

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35966
Docket No. MW-33425
02-3-96-3-789

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 Employes
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Lunda Construction Co.) to set bridge spans and panels on Bridge No. 472 near Mile Post 155.75 in the vicinity of Marshalltown, Iowa on January 9 through 12, 1995 (System File 4WJ-7008T/81-95-48 CNW).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out said work as required by Rule 1(b).
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, System Machine Operator A. N. Scavo and B&B Carpenter C. N. Nystrom shall each be compensated at their respective and appropriate rates of pay for all hours expended by the outside forces in the performance of the work in question on January 9 through 12, 1995.”

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.

System Machine Operator A. N. Scavo and B&B Carpenter C. N. Nystrom ("Claimants") hold seniority within their respective classes in the Maintenance of Way Track Department. At the time this dispute arose, they were regularly assigned within their respective classes. On January 7, 1995, a major derailment occurred on the Carrier's double main line near Marshalltown, Iowa. The westbound track, Track 1, was returned to service at approximately 2:00 A.M. on January 9, 1995, but major repairs continued on Bridge No. 472 and the eastbound track for several days thereafter. The eastbound track was not returned to service until January 13, 1995. In the meantime, both eastbound and westbound trains were required to use the single track while repair work continued.

The Claimants each were assigned to work on these repairs and, in addition, the Carrier contracted with Lunda Construction for a land-based crane of sufficient capacity and reach to make the necessary sets. According to the Carrier, with Track 2 out of service both east and west of the bridge, a rail-based crane could not be used to remove the damaged bridge panels and position new material at the bridge. Citing the "emergency" nature of this project, the Carrier gave no advance notice to the General Chairman that the Lunda Construction crane and operator would be used. On March 8, 1995, a claim was submitted alleging that the use of Lunda Construction in this instance, instead of the Claimants, was a violation of Rule 1 - Scope and the 15-day advance notice requirements.

The Carrier denied the claim, asserting that the Lunda Construction crane was needed to supplement the Carrier's forces which were already working at the derailment and also disputed the dates the Lunda Construction crane allegedly was in use. The initial claim denial was appealed by letter dated July 5, 1995, and denied by the Carrier's highest designated officer, by letter dated August 30, 1995. Some 11 months later, by letter dated July 12, 1996, the General Chairman requested the Carrier to

grant a "blanket extension of time limits for docketing with the NRAB [by] September 27, 1996," 11 different listed claims, including the instant claim. The Carrier responded that it would conditionally concur with that request to extend the time limits "as to all listed claims which are not currently past time limits." The Organization thereafter submitted the instant claim to the Board on September 24, 1996.

At the threshold of this case, the Carrier mounts a challenge that the claim is barred for lack of timely invocation of the Board's jurisdiction, pursuant to Rule 21(c) of the controlling Schedule Agreement, as follows:

"(c) The requirements outlined in paragraphs (a) and (b) pertaining to appeal by the employee and decision by the Company shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Company to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless, within (9) months from the date of said officer's decision, proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a System, Group or Regional Board of Adjustment that has been agreed to by the parties hereto as provided in Section 3 of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the nine (9) month period herein referred to." (Emphasis added)

As in the companion case in Third Division Award 35965, the Board is persuaded that the Carrier's procedural arbitrability objection is well-founded. This claim was already dead under the nine-month time limit of Rule 21(c) on July 12, 1996 when the General Chairman asked the Carrier to extend the time limits for this and several other claims. The net effect of the Carrier's response that it would grant the General Chairman's request "as to those listed claims which were not [as of July 12, 1996] currently past the time limits," was to extend the time limits for other listed claims but decline to waive the time limit violation that had already occurred in this particular case.

Based on the foregoing this claim must be dismissed for failure to handle the claim in the usual manner as set forth in Section 3, First (i) of the Railway Labor Act. See Third Division Awards 27502, 23566 and 23548.

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AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 8th day of March, 2002.