Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36285
Docket No. MW-35583
02-3-99-3-499

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Santa Fe Railway
((former Burlington Northern 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 (D.O.T. Rail Services) to perform ditching and dirt leveling work in the West Switching Yard at Eola, Illinois beginning November 12 through December 5, 1996 (System File C-97-C100-29/MWA 97-05-02AA BNR).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out the above-described work as stipulated in the Note to Rule 55.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above:

(a) Foreman D. F. Furar shall be allowed one hundred sixteen (116) hours' pay at his applicable straight time rate and fifty-four (54) hours' pay at his applicable overtime rate;

(b) Truck Driver L. G. Nunez shall be allowed one hundred sixteen (116) hours' pay at his applicable straight time rate and fifty-four (54) hours' pay at his applicable overtime rate;

(c) Group 2 Machine Operator R. W. Freeman shall be allowed one hundred sixteen (116) hours' pay at his applicable straight time rate and fifty-four (54) hours' pay at his applicable overtime rate;

(d) Group 2 Machine Operator R. A. Nelson shall be allowed ninety-nine (99) hours' pay at his applicable straight time rate and fifty-four (54) hours' pay at his applicable overtime rate; and

(e) Group 2 Machine Operator W. H. McGuire shall be allowed forty-nine (49) hours' pay at his applicable straight time rate and thirty-eight (38) hours' pay at his applicable overtime rate."

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.

The West Switching Yard in Eola, Illinois, was flooded in the summer of 1996. The Carrier determined there was an immediate need for flood repair and improved drainage. It regarded the situation as an "emergency" and engaged a contractor for this project. Ditching and dirt-leveling through the use of such equipment as a backhoe, bulldozer, bobcat loader and dump truck was involved. The contractor used a specially modified backhoe which the Carrier claims it did not possess and could not lease.

The record is far from clear on many of the details in this case. But sometime in October 1996, perhaps earlier, the contractor left the project and was replaced by Carrier employees who continued with the ditching and dirt-leveling through the use of Carrier equipment. Then, on November 12, 1996, the contractor returned and the Carrier employees were removed and assigned to other work. The Carrier alleges it gave telephone notice of the original contracting out to the Organization in the summer months, but was unable to produce any tangible evidence of such notice. It admittedly gave no notice to the General Chairman at the time the contractor returned to the project on November 12.

The Organization alleges that the work in question belonged exclusively to Carrier employees and that, in any event, the Carrier failed to provide the General Chairman with the necessary contracting out notice. The Carrier contends the Organization failed to show such work had been done in the past exclusively by BMWE-represented employees and insists it had no notice obligation in these circumstances. It asserts moreover that an "emergency" condition and the contractor's specialized equipment justified its choice of a contractor and that the Organization's claim was not presented within the pertinent 60-day time limit.

Rule 42 addresses the time limit issue in these words:

> "A. All claims . . . must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same within sixty (60) days from the date of the occurrence on which the claim . . . is based. . . . "

The parties agree that the "date of the occurrence" was November 12, 1996, apparently the day the employees were removed from the project and the contractor returned. The parties agree also that the 60-day period began as of November 13, the day following the "occurrence." They agree further that the 60-day period ended on January 11, 1997. The Organization placed the claim in question in the mail on January 11, 1997. The Carrier received the claim the morning of January 13, 1997. According to the Organization, the claim was "presented in writing . . ." to the Carrier on January 11 when it placed the claim in the hands of the U. S. Postal Service. It urges therefore that the claim was timely filed. According to the Carrier, the claim was not "presented in writing . . . " to the Company until it was received by a Carrier Officer on January 13. It urges therefore that the claim was untimely.

A number of Awards have interpreted and applied Rule 42. Some support the Organization's position; others support the Carrier's position. A claim is formalized through several steps. It must be reduced to writing; it must be sent; it must be received. Placement of a written claim in a mail box is simply not tantamount to the claim being "presented . . . to the officer of the Company authorized to receive same." Note Award 18 of Public Law Board No. 3460 between these same parties. Had the parties intended a mailing alone to be sufficient, they surely would have said so. The Agreement then would have stated that the claim must be "sent" or "mailed" within 60 days of the occurrence. But Rule 42 nowhere mentions sending or mailing. It speaks only of the claim being "presented" to a Carrier officer authorized to "receive" it. These words strongly suggest that the parties meant the date of receipt, the date "presented," to be the critical date in applying the 60-day time limit. Of course, an exception may well be appropriate when postal negligence causes undue delay in delivery. But no such undue delay was present here. The Organization's claim was not "timely filed" and must therefore be dismissed.

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 28th day of October 2002.