Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 3615
Docket Number 3598

Referee David P. Twomey

PARTIES TO DISPUTE: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

Grand Trunk Western Railroad Company

STATEMENT OF CLAIM: Claim of the Railway Patrolmen and Police Officers Section - Allied Services Division, BRAC, #P-57, that:

1. Carrier violated the Agreement when it suspended Patrolman P. P. Roy for thirteen (13) days - three and one/third (3 1/3) hours and assessed his record with fifty-five (55) demerits.

2. Patrolman P. P. Roy be paid for the time lost as a result of the suspension and his record be cleared of the demerits and suspension.

3. Patrolman P. P. Roy be paid for the cost of the polygraph test which he took and furnished to the Carrier following investigation held by Carrier.

OPINION OF BOARD: The Claimant, Patrolman P. P. Roy, was removed from service on January 30, 1977, and received a notice dated February 2, 1977 to attend an investigation to determine responsibility, if any, in connection with five charges relating to the performance of his work on January 23, 1977 and five charges relating to the performance of his work on January 30, 1977. The investigation took place on February 8 and 9, 1977; and upon review of the transcript by the Carrier, the Claimant was assessed 55 demerits and was suspended thirteen days and three and one-third hours, which period of time had already elapsed at the time of the Carrier's decision. An appeal and claim was filed under date of April 4, 1977 and the Carrier denied the appeal by letter dated April 13, 1977.

By letter dated June 9, 1977 an appeal was filed with the Carrier's highest designated officer. In the last paragraph of that letter the Organization contended:

> "The Union contends that Pat P. Roy was not guilty as charged and that the assessment was not justified and feel that his record should be cleared and that he should be paid for all time lost plus the cost of the Polygraph test in final settlement of this claim."

The Carrier responded to the above appeal by letter dated August 5, 1977. The evidence is conclusive that the letter was not received by the Organization until August 10, 1978. The envelope containing the letter dated August 5, 1978 revealed a postage meter date, from the meter in the Carrier's control, of August 8, 1978. The Organization's appeal letter dated June 9, 1977 was received by the Carrier on June 10, 1977. Excluding the date of June 10, 1977, the 60-day time limit expired on August 9, 1977. The Organization contends that under Rule 11-A, which is Article V of the August 21, 1954 Agreement, the claim was not disallowed within 60 days from the date it was filed, and therefore the rule required that the claim must be allowed as presented. The Carrier disagrees and contends that the date of the postmark is the controlling factor in this case, which was within the time limits. Further the Carrier contends that the mailing should toll the time limit for responses, for it is far better to allow the time limits to be tolled by posting and not penalize either party for the actions of an agency over which neither can exercise control.

Rule 11-A(c) of the Agreement states that:

> "The requirements outlined in paragraphs (a) and (b) pertaining to...decision by the Carrier, shall govern in appeals taken to each succeeding officer."

Rule 11-A(a) states in part:

> "the Carrier shall, <u>within</u> sixty (60) days from the date same is filed, <u>notify</u> whoever filed the claim or grievance...in writing..."(Emphasis added.).

It is undisputed that the Organization did not receive notification that the claim was denied until after the 60-day period had expired, and the clear language of the rule would appear to support a finding that the time limit was violated.

NDC Decision No. 16, which constitutes a recognized mutually agreed-upon interpretation of Article V of the August 21, 1954 Agreement, found that a claim shall be considered "filed" on the date it is received by the Carrier; and it also found, in the matter of a continuing claim where the Carrier had failed to deny a claim within the time limits, that the date of the late <u>receipt</u> (not the posting or mailing date) of the Carrier's denial letter stopped the Carrier's liability arising out of failure to comply with Article V. In NDC Decision No. 16 then, the parties, with full knowledge of the inconsistent precedents of this Board, agreed that <u>receipt</u> by the Carrier and the Organization was the critical factor.

After the decisions of the National Disputes Committee of March 17, 1965 a clear pattern of decisions of this Board focused on the date a belated denial of a continuing claim was received by the Organization as the date on which the Carrier's liability for the continuing claim ceased. (See for example Third Division Awards 14502, 14603, 17667 and 17999.) After the decisions of the National Disputes Committee, Third Division Award 15443 (Dorsey) stated:

> "Petitioner moves that the Claim be allowed as presented on the grounds that the Carrier's highest officer failed to deny it, giving his reasons in writing, within 60 days plus an agreed-upon extension of 30 days, as required by Article V of the August 21, 1954 National Agreement. The appeal was received by the highest officer on January 8, 1962. This is the date from which the time limitation runs. See National Disputes Committee Decision No. 16. In Computing the time limitation the date of receipt by the highest officer is not counted; but, the written denial must be in the hands of the organization not later than on the last day of the time period. The 90 days limitation in this case terminated on April 8, 1962. The General Chairman received the denial on April 9. Since this is a continuing Claim, we find that Carrier violated the Agreement, but its liability arising from the violation stopped on April 9, 1962. NDC Decision 16."

In Third Division Award 18004 (P. C. Dugan) the Board found Award No. 15443 controlling:

> "Inasmuch as the written letter of declination was not in the hands of the Organization not later than on the last day of the time period, then the Carrier violated the Agreement in this instance."

