

Award No. 10742
Docket No. CL-10108

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier reimburse Mr. H. N. Lewis, Waco, Texas, for two hours and thirty minutes at punitive rate of pay of General Clerk No. 2 position for March 5, 1956, account Carrier's failure to handle his claim within the time limits provided for in Article V-1 of the August 21, 1954 National Agreement.

EMPLOYES' STATEMENT OF FACTS: On Monday, March 5, 1956, Mr. H. N. Lewis, a furloughed or unassigned Group 1 employe, was being used temporarily on General Clerk No. 2 position, which has an assignment of 8:00 A. M., to 5:00 P. M., Monday through Friday, and a part of the regularly assigned duties include the checking of freight to and from cars and trucks in unloading and/or loading of merchandise, from 8:00 A. M., until 12:00 Noon, and longer when needed.

On the date in question, regularly assigned Delivery Clerk L. A. Seaberry, whose assigned hours are 8:00 A. M., to 5:00 P. M., and whose assigned duties are checking and delivering freight from the freight warehouse to consignees and/or draymen, was called for 5:30 A. M., along with a breakout and truckers, for checking and unloading merchandise cars instead of General Clerk No. 2, whose duty is to check freight that is being unloaded by the breakout and truckers that were called on overtime before assigned hours.

Claim was originated by Local Chairman H. E. Russell on March 20, 1956, with Mr. H. P. Irvin, Agent, Waco, and was declined by Mr. Irvin on March 29, 1956. (Employes' Exhibits A-1, A-2 and A-3.)

Claim was appealed to Mr. W. G. Hazlewood, Division Superintendent, Tyler, Texas, by Division Chairman W. L. Metcalf on May 26, 1956. (Employes' Exhibit B.)

On August 4, 1956, Division Chairman Metcalf wrote Mr. Hazlewood, attaching copy of his letter of May 26, 1956, and stated that the sixty day time

(Exhibits not reproduced.)

OPINION OF BOARD: The above Claim was originated by Local Chairman H. E. Russell on March 20, 1956, with Mr. H. P. Irvin, Agent, Waco, Texas, who declined it on March 29, 1956. On May 26, 1956, it was appealed by the Division Chairman of the Brotherhood, Mr. W. D. Metcalf, to the Division Superintendent of the Carrier, Mr. W. G. Hazlewood. On August 4, 1956, the Division Chairman wrote the Division Superintendent that he had received no reply to the appeal made on May 26, 1956; that he assumed that the Claim was approved; that the sixty day time limit for declination had elapsed; and that he further asked for information as to when payment would be made. On August 6, 1956, the Division Superintendent replied that a written declination of the appeal had been prepared on May 29, 1956, and that "Evidently this correspondence was lost in the mail as our records indicate it was passed to the Mail Bureau promptly after signing." Enclosed in the August 6, 1956 communication was a carbon copy of the letter of declination written by the Division Superintendent to Mr. Metcalf on May 29, 1956. On October 1, 1956, the matter was appealed by the Brotherhood to Mr. M. L. Erwin, First Assistant Manager Personnel, on the ground that Article V of the August 21, 1954 National Agreement (to which the parties are signatory) had been violated. This appeal was rejected November 29, 1956. Further appeal was made and subsequent declinations in writing were prepared and transmitted by Carrier on February 14, 1957, and on October 2, 1957. The Claim was presented to the Third Division of the National Railroad Adjustment Board on October 14, 1957.

The issue before us is whether Carrier is in violation of Article V of the 1954 National Agreement.

Section 1 of this Article sets up rules and regulations for the handling of all claims or grievances arising on or after January 1, 1955. Paragraphs (a), (b), and (c) of this section are applicable to the problems which confront us. Article V of the National Agreement is incorporated in this opinion by reference.

Article V 1. (a) specifically provides that if a claim or grievance be disallowed, ". . . the carrier shall, within 60 days from the date same is filed, **notify** whoever filed the claim or grievance . . . in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented . . ." (Emphasis added).

