FORM 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4588
Referee Marty E. Zusman Docket Number 4549

PARTIES TO DISPUTE: United Transportation Union - Yardmasters Department
The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Unassigned yardmaster Stan Markovitz claiming one day's pay for February 4, 1985 and every day thereafter or until the conditions complained of cease or until yardmaster positions are established at Goodman Yard, Ohio. The complaint in this case is that personnel other than yardmasters are performing yardmaster work at Goodman Yard.

OPINION OF BOARD: The instant case involves the continuing Claim of Yardmaster S. Markovitz alleging Carrier violation of the Scope Rule of the Agreement. During the progression of this Claim on the property a procedural time limit issue was raised by the Organization. This Board cannot reach the merits of the alleged Scope Rule violation until the procedural issue is resolved.

The procedural issue herein is the same as resolved in Award Nos. 4585 and 4586. In all of these cases, Article 21(a) requires Carrier notification of denial within 60 calendar days. Here, as in Award Nos. 4585 and 4586, the Carrier prepared the letter prior to Good Friday, April 5, 1985, and actually mailed it after the weekend on the 60th day.

The Organization argues with extensive Award support that to notify is to be in receipt of the denial (Fourth Division Awards 4310, 4309, 3615; Third Division Awards 25537, 18636, 18004, 15493). It is not contested that the Claimant was not in receipt of the denial.

The Carrier argues also with extensive Award support that to notify is to postmark or mail the denial within 60 days. (Fourth Division Award 3234; Third Division Awards 24530, 10490; Second Division Award 8725.) It is not contested that the denial was postmarked within the 60 days.

In the above Awards (Fourth Division Awards 4310, 4309, 3165), as in this Award, the Board rejects the Carrier's arguments. We concur with the reasoning of Fourth Division Award 4477 and Award Nos. 4309 and 4310 which stated that "the common and ordinary meaning of the word 'notify' denotes delivery to and receipt by the party to be notified."

As the Carrier failed to notify the Organization of the denial of the Claim, the Claim must be sustained without our reaching the merits of the case. The Carrier's liability is only to the date of the receipt of denial.

FINDINGS:

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

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 the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 19th day of November 1987.

CARRIER MEMBERS' DISSENT
TO
AWARDS 4585, 4586 & 4588
DOCKETS 4545, 4544 & 4549
(Referee Zusman)

Third Division Award 21543, as recognized by the Majority in Award 4585, "...stands on point with the issue at bar." That Award reads in relevant part as follows:

> "The Organization cites a number of awards sustaining claims under the time limit rules such as Rule 701. The Carrier, in turn, answers this procedural claim on various grounds. We need consider only that the claimant failed to make this a part of his formal statement of claim. We have reviewed all the awards cited by the Carrier and the Organization and each included the issue of time limits in its formal statement of claim with one exception, Award 20763 (Lieberman). In that case the time limit question was raised on the property and was fully discussed in the opinion, but no mention was made that the issue was not raised in the formal statement of claim. Accordingly, we do not consider that this award represents authority contrary to the general view reflected in the awards, that the time limits issue must be included in the formal claim. That was not done here and we find it is decisive on this issue. See Awards 17512 (Dugan) and 11006 (Boyd)." (Emphasis added)

The Majority elected to reject the Carrier's jurisdictional argument in apparent reliance upon Fourth Division Awards 1789, 2917, 3797, 4042 and 4211.

While Award 1789 involved a procedural question as to whether or not the carrier violated the time limit on claims rule, there is no evidence that the specific jurisdictional argument (i.e., time limit issue not raised in formal statement of claim) was even raised as an issue therein.

Similarly, in Award 2917 the Organization raised a procedural objection contending that the Carrier had failed to timely furnish a representative with a copy of the notice of discipline; Award 3797 raised a procedural question concerning the Carrier's alleged failure to give a representative a

copy of a notice of investigation; Award 4042 raised a series of procedural issues, such as imprecise charge, deprivation of due process and contract protection in the appellate process, etc.; Award 4211 concerned a procedural argument relative to the Carrier's failure to furnish a copy of the discipline notice to Claimant's representative.

In none of these Awards was the specific jurisdictional argument even mentioned as having been an issue in the case. Thus, none of the aforementioned Fourth Division Awards is of any precedential value because they simply are not on point. A case cannot stand as a precedent for a principle that was not discussed or resolved.

The second question at issue in these disputes concerns whether the Carrier's response complied with the Agreement's provision to timely "notify." The claims were filed by the Organization on February 5, 1985 and received by the Carrier on February 7, 1985. (Recognizing that this Board has consistently held that the time limit to respond to a claim begins on the date that it was received, not the date it was mailed, such was not an issue in these cases.)

