

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21373
Docket Number CL-20880

Dana E. Eischen, Referee

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
Express and Station **Employes**

PARTIES TO DISPUTE:

(The **Long** Island Rail Road Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7709) that:

a) The Carrier violated the existing clerical agreements between the parties when they arbitrarily disqualified Claimant E. A. White from the **5-C-1 training** program entered into by agreement of September 20, **1972**. (See attached agreement - Exhibit "B")

b) On **Page 2** of the existing September 20, **1972** agreement it states, "The training period contemplated by this agreement **will be twelve** (12) months. The trainee will be required to comply with the provisions of this section until the termination of the twelve **(12) months** referred to herein;" (Section 9 of Sept. **20, 1972** agreement) If the trainee is required to comply for a period of twelve **(12)** months, it would seem altogether reasonable that the Carrier must also comply.

c) Section **(8)**, "In the event an **employee's** progress is not satisfactory, he will be so advised in writing by the Director of Purchases and Materials." Section (8) does not say that such notice in **writing will constitute** abrogation of the agreement. Claimant's notice of disqualification on November 30, **1973**, also contains penalties not provided for in the agreement of September 20, 1972.

d) Section **(6)**, "**Employee(s)** awarded or assigned to the 5-C-1 clerical positions stipulated in Section (1) hereof, **will be guaranteed** five (5) days per week and will be accorded two (2) consecutive rest days per **week.**"

e) Claimant E. A. White is now entitled to a days pay for December 3 and December 4, 1973, and the difference in the rate of the position he now holds and that of the **Inquiry** Clerk's position. Claimant E. A. White worked as an Extra Clerk **from** December 1, **1973** until January 15, 1974. He bid a regular assigned position and was awarded same. Attached please **find** Claimant's letter, **5-page appeal** and wage claim dated January 24, 1974. (**Employee Exhibit "A"**)

OPINION OF BOARD: Claimant was awarded on February 14, 1973 a position of Clerk-Trainee pursuant to Section 5-C-1 of an Agreement between the parties entered into on September 20, 1972. Under date of November 30, 1973 Claimant received written notification of disqualification as a 5-C-1 trainee, by the Staff Assistant to Director of Purchases and Materials, Mr. R.P. Murray. According to the record, December 1 and 2, 1973 were Claimant's pass days and on December 3, 1973 he orally requested and was granted an "appeal hearing" on his disqualification. Claimant appeared, for the appeal hearing on December 4, 1973 with his own private counsel but thereafter acquiesced in having the Organization's Local Chairman represent him. At the conclusion of the hearing the Staff Assistant, Mr. Murray, orally denied Claimant's demand for reinstatement in the training program. Thereafter, Claimant filed a written claim letter dated January 24, 1974 with the Director, Purchases and Materials, by Certified Mail, Return Receipt Requested, with copy to the BRAC Local Chairman, as follows:

"Certified Mail
Return Receipt Requested

Mr. A. J. Hoover, Director
Purchases & Materials
Long Island Rail Road
Jamaica Station Bldg.
Jamaica, N. Y. 11435

Dear Sir:

Attached hereto are 5 pages representing my Appeal from Notice of Disqualification, presented to me at approximately 4:30 P.M. on November 30, 1973, and Claim for Loss of Wages.

The original of pages 1 and 2 were presented to your Staff Assistant R. P. Murray on December 4, 1973 at 90-24 Sutphin Blvd. in the presence of Local Chairman, Don Waldman, BRAC, and as no reply has ever been received from Mr. Murray, these pages are now being presented to you as part of my Appeal and Claim.

Pages 1 and 2 are essentially the same as presented to Mr. Murray on December 4, 1973 with the addition of a final paragraph making a formal claim for loss of wages.

The last 3 pages under the heading "Appeal from Disqualification - Part II" and dated December 8, 1973 give an account of the meeting of December 4, 1973 attended by R. P. Murray, Donald Waldman, myself and a stenographer for the carrier, M. E. Cummings. Stenographer's transcript has never been received by me or my Union representative, Donald Waldman.

"All 5 pages **have** been reviewed by Local **Chairman Waldman**, BRAC, and are now being presented to you, as head of the department, via United States **Post** Office Certified Mail..