Article V 1. (c) provides that appeals taken "to each succeeding officer" shall be governed by the same requirements outlined in paragraphs (a) and (b)—with exceptions not involved in the Claim at hand.

It has been contended in behalf of Carrier that there was no wilful violation on its part of Article V (if any occurred, which it denies); that the Division Superintendent **had** written a declination letter on May 29, 1956; that Article V does not make Carrier responsible for a delivery failure; that the Division Chairman may simply have **lost** the notice of declination; that it was customary to send him written communications by depositing these in a pigeon hole provided for him in the central Mail Room, which was in the General Office Building where Mr. Metcalf worked; that this was in accordance with his wishes; that if he didn't get a bulletin, etc. out of his pigeon hole, it was customary to send him the written communication by U. S. Mail (**promptly**); that the personnel in the Mail Room were actually Mr. Metcalf's agents—in the sense that he would be involved in negligence on their part in

reference to him; and that Carrier is not required under Article V to show receipt of notice of declination.

On the other hand, Mr. Metcalf was in a position to positively certify that the May 29, 1956 letter was not received by him and that he had no knowledge of it until he saw the carbon copy which was attached to the August 6th letter.

There is less conflict in the facts pertaining to this Claim than would appear at first glance, e. g., Carrier has not contended that Mr. Metcalf received the declination notice within the time limits. Please see Page 20 of the Record in pending Docket CL-10109 (a companion Claim in reference to the matters commented upon above), which shows the following statement of the Carrier: **"While we are of the opinion that Mr. Metcalf correctly states that he did not receive Mr. Hazlewood's letter dated May 29, 1956 . . ."** (Emphasis added). At the time this admission was made, the Claim was pending on the property.

There is nothing in the Record before us that would indicate that on or before May 29, 1956, Mr. Metcalf, the Division Chairman, was either unavailable, incompetent, or purposely taking steps of any sort to avoid receipt of a notice of declination.

It appears that the Mail Room handled thousands of sundry communications per day, and we cannot sustain the proposition that mail room personnel, who ostensibly were neither hired or paid by Mr. Metcalf, or subject to his supervision or control, were his "agents."

On the property (Page 20 of Record in CL-10109), Carrier said: "The fact that Mr. Metcalf might not have received Mr. Hazlewood's letter May 29, 1956, is not conclusive that Mr. Hazlewood did not deny the claim in writing and thereby comply with the provisions of Article V of the General Agreement of August 21, 1954." (Emphasis added.) From our point of view, the Carrier, in this statement, manifested some degree of misunderstanding of the basic import of notification.

We do not find Carrier lacking in good faith. It appears that the Carrier official involved did prepare a timely declination letter; that he was able to locate a carbon copy of it in his files; and that he assumed that the letter probably would (or did) reach the Division Chairman within the time limits.

From an evidentiary standpoint, the Division Superintendent was unable to show that he or any of his assistants placed the letter in Mr. Metcalf's pigeon hole, or that it was mailed to him, or that it was delivered to him in any manner. No assistant clerk was in a position to so certify. The record of the outgoing communications of the office was not presented in evidence on the property, nor was a copy of such record shown as an exhibit in an ex parte submission.

It is our conviction that Carrier must make a better factual showing than this in order to comply with the requirements of Article V.

In recent Award 10173 (November, 1961) this Division held:

" . . . When either party is charged with failure to discharge the responsibility placed upon it by the Agreement in this regard, that party has the burden of proving it met its responsibility . . ."

This was in reference to the construction of Article V of the National Agreement.

Although there is authority to the contrary, we believe this Board's statement shown above represents the better point of view.

In the Claim at hand, it is our finding that Carrier was unable to show by sufficient and adequate proof that it complied with Article V of the National Agreement; and that therefore this Claim should be sustained.

This decision is based entirely on a procedural point and is not addressed to any other issues between the parties arising out of this Claim. In accordance with Article V, it "shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of August 1962.