The Carrier's declination letters were dated April 5 and postmarked on the 60th day, April 8, 1985. They were not received by the Organization until April 11, 1985. On this issue, the Majority concludes in Award 4586:

> "This Board is aware of Awards in which differing interpretations occurred as presented by the parties to this dispute. Some Awards support the Organization and indicate that to "notify" means that the Organization or employee must have received the denial (Fourth Division Awards 4310, 4309, 3615; Third Division Awards 25537, 18636, 18004, 15443). Other Awards support the Carrier's position that it must postmark the denial in 60 days to evidence notification (Fourth Division Award 3234; Third Division Awards 24530, 10490; Second Division Award 8725). Nevertheless, this Board follows Decision No. 16 of the National Disputes Committee and the large number of Awards that have thereafter held that

notification requires receipt. As stated by Fourth Division Awards 4309 and 4310:

> '. . . the common and ordinary meaning of the word "notify" denotes delivery to and receipt by the party to be notified. Therefore, a claim is "filed" with the Carrier when it is received by the Carrier and the Claimant is "notified" by the Carrier when the disallowance is received by the Claimant.'

In the instant case the Claimant was not notified within 60 days as per Article 21. This interpretation of notification is consistent with recent Fourth Division Award 4477."

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

> "In computing the time limitation the day 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."

It is important to note that the specific issue dealt with in the instant cases <u>was not</u> before the Division in Third Division Award 15443, but rather the language quoted dealt with determining the liability period in a <u>continuing claim</u> situation and is <u>quoted out of context</u> in the cited Award. The Board erroneously relied upon Awards 15443 and 18004, as well as Fourth Division Award 3615 when rendering its decision in Third Division Award 25537.

Third Division Award 18636 does not support the Organization's position as can be seen from the following excerpt:

> "...the appeal timely presented to the Chief Mechanical Officer on July 8, 1969, was denied by that Officer's successor in letter dated September 9, 1969 and actually received by that General Chairman on September 12, 1969, sixty-six (66) days after appeal had been made, thereby exceeding by six (6) days the 60-day time limit proviso."

Since the September 9, 1969 response was on the 63rd day, it was untimely and the fact that same was not received by the General Chairman until September 12, 1969, i.e., the 66th day, was of no consequence.

Fourth Division Award 3615 followed the error in Third Division Award 18004. The Board stated in Award 3615:

> "After the decision 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." (Emphasis added)

The Award then cited several other Awards holding similarly. However, as pointed out in the Carrier Members' Dissent, which is incorporated herein by reference, the Board then 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.

Since the Majority placed so much stock in Fourth Division denial Awards 4309 and 4310, as evidenced by the quotation therefrom which appears on Page 3 of this Dissent, we feel compelled to quote the next paragraph from Awards 4309 and 4310:

> "In this case, the claim was received by the Carrier on June 8, 1979. The Carrier had sixty (60) days thereafter to respond. The Organization admits that it does not know the date of receipt of the disallowance, but argues that at least two days in transit is a reasonable assumption. The right to have a case decided on its merits should not be denied based upon speculation, even though that speculation is reasonable. Therefore, the claim is not payable on the basis of a default." (Emphasis added)

The Majority also relied upon Fourth Division Award 4477 which cited Awards 4309 and 4310 as precedent. The Rule being interpreted in Award 4477 was not the standard time limit rule involved in the instant cases. Rather, Award 4477 interpreted Rule 5-B-1 Positions abolished--advance notice of, which reads in relevant part as follows:

> "...The General Chairman will be advised not less than ten (10) calendar days prior to the effective date of any abolishment of a regular or relief position which reduces the number of such positions in a thirty (30) mile radius. If requested by the General Chairman, the representative of the Company and the General Chairman, or his representative, shall meet for the purpose of discussing such abolishment."

The logic for the conclusion reached by the Board in Award 4477 is probably best summarized in the following quotation:

> "This view is supported by the Section in Rule 5-B-1 which permits the General Chairman to request a meeting with the Carrier to discuss any potential abolishment. This right becomes much less effective if the Board were to accept an interpretation of the notice language which would in many cases create a period of only one or two days for the General Chairman to request, schedule and hold this meeting. It makes much more sense that the Parties intended to give the General Chairman a full ten-day period to hold this meeting; even a ten-day period is not a great amount of time in which to schedule such a meeting, and a period of one or two days seems not practicable."

Clearly, Award 4477 and the instant cases are different. As further stated by the Board therein:

> "In a general vein, general principles of notice borrowed from other areas of labor arbitration or law are not particularly helpful."

Ironically, six months after Award 4477 was adopted on the Fourth Division, the Second Division in a dispute before the same Referee, adopted Award 11224. The Rule under interpretation involved increasing forces and reads in relevant part as follows:

> "...Ten (10) days' notice will be considered sufficient time to report for work."

