NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20763
THIRD DIVISION Docket Number SG-20572

Irvin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(The Long Island Rail Road Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Long Island Railroad Company that:

(a) Carrier violated the Signalmen's Agreement, particularly the Clock Agreement of January 20th, 1966, when allowing other than Communication employes to install a clock in S. G. Tower in Brentwood.

(b) Carrier now pay to Maintainer J. A. Ryan three (3) hours pay at the straight time rate.

This claim is payable pursuant to Article V of the August 21, 1954 Agreement because Carrier did not render a timely decision on the September 27, 1972 appeal from Committeeman G. W. Graver to Chief Engineer J. D. Woodward.

OPINION OF BOARD: In this dispute we are faced first with the issue of whether or not there was a time limit violation by Carrier with respect to the provisions of Article V of the August 21, 1954 National Agreement. Under the provisions of that Agreement Carrier had sixty days to respond to Petitioner's appeal of the disallowed claim.

The pertinent facts are as follows:

1. The claim was initiatedby letter from Committeeman Graver, dated July 18, 1972. The claim was denied by letter dated July 31, 1972 from Assistant Engineer Aiken.

2. By letter dated September 27, 1972, Committeeman Graver appealed the Assistant Chief Engineer's decision to the Chief Engineer. By letter dated October 4,1972, the Chief Engineer wrote to the Committeeman denying the appeal.

3. By letter dated December 3, 1972, the General Chairman wrote to Carrier's highest officer charging a violation of Article V of the National Agreement as follows: "In as much as the time limits have been violated by Mr. Woodward's silence, to Mr. Graver's claim letter, dated September 27, 1972, I request a conference at your convenience."

4. Following a conference held on January 24, 1973, Carrier wrote to the General Chairman on February 13, 1972 denying the appeal both on the procedural and merits arguments and stating that a copy of the October 4, 1972 letter was enclosed.

5. The General Chairman, by letter dated February 22, 1973 wrote to Carrier's highest officer reiterating the procedural argument, stating that the copy of the October letter had not been enclosed with Carrier's letter of February 13, 1973 and raising certain new arguments on the merits. By letter dated March 1, 1973 Carrier responded and indicated an inadvertant omission of the October letter from its last correspondence and attaching the letter.

Carrier, in denying the procedural violation, contends that there was no factual denial by Committeeman Graver that he did not receive the October 4th letter, but merely a statement by the General Chairman. Carrier insists that the October letter was sent to Graver.

The Organization contends that they did **not** receive the October 4th letter (until after March 1, 1973) and that the Carrier was in default with respect to Article V. Petitioner argues that even though Carrier has a right to rely on the mails, it must at very least establish that it did in fact use the mails or otherwise tender proof of delivery. The Organization states that it cannot prove a negative; the burden of proof is on Carrier.

It must be noted that the record contains no information whatever with respect to the mailing of the October 4th letter; there was no information tendered even after Petitioner's December 3rd letter averring that the document in question had not been received.

The issue of alleged non-receipt of correspondence and the correlative violation of the time limits imposed by Article V of the 1954 National Agreement has been before the various Divisions of the Board on many occasions. While there are some conflicting decisions, the preponderence of the better opinions, in our view, hold that the Carrier has the burden of proving that the Claimant, or his representatives were duly notified in writing of the disallowance of the Claim at each level. In Award 14354 (Ives) the Board held:

"As we stated in Award 10173, 'Article V, Section 1 places correlative obligations upon the parties with

"respect to the progression of claims.' Just as Employees bear the responsibility of being able to prove that a claim is timely filed with a Carrier, so the burden of proof rests with a Carrier to prove that Employes are duly notified in writing of the reasons for the disallowance. Notification connotes communication of knowledge to another of some action or event. The method of communication in the instant case was left to the discretion of the party bearing the responsibility of notification and the Carrier apparently elected to use the regular first class Mail service rendered by the Post Office Department. Had the Carrier elected to use certified or registered mail service offered by the Post Office Department, probative evidence of delivery would be available to support Carrier's assertion.

Employes cannot be held responsible for the handling of Carrier's mail by the Post Office Department. It was the responsibility of the Carrier to be certain that the letter of disallowance was properly delivered to the Employes' Local Chairman."

Also see Awards 10742, 15070, 16000, 17227, 17291, 17999 and many others.

We concur in the reasoning expressed above, which is directly applicable to the instant dispute; Carrier has failed to meet its burden of proof. Based on the provisions of Article V Section 1 (a) of the National Agreement, this claim must be allowed as presented, without consideration of the merits; however, this shall not constitute a precedent or waiver of the contentions of the Carrier on the merits as to other similar cases or grievances.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 18th day of July 1975.