F. Carpenter, J. Lewis, for sixteen hours pay each at the time and one-half rate and nine hours pay each at the doubletime rate, account of this violation of Article VII of the December 4, 1975 Agreement.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Part 1 of the Organization's claim states that:

> "1. That carrier violated the terms of the controlling agreement when Manager of Labor Relations, Mr. Swann, did not make reply to the Organization's appeal dated October 10, 1978, until December 15, 1978, which is (61) days after date said claim was filed."

The Organization filed the instant claim by letter dated July 10, 1978, which claim the Carrier's Division Manager of the Car Department stated was received on July 17, 1978. The claim was declined by letter dated September 8, 1978. The claim was appealed by the Organization by letter dated October 10, 1978, which letter was date stamped as received by the Carrier's Labor Relations Department, Baltimore, Maryland on October 16, 1978. The appeal was declined by Carrier's letter dated December 15, 1978, which was received by the Organization on December 19, 1978. The Organization responded by letter dated December 20, 1978, which letter was date stamped as received by the Carrier on December 27, 1978.

The Organization contends that the sixty (60) day time limit found in Carrier's Proposal No. 7, Article V of the August 21, 1954 Agreement, which became Rule 33 of the Schedule Agreement, was violated when the Organization's letter of October 10, 1978, received by the Carrier on October 16, 1978, was not answered until December 15, 1978, and received by the Organization until December 19, 1978. The Organization states that beginning with October 16, 1978, through December 15, 1978, is 61 days. The Organization states that by the Carrier's own admission, it agrees that it posted its letter on December 15, 1978, which was not received by the Organization until December 19, 1978, some 65 days after receipt by the Carrier of the October letter. The Organization contends that the Carrier's attempt to exclude counting the first day is in error, and the Organization asserts that such is not true anywhere throughout the railroad industry. The Organization states the first day is always counted.

The Carrier contends that the date of receipt of a claim or appeal by the Carrier determines the start of the 60-day time limit, which commences to run from that date; and that the Carrier stops the running of the time limit by mailing or posting within the 60-day period. The Carrier states that the general rule of law is that the time within which an act is done is to be computed by excluding the first day and including the last day. The Carrier contends that the appeal, being received on October 16, 1978, and excluding that date, the 60th day from receipt was December 15, 1978, the date on which the Carrier mailed its reply, declining the appeal. The Carrier states that such denial was within the time limits.

In Third Division Award No. 14695, it was stated:

> "The National Disputes Committee Decision No. 16, dated March 17, 1965, incorporated into Award 13780, held that the claim should be considered 'filed' on the date received by the Carrier. Consequently, the date of receipt determines the 60 day time limit which commences to run from that date. Subsequently, Awards have held that the Carrier must stop running of the time limit by mialing or

"posting the notice required within the 60 days of the date that the claim was received. (Award 11575 and Second Division 3656)." (Emphasis added)

Second Division Award No. 3656 focused on the Carrier's receipt of an appeal through the mails as the start of the sixty-day time limit. Second Division Award 7626 recognized that a Carrier complies with time limits provisions when it gives up control of a letter by dispatching it in the U.S. Mails or other method of communication authorized by the Organization within the time limits.

In Second Division Award 3545 it was stated that:

> "The general rule (in law) is that the time within which an act is to be done is to be computed by excluding the first day and including the last, that is, the day on which the act is to be done ***" 86 Corpus Juris Secundum 13(1). The words 'from' and 'after' are frequently employed as adverbs of time, and when used with reference to time are generally treated as having the same meaning. Ibid, 13(3). Thus, if something is to be done 'within' a specified time 'from' or 'after' a given date or a certain day, the generally recognized rule is that the period of time is computed by excluding the given date or the certain day and including the last day of the period, and similarly, if something is to be done 'within' a specified time 'from' or 'after' a preceding event, or the day an act was done, the day of the preceding event or on which the act was done must be excluded from the count. Ibid, 13(7)."

We are compelled to find that the Carrier did timely deny the appeal within the 60-day time limits of Rule 33. The appeal was received by the Carrier on October 16, 1978, and the denial letter was posted in the U.S. Mail on December 15, 1978, which was the 60th day, and just within the time limits of Rule 33. We have followed the general rule set forth in Second Division Award No. 3545 which excludes the first day of the period and includes the last day of the period. In doing so, we have rejected the Organization's position that the first day is always counted. No proof is offered by the Organization to support the contention relative to time limits, and the cited awards before the Board are clearly to the contrary. The Organization positions that time limits should run from the date it mails the appeal and/or in the alternative time limits should run to the date the Organization receives the denial letter are contrary to the cited Awards of this and other Divisions of the Board.

This Board understands the Organization's concern that it took six days for the appeal letter dated October 10, 1978, to get to the Carrier on October 16, 1978. The Organization states that perhaps four days would be normal. The record indicates that the claim filed on July 10, 1978, was not received by the Carrier's Division Manager until July 17, 1978; and the Organization's letter dated December 20, 1978 was not received by the Carrier until December 27, 1978. These dates are not in dispute, but do indicate a possible problem. The Organization may choose

to discuss this apparent problem with the Carrier and the Postal Service. And, the Organization may well choose to send its letters by registered mail return receipt requested. All parties may choose to keep post-marked envelopes.

Based on the record before this Board, we find that part 1 of the Employees' Claim must be denied.

On June 2, 1978, at approximately 12:55 a.m., 30 cars in Train 51 derailed at Boulder, West Virginia. The Grafton wreck train and crew was called at 1:30 a.m. to clear the derailment, and an outside contractor, Donahue Brothers Emergency Service was contacted at 4:05 a.m. The Grafton wreck train arrived at 6:15 a.m. on June 2, 1978. Donahue Brothers Co. arrived with their off-track equipment at between 1:30 and 2:30 p.m. on June 2, 1978. The derailment was cleared as of 3:20 p.m. on June 3, 1978, where Donahue Brothers Co. was released and the Grafton wreck train and crew departed the scene and was relieved at 11:00 p.m. on that date. Donahue Brothers utilized their own equipment consisting of three dozers, one loader and three operators, as well as six of their own groundmen. The Organization's claim is based on the contractor's use of its own ground forces instead of utilizing the services of the Carrier's own Cowen assigned wrecking crew. The Organization contends that such violated Article VII of the December 4, 1975 Agreement and Rule 142 of the controlling Agreement.

Rule 142 was not violated since neither the Cowen wreck crew nor outfit was called. We find that the Carrier was in compliance with Article VII of the December 4, 1975 Agreement. The Carrier's assigned wrecking crew at Grafton was called and used to work with the outside forces. There is no requirement in Article VII as such applies to the facts of this case that more than one Carrier wrecking crew be called or that the Carrier's forces be actually commingled with the contractor's forces while working at the derailment site. Please see Second Division Award No. 8106. We are compelled to deny this claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 3rd day of June, 1981.