

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33623
Docket No. MW-32363
99-3-95-3-210

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Western Maryland
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (H. Jeffries Contracting Company) to pave the Long Meadow road crossing at Hagerstown, Maryland on August 21 and 22, 1992 (WMR).
- (2) The claim as presented by Vice Chairman Secretary-Treasurer R. L. Caldwell on September 17, 1992 to Division Engineer M. D. Ramsey shall be allowed as presented because said claim was not timely disallowed by Division Engineer M. D. Ramsey in accordance with Rule 16.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed employees T. L. Lynch, R. L. Smith, G. A. Harbaugh, H. D. Weslow and R. L. Ridenour shall each be allowed thirty-four and one-half (34.5) hours' pay at their respective time and one-half rates and they shall each receive the appropriate credits for vacation and railroad retirement purposes.”

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Parties to said dispute were given due notice of hearing thereon.

By letter dated September 17, 1992, sent Certified Mail, the Organization filed the claim that is at issue in the instant proceeding. On November 7, 1994, the Organization requested a conference concerning a number of claims, including some for which it had allegedly not received responses from the first level claim officer. The Organization appealed those claims as a default issue. At a conference held on November 17, 1994, the Carrier provided the Organization with a purported copy of a November 18, 1992 letter declining the claim.

The parties agree that the merits of the claim are not before the Board. The Organization maintains that it did not receive the first level claim denial until the November 17, 1994 conference. Consequently, the Carrier failed to respond to the claim within 60 days of its filing and, under Rule 16(a) the claim must be allowed as presented. The Carrier contends that it sent the denial in a timely fashion and that the Organization failed to respond within the 60 days allowed under Rule 16(b). The Carrier urges that the Agreement does not require it to reply via Certified Mail.

The identical issue was presented to the Board in Third Division Awards 33417 and 33452. Both Awards interpreted Rule 16(a), which provides:

"All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered

as a precedent, or waiver of the contentions of the Carrier as to other similar claims or grievances."

Both Awards recognized that the Agreement does not require the Carrier to respond to claims via Certified Mail. However, both Awards recognized that when the Organization files a claim via Certified Mail, the Organization invites the Carrier to respond by the same medium and the Carrier chooses to use a different medium at its peril. Both Awards hold that under such circumstances, the Carrier's subsequent assertion that the denial letter was sent and received in a timely manner, coupled with a file copy of the purported denial letter, is insufficient to establish that the Carrier replied in a timely fashion.

In keeping with the principle of stare decisis and to ensure stability in the relationship between the parties, we should follow prior Awards unless they are palpably wrong. We cannot say that Awards 32417 and 32452 are palpably wrong. We hold that they control the instant case.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of November 1999.