Carrier cites to the Board as precedent Third Division Award No. 18881 (Hayes). However the extenuating facts of that case are simply not present in the instant case. In Award No. 18881 the Carrier sent a denial letter well within the time limits by Certified Mail Return Receipt Requested, which letter was actually brought to the General Chairman's home by a letter carrier within the time limits but not "delivered" because no one was home; and a "Notice of Arrival" concerning the letter was left at the residence by the letter carrier.

The evidence is conclusive that the denial letter was not received by the Organization within 60 days. Based on the clear language of the Agreement, the logic of NDC Decision No. 16, Third Division Awards Nos. 15443 and 18004, and the lack of extenuating circumstances as found in Award No. 18881, we must sustain this claim as presented. Clearly under the Agreement, this shall not be considered a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

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 respectfully 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 sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment
Board

By: Nancy J. Dever
Assistant Executive Secretary

Dated at Chicago, Illinois, this 6th day of December 1978.

DISSENT OF CARRIER MEMBERS

FOURTH DIVISION AWARD 3615 (Docket 3598)

BRAC vs GTW RR CO

REFEREE: TWOMEY

The decision of the Board in the cited matter augurs for continued confusion and uncertainty in matters concerning violation of time limits.

The award states, inter alia,

> "After the decision of the National Disputes Committee of March 17, 1965 a clear pattern of decisions of this Board focused on the date of a belated denial of a continuing claim was received by the Organization as the date on which the Carrier's liability for the continuing claim ceased". (Emphasis supplied)

The award then cited several other cases holding similarly. However, the Board overlooked an equal number of cases opting for the postmark or mailing date as determining whether a time limit has been met, which cases also were determined subsequent to the NDC decision.

A review of the Organization's authority on the point discloses the Carrier's position to be the better reasoned. The Board relies on the Third Division Award 18004 which quotes Award 15443 as follows:

> ". . . In computing the time limitation the day of receipt of the highest officer is not counted, but, the written denial must be in the hands of the Organization not later than on the last day of the time period . . ."

It is important to note that the specific issue dealt with in the instant case was not before the Division in Third Division Award 15443, but rather the language quoted dealt with determining liability period in a continuing claim situation and is quoted out of context in the cited award.

Further, the logic of requiring an item posted to be "in the hands" of the opposing party leave the procedural step of time limits subject to the vagaries of the postal delivery system which is not an agent of any party.

Thus it is far better to allow the time limits to be tolled by posting, and not penalize either party for the actions of an agency over which neither can exercise control, than to require a guess as to how many days will be needed for delivery of mail (and subjective testimony indicating time of receipt).

We believe that the best rule, which operates objectively, and will apply with equal force and effect to Carrier and the Organization, was that established in Third Division Award 14695 wherein Referee Ives stated:

> "The National Disputes Committee Decision No. 16 dated March 17, 1965, incorporated in Award 13780, held that the claim should be considered "filed" on the date received by the Carrier. Consequently, the date of receipt determined the 60 day time limit which commences to run from that date. Subsequent Awards have held that the Carrier must stop the running of the timit limit by mailing or posting the notice required within the 60 days of the date that the claim was received. (Award 11575 and Second Division Award 3656). Here, the Carrier responded to the appeal within the sixty day period and the dispute is properly before us on its's merits". (Emphasis supplied).

These general principles have even been upheld in a case where the proofs showed that the Organization had not received notice within the time limits, despite a timely mailing, further affirming that the rule has consistently been interpreted to consider mailing as tolling the time limit for responses.

The above referred to Third Division case, Award 18881 (Hayes) held:

> "In Award 11505 this Board held;
>
> It is a general principle of the law of agency that a letter properly addressed, stamped, and deposited in the United States mail is presumed to have been received by the addressee (but this is a rebuttable presumption. If the addressee) denied receipt of the letter then the addressor has the burden of proving that the letter was in fact received. Petitioner herein has adduced no proof, in the record, to prove de facto receipt of the letter by the Carrier".

"While we recognize that the Carrier has adduced no proof of de facto receipt of the letter by the Organization, it in fact has been proved that the Organization did not receive the letter as it was returned; we nonetheless find that substantial probative proof is in the record that a letter timely denying the claim was set. (sic) The letter denied the claim, and following the denial Organization had an opportunity to pursue the claim on it's merits. When first advised of the mix-up in the denial letter, that was timely written, after appeal to Carrier's Director of Labor Relations and Personnel, the Organization had another opportunity to pursue the claim on it's merits. This they elected not to do in both instances".

"From the record we conclude that Superintendent DeLongis timely denied the claim on September 30, 1958 and took reasonable steps to insure delivery of notice of denial. Following the Superintendent's denial the Organization abandoned pursuit of the claim on it's merits. Rather, sought to have it paid under the Time Limits rule. Under the circumstances in this case, payment under the Time Limits rule is not warranted. A dismissal Award is therefore in order". (Emphasis supplied).

We respectfully submit that the better reasoned rule is one that opts for certainty, i. e. where objective proof such as a postmark exists, its existence should be determinative that a response was timely, and therefore we dissent.

B. K. Tucker

W. F. Euker

G. H. Vernon