Sincerely,

EVERETT A. WHITE /s/

Everett A. White

**Attachment: 5-page Appeal
& Wage Claim.**

cc: **Local** Chairman, Mr.
Donald Waldman BRAC"

Carrier tells us it denied these claims both as to alleged wage loss and reinstatement as a trainee via a detailed four-page letter dated **March 12, 1974** and **bearing** a **conclusory** paragraph as **follows**:

"Should you **consider this** matter not closed, you should direct yourself to and through the appropriate B.R.A.C. official who can progress it further for you."

This letter allegedly was sent by first-class mail to Claimant with no copy to the Organization.

At the core of this dispute is the contention by Claimant that he never received the **denial** letter of **March 12, 1974**. Carrier produced a copy of the denial letter at the hearing before our Board and provided a copy to the **BRAC Local Chairman** on **May 16, 1974** in response to the latter's repeated demands of April 5 and May 7, **1974** that **White's claims** be paid under **Rule 4-D-1 (a) time limit rule** for failure of **Carrier** to make a written denial within **60** days of January 24, **1974**. In **response** to the **Local Chairman's** k-D-1 (a) demand of April 5, **1974** the Staff Assistant had **alluded** to a March 3, **1974** denial letter from the **Director-Purchases** and Materials but had not provided a copy to **BRAC**. In his letters of April 15, **May 16** and **May 31, 1974** the Staff Assistant urged the **Local Chairman** to progress the case through the appeals machinery to the highest Carrier officer handling such claim. In letters of May 7 and 20, and June 5, **1974** the **Local Chairman** expressly declined to do so on the stated grounds that Carrier's alleged violation of Rule k-D-1 (a) prevented the Organization from **taking** "the proper procedural steps" of appeal to the Presidential level. Thereafter, the **instant claim** was progressed directly to our Board following the Staff Assistant's final letter of May **31, 1974**, without **further** handling on the property.

On the basis of the foregoing factual record each party seeks vindication on "procedural" grounds under Rule 4-D-1, to-wit: 1) The Organization asserts that Mr. White's claim must be **allowed as** presented for Carrier's alleged failure to notify with reasons for disallowance within **60 days** (Rule **4-D-1** (a)) and; 2) The Carrier **contends** that the claim must fail for violation of Rule **4-D-1** (b), Section 3, First (i) of the Railway Labor Act and **Circular** No. 1 of the **NRAB** in that it was not appealed to the highest Carrier officer before progression to this Board. **Additionally** and alternatively each party has presented substantial evidence and **argumentation** relative to the merits of White's claim that his disqualification constituted a violation of the **Agreement. Finally,** the Carrier tendered the alternative theory that if arguendo the denial was procedurally **defective, then** damages may lie only for that period from January 24, **1974** through April 15, 1974 when Petitioner was apprised of the March **12, 1974** denial letter.

We have reviewed **carefully** the record of handling and mishandling of this case. It appears that neither of the parties' representatives at the property level distinguished **themselves** for astute grievance processing. Carrier's front-line supervisors received **an individual employee's** claim letter, certified mail-return receipt requested, and chose to respond via **first class** mail. It is one of the oldest recognized common-law contract doctrines that the sender (respondee) **authorizes** a channel of communications by usage and a response placed in that channel is as good as received. But where, as here, the responder chooses to use **another** medium of **communication** then the risk of nonreceipt lies with him and the responder's message is not considered **communicated** until actually received by the respondee.

The foregoing doctrines present interesting questions relative to Carrier's possible liability herein under Rule 4-D-1 (a) for procedural mishandling. **But** we are barred from resolving even these threshold procedural questions, let alone the merits of the **disqualification, by** the more consequential miscue of the **Organization's** representative and Claimant in failing to appeal the claim to the highest level of handling on the **property.** The Organization states unequivocally in its **ex parte** submission that "as of this date the Organization has not appealed this case to the highest officer of the Carrier due to the fact that . . . the Organization **still has not received a proper written denial.**" This non sequitur **proves fatal** to the claim. The appeal to the highest level on the property is not only procedural under the Agreement it also is a jurisdictional prerequisite to our **taking** a claim under Section 3, **First (i) and Circular No. 1 of the NRAB.** Absent **such** prior exhaustion of **remedies we are** precluded by law from disposing of the alleged issues presented, whether procedural or substantive. We have left no alternative on the record before us but to dismiss for lack of proper jurisdiction to hear the claim on its **merits.**

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 Claim be dismissed on jurisdictional grounds.

A W A R D

Claim **dismissed.**

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1977.