Award No. 10576
Docket No. MW-9713

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) Superintendent Eastman's disallowance of the claim filed with him by Division Chairman Schoelerman in a letter dated March 14, 1956 was not in conformance with the provisions of Section 1(a) of Article V of the National Agreement of August 21, 1954 and in consequence thereof

(2) The Carrier be required and directed to allow the following claim as was presented under date of March 14, 1956:

(a) That the Carrier violated the agreement by letting out by contract, or otherwise, the construction of various bridges on the Yuma Division between Mile Post 539 and Mile Post 727 beginning on or about January 1, 1956.

(b) That all employes holding a seniority right to perform work in the B&B Sub-department on the Yuma Division, be paid additional compensation for the same number of hours as consumed by the contractor's forces in the performance of this work, each his proportionate share at his regular rate of pay as provided in the agreement, particularly the Scope Rule.

EMPLOYES' STATEMENT OF FACTS: On or about January 1, 1956 the work of constructing various bridges on the Yuma Division between Mile Posts 539 and 727 was assigned to and performed by a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

The work was of the nature and character usually and traditionally performed by the Carrier's Bridge and Building employes.

The claim was first presented to the Carrier's Superintendent in a letter dated March 14, 1956 as follows:

Although carrier could have properly contracted for the performance of the work in question without in any manner consulting with petitioner, it was felt advisable, in view of certain pronouncements by this Board, to explain to petitioner's representatives the problems involved and the reasons it was felt necessary to have the work performed by contract. Accordingly, as set forth in carrier's statement of facts, several conferences were held during the months of September and October 1955. In addition, by letter dated October 3, 1957 (Carrier's Exhibit "F"), petitioner's general chairman was informed in writing concerning the necessity of contracting the work. At no time during the conferences did the petitioner's representatives object to the grading being done by contract; their only contention being they felt that the drainage (Bridge and Building) portion of the work could be performed by carrier's forces. At the latest conference, held on October 17, 1955, attended by carrier's Assistant Manager of Personnel J. C. Stephenson, petitioner's Vice President T. L. Jones and General Chairman C. L. Ashley, petititioner's representatives were informed of the carrier's position that the drainage and grading work were so inter-related that it would not be feasible to separate the drainage work from the grading to the extent of doing part of the correlated project by Company forces and part by contract, and that even if an attempt was to be made to do so it would in all probability be found that sufficient labor forces could not be assembled to complete the project on schedule. After considerable discussion Mr. Jones stated that it was not the organization's intent to stand in the way of getting the job done and "you can tell Bill Jaekle (carrier's Chief Engineer) to go ahead".

Even if it were to be held that the work here involved is reserved exclusively to employes covered by the scope of the current agreement (carrier does not so concede but expressly denies) there obviously still could be no valid basis for the claim here presented in view of the commitment made by petitioner's vice-president on October 17, 1955.

CONCLUSION

Carrier asserts that it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support and therefore requests that said claim, if not dismissed, be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute. The carrier reserves the right if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim of the System Committee of the Brotherhood of Maintenance of Way Employes was submitted to Carrier on March 14, 1956, for the reasons set forth in Paragraph 2, subsection (a) and for the relief set forth in subsection (b) of said Paragraph 2.

It is the further claim of the Brotherhood that Superintendent Eastman's disallowance of said claim, was not in conformance with the provisions of Section One (a) of Article V of the National Agreement of August 21, 1954

and in consequence thereof that the Carrier be required to allow said claim as presented.

The original claim under date of March 14, 1956, was as follows:

"March 14, 1956

CERTIFIED U.S. MAIL
RETURN RECEIPT REQUESTED

Mr. W. E. Eastman, Superintendent
Southern Pacific Company
Room 747, Pacific Electric Building
610 South Main Street
Los Angeles 14, California

Dear Sir:

The Committee submits grievance regarding the following violation and claim:

(a) That the Carrier violated the agreement by letting out by contract, or otherwise, the construction of various bridges on the Yuma Division between Mile Post 539 and Mile Post 727 beginning on or about January 1, 1956.

(b) That all employes holding a seniority right to perform work in the B&B Sub-department on the Yuma Division, be paid additional compensation for the same number of hours consumed by the contractor's forces in the performance of this work, each his proportionate share at his regular rate of pay as provided in the agreement particularly the Scope Rule.

The facts are as follows:

On or about January 1, 1956, the Carrier let out by Contract or otherwise, and said contractors are currently performing the work of constructing and/or widening the various existing culverts and bridge structures on the Yuma Division between Mile Post 539 and Mile Post 727.

The work referred to in the above paragraph, and which was performed by parties who hold no seniority in the Maintenance of Way Department, is work that comes within the scope of the current Maintenance of Way Agreement, and such work is subject to the rules governing working conditions, hours or service and rates of pay for employes of the Maintenance of Way Department covered by that Agreement.

The employes of the B&B Subdepartment were available and in accordance with their seniority were entitled to have been used to perform the work claimed. It is work normally performed by and which should have been performed by B&B Subdepartment forces.

The Committee will meet and discuss this case with you on a date convenient to your calendar.

Will you kindly acknowledge receipt and advise when payment will be allowed as herein claimed.

Yours truly,

/s/ H. N. Schoelerman
Division Chairman"

* * * * *

On April 3, 1956, Mr. W. E. Eastman, Superintendent, Southern Pacific Company, replied to said claim as follows:

"April 3, 1956 013-293

U.S. REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mr. H. N. Schoelerman (2)
Division Chairman
B. of M. of W. Employes
Liberty Lodge No. 875
11202 S. Harvard Blvd.
Los Angeles 47, California

Dear Sir:

Referring to your letter of March 14, 1956, in regard to alleged violation of agreements in connection with contracting, etc., the construction of various bridges on the Yuma Division:

I do not understand the reason any claim should be submitted to me in view of the previous handling of this matter by appropriate representatives of the management and your organization prior to the time the work was commenced.