Therein the Board held:

> "The crucial issue in this case is when the Notice of Recall became effective: upon posting, as the Carrier claims, or upon receipt, as the Organization claims. The Carrier claims that past precedent holds that the date of mailing controls, and this appears to be the case. The Carrier has submitted several decisions covering various situations in which this Board and others have held that the Carrier cannot be held to be an insurer of the receipt of Notice by the addressee. (Third Division Award Nos. 13757, 15007, 15575, 24348; Second Division Award No. 9845.) Therefore the Carrier's duty to notify is fulfilled when the Notice is sent to the last recorded address given by the employe and the period begins to run on that date. (Third Division Award No. 24348.)
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> "...especially in view of the considerable precedent holding that Carrier mailing constitutes Notice, the Board will deny the Claim." (Emphasis added)

The logic of requiring a response to be "in the hands" of the opposing party leaves the procedural step of time limits subject to the vagaries of the U. S. Postal Service which is not an agent of any party. Thus, it is inherently more fair to allow 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 date of receipt).

From a chronological standpoint, the First Division recognized the wisdom in such an approach when called upon to interpret the word "apprised" in a dispute which culminated in Award 16912.

The Third Division wisely held in Award 10490:

> "...both parties have a right to rely on the regularity of the mail.
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> * * * * *
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> "This principle will work both ways. Where the Organization asserts that it has mailed an appeal within the 60 day required period, producing a copy of the letter from its files, and the Carrier alleges it did not receive the letter

"the presumption then would be that the Organization had not violated the 60 day rule."

Following 10490, the Third Division held in Award 11575:

"It is readily apparent, therefore, that the length of time consumed while the appeal or the denial decision was not in transit could not be chargeable to either of the parties. See Award 10490.

Article V of the Agreement dated August 21, 1954, was agreed to for the purpose of expediting the progressing of claims or grievances. With that in mind, certain time limits were provided for. In 1 (a) of Article V it is quite evident that it was the intention of the parties that the 60 day time limit provided for would start to run from the day the claim was received and filed by the Carrier--that, obviously, would be the first time that the officer of the Carrier would have knowledge of it. Proceeding further in our consideration of 1 (a), it clearly appears that the Carrier must stop the running of the time limit of 60 days by notifying within the 60 day limit whoever filed the claim of the disallowance of the same. That can be accomplished by mailing or posting the notice required within 60 days of the date that the claim was received. The employe presenting the claim then, under 1 (b) would have 60 days to appeal from the officer's decision from the date of the receipt of the notice of disallowance." (Emphasis added)

Thereafter, the Third Division held in Award 14695:

"The National Disputes Committee Decision No. 16, dated March 17, 1965, incorporated into Award 13780, held that the claim should be considered 'filed' on the date received by the Carrier. Consequently, the date of receipt determines 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 time limit by mailing or posting the notice required within the 60 days of the date that the claim was received." (Emphasis added)

In rejecting an argument that a carrier failed to timely notify an employee that he was dismissed, the Third Division held in Award 17588 that the carrier had satisfied the provision regarding notice of discipline although the notice was not received by the claimant within ten days, but was properly mailed within the ten days.

In 1975, the Fourth Division held in Award 3234:

"We have reviewed carefully the positions of the parties and the Agreement language. While not enunciated with particularity the position of the Organization appears to be that Petitioner must receive the Carrier's decision within 60 days of either (1) the date of the appeal letter to Carrier, or (2) within 60 days of the receipt by Carrier of the appeal letter. In our judgment these matters have been resolved adequately by Awards of several Divisions of this Board to wit Award 3656 (Second Division); Awards 10490, 13219, 14695 (Third Division); Award 1717 (Weston); See also First Division Awards 16 366 and 16 739. Consistent with this line of authority we find that the instant claim was in fact declined within the 60 day time limit of Article X, Section (a), with the posting or mailing of the denial letter of December 14, 1973. The claim must be denied."

In Second Division Award 8725 involving the same Carrier involved in the instant cases, the Board held in 1981:

"The Organization positions that time limits should run from the date it mails the appeal and/or in the alternative time limits should run to the date the Organization receives the denial letter are contrary to the cited Awards of this and other Divisions of the Board."

In Second Division Award 8833 the issue was identical to the one involved in Fourth Division Award 3615 discussed hereinbefore, and the issue involved in the instant disputes. The facts showed that the Carrier mailed its notice of denial on the 58th day and it was received by the Organization on the 61st day. The same Referee who sustained the claim in Award 3615 recognized the error of his ways, for the Board denied the claim in Award 8833 holding:

"Second Division Award 7626 recognized that a Carrier complies with time limits provisions when it gives up control of a letter by dispatching it in the U.S. Mails or other method of communication authorized by the Organization within the time limits.

In the instant case the appeal was received by the Carrier on December 13, 1978 and the Carrier's reply was placed in the U.S. Mail on February 9, 1979 on the 58th day from the receipt of the appeal. We find therefore that the Carrier did timely deny the appeal within the 60-day time limit of Article V of the August 21, 1954 Agreement."

Although they were not cited in the instant Awards, all of the above-mentioned Awards were before the Neutral Member of the Board at the time he rendered his decisions.

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. We trust that should the situation arise again on this property, that the Majority, unlike the one here, will make its determination based upon logic and fairness to both sides.

We dissent.

Michael C. Lesnik
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