Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37269
Docket No. MW-36373
04-3-00-3-619

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Burlington Northern and Santa Fe Railway Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Patrick Construction) to install trench drains and bank stabilization work at Mile Post 160.5 near Stanford, Montana on the Montana Division beginning July 9, 1998 and continuing (System File B-M-628-F/MWB 98-12-10BF BNR).

(2) The Agreement was further violated when the Carrier failed to make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.

(3) The Agreement was further violated when the claim filed by Vice General Chairman G. E. Frank under date of August 31, 1998 to Carrier Representative K. L. Parenteau was not denied by Ms. Parenteau pursuant to Rule 42 and shall now be allowed in accordance with said rule.

(4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Foreman G. W. Sinclair, Group 2 Machine Operators R. C. Rodriguez, M. W. Sinclair, J. W. Peltier, G. L. Sinclair, K. R. Johnson, F. L. Linquista, Laborers R. Patacsil and L. Spiller shall each '... receive an equal and proportionate

amount of pay for all straight time hours and overtime hours worked by the contractor beginning on July 9, 1998 and continuing until work has been completed."

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.

This is a contracting dispute where proper notice was sent to the General Chairman by letter dated June 24, 1998 asserting the nature and extent of the work involved and the reasons for the contracting. The Organization responded to the notice on June 26, 1998, claiming that the nature of the work was within the scope of the Agreement, could be performed by employees with equipment owned by the Carrier and requesting a conference. There is no contention herein that the notice and conference requirements in the Agreement were violated. According to the claim, the contracting in issue began on July 9, 1998 and involves bank stabilization work.

This case turns on the procedural issue raised by the Organization under Rule 42, Time Limit on Claims, which states in pertinent part:

"A. All claims or grievances 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 or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (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 Company as to other similar claims or grievances."

The relevant facts establish that by letter dated August 31, 1998, Vice General Chairman (VGC) G. E. Frank initiated a continuing claim protesting the subcontracting of the bank stabilizing work near Stanford, Montana, and sent it to K. Parenteau, Manager of Maintenance Support, located in the Carrier's Kansas City office, the Company officer authorized to receive such claims. It was stamped received by the Carrier on September 3, 1998. On the top of the Organization's letterhead upon which the claim was typewritten is its logo in the middle with the name of its General Chairman (GC) and Vice Chairman/Secretary-Treasurer, the Federation address, as well as the names and addresses of each of the four VGCs, including Frank, on each side. With the exception of the Federation address, the names and addresses of the GC and VGCs are all the same size and clearly designated.

By cover letter dated October 27, 1998, Parenteau sent responses to four claims, including the instant one, to VGC R. D. Osler at his Whitefish, Montana, office. The record reflects that Osler was away on vacation from October 24 to November 2, 1998, and upon his return, discovered that the envelope containing denial letters to several claims included one that he had not filed. VGC Osler's written statement indicates that he sent that envelope and denial letter back to the Carrier as soon as he could upon his return stating that he had not filed the claim, and denies that he sat on it for a period of time waiting for the time limits to expire. The denial letter itself indicates that the reasons for the contracting, as stated in the prior notice, were that the Carrier did not possess the specialized equipment or skill necessary to perform the work, was not equipped to handle all phases of the work within the time frame allotted, and the Claimants were fully employed during this period.

By letter dated November 4, 1998, VGC Frank informed Parenteau that the claim was timely filed and received, and due to the Carrier's failure to answer within the prescribed time limits, the provisions of Rule 42A require that the claim be allowed as presented. On December 10, 1998, the Organization appealed the claim to the General Director of Labor Relations in Fort Worth, Texas, indicating

that it was in default and that he had not received any response from Parenteau to date.

On January 26, 1999, General Director of Labor Relations D. J. Merrell responded in writing, indicating that Parenteau had timely responded to the claim and attaching a copy of said response. Merrell stated that Parenteau inadvertently mailed the declination to Osler rather than Frank, it was accepted by Osler's office, and that both Osler and Frank sat on the letter until the time limits had expired before bringing this to the Carrier's attention. He also addressed the merits of the contracting dispute.

Following a series of extensions of time during which to handle this and other claims, the Organization appealed the matter by letter dated April 27, 2000, taking issue with the Carrier's characterization of what occurred as the Organization intentionally "sitting on its hands." Therein the Organization reiterated that Osler sent the declination letter back to Parenteau's office as soon as he found it upon his return from vacation, and noted that Parenteau neither responded to this occurrence or VGC Frank's November 4 letter bringing the lack of timely response to her attention, thereby forcing the Organization to appeal the matter based upon Article 42A. The Organization also addressed the merits of the claim, noting that the contractor expended some 5184 hours performing the disputed work.

The Organization contends that the language of Rule 42A requires that the claim be sustained as presented because the Carrier failed to timely respond to the representative who filed the claim, citing Third Division Awards 27640, 27692, 28604, 28743, 29382, 29992, 30241. With respect to the merits, the Organization asserts that the work involved is scope-covered, specifically reserved to employees by the Agreement, customarily and historically performed by them and that the Carrier failed to established that special equipment or skills were involved or that an emergency situation existed necessitating the contracting.