The alleged claim is denied.

Yours truly,

/s/ W. E. Eastman

P.S. Since you have expressed a desire to discuss the matter I shall be glad to do so at the first opporunity.

W. E. Eastman"

Further correspondence was had between the Division Chairman and the Superintendent, relative to the latter's failure to give reason for disallowance of the claim. No further or proper reason was given within the 60 day period provided by the Rules.

The pertinent Rule involved here was, among others, adopted on August, 1954 and Rule V(a) reads as follows:

"(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier au-

thorized 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 employe 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."

We are of the opinion that the letter of Mr. W. E. Eastman, hereinbefore set forth, wherein he denied the claim, failed to comply with said foregoing rule, in that it failed to notify the employes or their representatives in writing, the reasons for such disallowance, in accordance with said Rule.

While we are reluctant to reach a decision on the basis of procedural defects rather than on the merits of a claim, we are bound to such a result, when as here, the parties, by the language of their agreement, have made compliance with procedural requirements mandatory. We must also recognize that the time limitation and the provision for written reasons for disallowance of claims have salutary purposes. The former serves to expedite the disposition of claims and the latter furnishes the Claimants with a definite basis for considering the merits of their claims in order to determine whether to accept the disallowance or proceed further.

Express time limitations in grievance procedure have been many times held to be enforceable. Application of such rules is sometimes harsh but in the interests of efficient, proper procedure they must be applied. We are not granted any discretion to extend such statutes of limitation as the parties have fixed on themselves. We can only apply their own rules. It follows that in so doing we are precluded from judging the merits of the basic dispute.

Carrier has objected to the claims set forth herein on the basis that the claim is invalid in that it failed to name the individual Claimants in whose behalf the claim was made and by reason thereof vague and indefinite. We do not so find: the individuals involved in this claim can without too much difficulty, be ascertained and identified.

The claim is allowed, but no monetary allowance be allowed retroactively for more than 60 days prior to the filing thereof, in accordance with the provisions of Article V, Subsection 3 of the Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 Agreement was violated.

AWARD

Claims disposed of in accordance with the foregoing Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of May 1962.

DISSENT OF CARRIER MEMBERS TO AWARD 10576, DOCKET MW-9713

The Award of the majority in this case turns on that part of Article V 1(a) of the August 21, 1954 National Agreement reading:

> "* * * Should any such claim or grievance be disallowed and carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance.* * *"

This Rule does not require the use of any particular phraseology in the disallowance of claims or in the statement of reasons (**Award 9615**—Rose), and it does not contain any adjective or other descriptive word limiting the scope of the "reasons" that may be given. In recent **Award 10416** (Sheridan) the Board properly held that a mere refusal to discuss a claim because part of it had not been handled with a lower officer was both a statement of reasons and and a declinaion under Article V 1(a).

The Award here sustains the claim on the erroneous basis that the Superintendent failed to notify the employes or their representatives in writing of "proper reasons" for disallowance of the claim.

The Superintendent in his letter of denial said:

> "I do not understand the reason any claim should be submitted to me **in view of the previous handling of this matter by appropriate representatives of the management and your organization prior to the time the work was commenced.**" (Emphasis ours.)

The majority expressly recognize that a reason was here given, and it should be noted that the good faith of the Superintendent or the Carrier in giving that reason is beyond question. After quoting the Superintendent's letter of denial, the Award states:

> "Further correspondence was had between the Division Chairman and the Superintendent, relative to the latter's failure to give reason for disallowance of the claim. **No further or proper reason was given within the 60 day period provided by the Rules.**" (Emphasis ours.)

By what authority does the majority add the qualification "proper" to the word "reasons" in this Agreement? We have no power to add words to Agreements, and our Awards acknowledging this are too numerous to cite.

Furthermore, it would be impractical to require that the reasons which must be given in order to comply with the time limit rules must be proper;

for this would create the absurd necessity of pre-judging every case at every stage of handling in order to determine whether the time limit rules had been complied with.

The logical and obvious purpose of the requirement that reasons be given in writing at each stage of handling on the property is to create a definite record of issues raised in such handling. Under the rules of this Division the parties are limited to the issues raised and handled on the property.

The Superintendent's decision to base his whole defense on the discussion that had admittedly taken place between Carrier and the Organization officers merely limited the scope of the defense asserted at that level of handling. Admittedly it was a reason, and under the Agreement a "proper" reason or one that would ultimately prevail was not required.

The Superintendent was obviously of the opinion that the Division Chairman was out of line with the thinking of his Organization's representatives (General Chairman and Vice President who, according to the understanding of a Carrier official, had orally conceded Carrier's right to contract the work out and had indicated that no objection would be made); and he manifestly believed that a declination of the claim based on the prior handling with those Organization representatives would appropriately end the matter. Thus it is clear that the reason given by the Superintendent is the very reason that would have been uppermost in the minds of most people under the circumstances—see second paragraph preceding "CONCLUSION" in "Position of Carrier".

This Award is further in serious error in sustaining the alleged continuing violation on a technical basis without regard to the merits of the claim as originally presented. Article V, Section 3, mandatorily requires an examination of the merits of the claim. It provides for the filing of one claim covering a continuing violation " * * * if found to be such. * * * " Second Division Award 3298 and recent Third Division Award 10401 dated March 8, 1962 so hold.

The effect of compliance with this erroneous award would be to make the Carrier pay twice for work which it unquestionably had a right to contract out; unnamed and uninjured claimants would get the illegal penalty payments.

This Award constitutes grievous error and we dissent.

/s/ D. S. Dugan

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ T. F. Strunck