

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35326
Docket No. MW-33123
01-3-96-3-559

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The claim as presented by Assistant General Chairman G. Wegener on May 19, 1993 to Heartland Division Manager D.J. Hansen, concerning outside forces (Kelly and Company) installing crossbuck posts and signs at various crossings on the Soo Line right of way from March 23 to April 6, 1993, shall be allowed as presented because said claim was not disallowed by Heartland Division Manager Hansen in accordance with Rule 21-1(a) and (b) (System File R721/8-00228-002).**
- (2) The claim as presented by Assistant General Chairman G. Wegener on May 20, 1993 to Heartland Division Manager D.J. Hansen, concerning outside forces (Kelly and Company) installing crossbuck posts and signs at various crossings on the Soo Line right of way from April 12 to 16, 1993, shall be allowed as presented because said claim was not disallowed by Heartland Division Manager Hansen in accordance with Rule 21-1(a) and (b) (System File R722/8-00228-003).**
- (3) The claim as presented by Vice General Chairman R.D. Iwen on April 29, 1993 to Heartland Division Manager D.J. Hansen, concerning outside forces (Kelly and Company) installing crossbuck posts and signs at various crossings on the Soo Line right of way between March 1 and 31, 1993, shall be allowed as presented because said claim was not disallowed by Heartland Division Manager Hansen in accordance with Rule 21-1(a) and (b) (System File R720/8-00228-004).**
- (4) The claim as presented by Vice General Chairman W.D. Birnbaum on June 1, 1993 to Heartland Division Manager D.J. Hansen, concerning outside forces (Kelly and Company) installing crossbuck posts and signs at various crossings on the Soo Line right of way**

from April 2 through May 1, 1993, shall be allowed as presented because said claim was not disallowed by Heartland Division Manager Hansen in accordance with Rule 21-1(a) and (b) (System File R723/8-00228-001)."

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.

Claimants (G. F. Mitchell, D. B. Lorendo, S. Elrey, R. A. Bookey, P. M. Berlund, C. W. Smith, B. S. Prose, R. S. Johnson, A. J. Fredlund, A. R. Nicholson, H. J. Woizeschke, L. A. Moen, E. D. Zietlow, A. W. Berndt, K. Mendenwald, R. P. Conzet and G. L. Wegener) established and hold seniority in various classifications of the Track Subdepartment and were working their respective positions when this dispute arose.

In April and May 1993 the General Chairman submitted claims in which he asserted that, on four occasions between March 1 and May 20, 1993, the Carrier permitted outside forces to perform work at various locations that the Claimants had "historically and traditionally" performed.

Subsequently, on June 23, 1995, the General Chairman informed the Carrier that:

"We have as yet received no reply to our attached claim of April 29, 1993, under the above file number on behalf of G.F. Mitchell, D.B. Lorendo, S. Elery, R. Bookey, P. Berklund, C. Smith, B. Prose, R.S. Johnson, and A. Fredlund, all of the Humboldt Section Crew.

We maintain that this failure to respond constitutes a violation of Rules 21-1(a) and 21-1(b) of the Schedule Agreement dated October 1, 1987, which requires the Carrier to reply within sixty days from the date our claim was filed. Our claim in this instance would now be allowed as presented."

The Carrier requested, and was granted a 60-day extension to respond to the Organization's June 23 correspondence. In its October 19, 1995 response, the Carrier maintained that it had not received the claim noted supra, and further maintained that it did not receive subsequent correspondence with respect to Parts (1), (2) and (4) also noted above. Based on the assertion that the Organization did not appeal the issue until "some two years later," the Carrier denied the claim.

In response to the denial, the Organization provided the Carrier with copies of three return receipts, dated May 20, May 24 and June 3, 1993, each of which had been signed by J. B. Reay on behalf of Heartland Division Manager D. J. Hansen. Specifically, the three return receipts which the Organization provided related to Parts 1, 2 and 4 of the claim. Although the Organization was unable to provide documentation regarding Part 3 of the above claim (System File R720/8-00228-004), the General Chairman contended: "That letter involved exactly the same disputed work concerning the Carrier's assignment of outside forces," and should therefore be paid accordingly.

Rule 21 - TIME LIMIT-CLAIMS OR GRIEVANCES - states, in pertinent part:

"1. All claims or grievances shall be handled as follows:

- (a) All claims or grievances shall 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."**

In June 23, 1995 correspondence, the General Chairman alleged that the Carrier violated the Agreement when it failed to respond to claims that had been submitted approximately two years prior. Although the Carrier initially denied receiving said claim(s), the Organization provided copies of return receipts relating to Parts 1, 2 and 4 of this claim. Premised on the return receipt documentation specific to Parts 1, 2 and 4 of this claim (System File Numbers R721/8-00228-002, R722/8-00228-003, and R723/8-00228-001), it is clear that the Carrier did not respond within the requisite 60-days. Therefore, those portions of the claim must be sustained. Although the Organization made a similar assertion with respect to Part 3 of the claim (System File No. R720/8-00228-004), there is no probative evidence on this record that supports the

Organization's claim that the Carrier did indeed receive the correspondence at issue. Therefore, Part (3) of this claim must be denied.

AWARD

Claim sustained in accordance with the Findings.

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 February, 2001.