The Carrier argues that the Organization failed to establish a violation of Rule 42A because the record reflects that the Carrier responded to the claim in a timely fashion on October 27, 1998, the response was accepted at the Organization's office to which it was sent, and any error in location was inadvertent and constitutes harmless error, which should not support the absurd windfall remedy requested by the Organization in this case. It notes the confusion caused by the Organization's letterhead, relying on Public Law Board No. 6204, Awards 17 & 20 as dismissing

this type of objection by the Organization, and Public Law Board No. 5950, Award 2. The Carrier contends that the evidence supports the conclusion that the Organization was "laying in wait" until the time limits passed in order to bring the inadvertent error to the Carrier's attention, providing a sufficient basis to deny the claim, citing Third Division Awards 33850 and 22111. The Carrier argues that in circumstances similar to these, the Board does not grant the full relief requested by the claim, despite the language of Rule 42A, where to do so would be unjustified and without contractual support, citing Third Division Awards 35916 and 35031. It urges the Board to reach the merits, for which overwhelming precedent on the property holds that the Carrier's subcontracting of similar work does not violate the Agreement. See, e.g. Third Division Awards 36744, 36326, 36283, 34217.

A careful review of the record convinces the Board that this case must be decided on the procedural issue involved without reaching the merits. There can be no dispute that Parenteau's October 27, 1998 response to the instant claim was addressed and sent to the wrong VGC. Thus, while drafted and sent within the 60 day time period for responding to claims and containing the reasons for the subcontracting, the Carrier's denial did not comply with the requirement of Article 42A that notice of disallowance of a claim be sent to "whoever filed the claim or grievance (the employee or his representative." As noted in other cases presented to the Board dealing with violations of similar time limit provisions, the parties have agreed upon the specific remedy for such occurrence as made clear by the language "If not so notified, the claim or grievance shall be allowed as presented." Third Division Awards 22822, 27640, 27692, 29382, 29992, 30241. Unlike the situation in Third Division Award 27640, where the Carrier's Dissent takes issue with the Board's lack of jurisdiction to award the requested relief, the request for compensation sought by the instant claim is based upon the number of hours worked by the contractor, a remedy well within the auspices of the Board. The Board is bound to enforce the parties' agreed language even if the claim, if addressed on the merits, would be denied.

The Board is unable to accept the Carrier's argument that there should be no monetary remedy in this case based upon facts that it alleges establish a "sharp practice" by the Organization of "laying in wait" until the time limits passed before bringing the mistake to the Carrier's attention. Unlike the situation in Third Division Award 22111, where the Carrier waited some 62 days until just beyond the 60 day time limit to inform the Organization that it had filed the claim with the wrong Carrier officer, the evidence herein reveals that the claim was filed on August

31 and received on September 3, 1998. The Carrier's disallowance was sent on October 27, 1998, almost at the end of the 60 day time period and at a time when the VGC to whom it was mistakenly sent was away on vacation. There is no evidence to undermine VGC Osler's contention that he notified the Carrier of its error as soon as it was discovered after his return on November 2, 1998. Additionally, VGC Frank sent the Carrier another letter on November 4, 1998 advising of the fact that he had not received a copy of any declination letter.

The record reveals that Parenteau did nothing to attempt to rectify her mistake, albeit untimely, which formed the basis for cutting off liability in Third Division Awards 27640, 28604 and 35916, and that the Organization never formally received a copy of the initial declination letter in the grievance procedure until it was attached to the Carrier's January 26, 1999 denial of its appeal. These facts do not support a finding that the Organization is attempting to benefit from a "sharp practice" in this case. See, Third Division Award 33850. Further, unlike the findings in Awards 17 and 20 of Public Law Board No. 6204, there is no basis for concluding that Parenteau was somehow confused by the Organization's letterhead. In that case the declination letter was sent to the correct VGC, but at the address boldly displayed on the center of the letterhead. Here, Parenteau sent it to the wrong VGC at his correct address, which is just as discernible as VGC Frank's.

Many of the cases relied upon by the Organization concerning the appropriate award of the requested monetary remedy are for time claims that are finite in nature, and the fact that they are not continuing claims is noted by the Board. See, e.g. Third Division Awards 27692 and 30241. There is no evidence in the record concerning when the protested subcontracting was completed and the length of the claim period, except for the Organization's assertion that the contractor worked 5184 hours. Unlike the situation in Third Division Award 35031, the Carrier chose to rely solely upon the established validity of its practice of contracting this type of work and did not specifically take issue with the Organization's requested remedy other than to indicate that the Claimants were fully employed during this period, a defense rejected by the Board. Third Division Awards 36015 and 20892. While sustaining the claim provides an extraordinary remedy for an alleged violation of subcontracting work, after proper notice and conference, where a multitude of prior cases hold that the Carrier may well be within its rights to engage in the underlying subcontracting, the Board can find nothing in this record that enables it to disregard the clear language of Rule 42A and mitigate the result. Accordingly, the claim must be sustained as presented.

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 5th day of November 2004.