

Referee Milton Friedman

PARTIES Railroad Yardmasters of America
TO
DISPUTE: Grand Trunk Western Railroad Company

STATEMENT Claim and request of Railroad Yardmasters of America:
OF CLAIM:

Yardmaster R. L. Barker's record be cleared
of the ten (10) demerit marks and that he be
paid for all time lost.

OPINION Both agree that the issue involves time limits only. If it
OF BOARD: is held that an appeal was not timely taken by the Organ-
ization, the claim must be dismissed. If it was, then Carrier
failed to deny it and the claim must be upheld.

In November, 1973, Award No. 3003 of this Board decided a case between these parties and found that Carrier had not violated the time limits rule, as alleged by the Organization. The procedural question arose because Carrier contended that the Organization's letter dated July 24, 1972, had not been received until August 11, 1972, when it was date-stamped by Carrier.

The same problem has again arisen in the present case. An appeal letter addressed to the Director, Labor Relations with a copy to the Superintendent advising him that his decision was being appealed, was dated February 11, 1973. Allegedly the Director, Labor Relations, never received this letter at all. And the Superintendent's copy of it is date-stamped March 9, 1973, which is beyond the 60-day limit, both parties agreeing that the last day for timely appeal was February 24.

Award No. 3003 suggested that the Post Office conceivably could be at fault. It is very coincidental that mail should twice be delivered to Carrier's offices in Michigan not a day or two late but 15 or 20 days late, when it involves claims filed by the Organization. The record does not indicate that other mail is delayed in delivery to Carrier. Thus, if the Post Office were reasonably prompt, the appeals at issue here may not actually have been sent until about March 7 or 8, more than 10 days after the time for appeal had expired.

Yet the Organization wrote to Carrier's Director, Labor Relations, on February 28 mentioning, inter alia, that "we now have appealed two (2) more discipline cases from the decision of Supt. H. Reed." One of these was the instant claim. Why would the Organization have written this on February 28 if it had not already written to the Director?

Of course it is possible that the General Chairman does not mail his letters until long after they are dated, or that they are written late and then back-dated or otherwise mishandled. It is equally possible that Carrier's incoming mail is mishandled. The available record of mail received by Carrier from the Organization shows the following letter dates and the dates letters were received according to date-stamps, which is far from normal delivery lag of mail from Illinois to Detroit, Michigan, even allowing for weekends:

<u>Organization's Letter Dates</u>	<u>Carrier's Date-Stamps</u>
7-24-72	8-11-72
2-11-73	3- 9-73
2-28-73	3-13-73
5-12-73	5-18-73
6-16-73	6-22-73
6-31-73 (sic)	7- 5-73
10-12-73	10-18-73

Whether letters have been mailed, and when, and whether they have been received, and when, are matters that must be dealt with in the same way as any controverted facts. Decisions of referees have placed the burden of proving timely mailing on the Organization, when Carriers have denied receiving an appeal. For example, Third Division Award No. 11 505 holds that "then the addressor has the burden of proving that the letter was in fact received." Third Division Award No. 16537 cited No. 11 505 and dismissed a claim even though evidence in the form of affidavits tended to prove that, despite Carrier's denial, it had knowledge of the letter of appeal.

In the instant case, the Agreement between the parties requires that an "appeal must be taken within 60 calendar days from receipt of notice of disallowance," as well as requiring notice to the representative within that time period of the rejection of his decision. Yet after Carrier's Director, Labor Relations, advised the Organization that he had never received the appeal, no further affirmative action to contest this was made. For example, the Organization took no steps to have the post office investigate such a long delay in delivery. It presented no evidence on the date or manner of writing the February 11 letter, nor did it submit evidence on its mailing.

Thus one may speculate that either the Organization misdates its letters or that Carrier's date-stamps of receipt are meaningless, for whatever cause. But speculation cannot substitute for some form of hard evidence upon which to rest a finding. Consequently, since the weight of precedent requires the Organization to establish at least that it made an appeal, once

Carrier denies receipt of it, the failure to submit any evidence at all beyond a copy of the letter, dictates dismissal of the claim.

As has been pointed out before, use of mail requiring return receipts will put this recurring problem to rest, once and for all, in those relationships where it seems to persist. Until then the parties are doomed to play a form of procedural Russian roulette, in which cases will be decided by analyzing who has the burden of proving mailing and/or receipt of mail, and whether the burden was sustained. As it is now, the Organization may continually lose justifiable claims even if Carrier's office mishandles the mail, because the Organization cannot establish either that delivery was made or that the Carrier habitually mishandles incoming mail with respect to routing it or to dating it. At times the converse may occur, and Carrier will suffer the consequences. The parties' simple alternative is a foolproof method like certified mail. The Board should not be afflicted with cases like these, which could be so simply disposed of by indisputable proof of receipt of mail.

FINDINGS:

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

The carrier and the employe 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.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: Executive Secretary
National Railroad Adjustment Board

By: 
Assistant Executive Secretary

Dated at Chicago, Illinois, this 9th day of October 1974.