Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40801
Docket No. MW-39070
10-3-NRAB-00003-050497
(05-3-497)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Division -
(IBT Rail Conference
(
(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 (Kelly-Hill RR Construction and McKinness Excavating, Inc.) to perform Maintenance of Way and Structures Department work (distribute material, build switch, install switch and related work) at Mile Post 189.4 on June 15, 16, 30 and August 12, 2004, instead of District T-2 employes J. Dirks, K. Betts, J. Coolican, J. Holding, L. Nordman, R. Buol, M. Kath and D. Bohl (System File 2RM-9593T/1407581 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written notice of its intent to contract the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Dirks, K. Betts, J. Coolican, J. Holding, L. Nordman, and D. Bohl shall now each be compensated for twenty-four (24) hours at their respective

straight time rates of pay and six (6) hours at their respective time and one-half rates of pay and Claimants R. Buol and M. Kath shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay and six (6) hours at their respective time and one-half rates of pay."

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 basic facts are not in controversy. Golden Grain Energy, LLC operated an ethanol plant in Mason City, Iowa. According to the contract in the record, it wanted to access the Carrier's track in the vicinity of its plant. Access required building some 2,700 feet of track on its property leading to the Carrier's track. In addition, Golden Grain Energy, LLC was to build a switch panel to connect its track with that of the Carrier and provide the switch panel to the Carrier for installation.

The contractor built the switch panel on June 15, 16, and 30, 2004, on land adjacent to the Carrier's property. The record suggests that the construction of the switch may have actually been partially on the Carrier's property. In any event, the work was done out in the open and in plain sight of the Carrier's employees.

On August 12, 2004, the switch panel was installed by Carrier forces with the assistance of two contractor employees.

The Carrier raised a procedural objection to the timeliness of the claim. As the foregoing Statement of Claim makes clear, the claim is for all hours worked by the contractor on the switch panel beginning on June 15, 2004. However, the Organization's claim was not dated until August 25, 2004. Rule 21 of the parties' Agreement reads, in pertinent part, as follows:

> "RULE 21 - TIME LIMIT ON CLAIMS
>
> All claims or grievances shall be handled as follows:
>
> "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."

According to the Organization's contention in opposition to the Carrier's objection, because the switch panel was not installed until August 12, 2004, that date is the triggering date for the application of Rule 21. In the Organization's view, the claim filed on August 25 was well within the 60-day time limit.

The record before the Board establishes that the work in dispute was one overall project pursuant to a contract signed by Golden Grain Energy, LLC and the Carrier on April 9, 2004. This kind of project does not fit within continuing violation theory. It is further clear that the Organization is seeking to retroactively claim damages for the work that began on June 15, 2004. Under the circumstances, the Organization's contention that August 12, 2004, is the controlling date must be rejected.

Given the state of the record before the Board, we are compelled to find that the instant claim was not filed in compliance with Rule 21. As a result, we may not reach the merits and must dismiss the claim.

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 15th day of December 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40801, DOCKET MW-39070
(Referee Wallin)

The Majority in this case incorrectly interpreted Rules 1 and 21 to arrive at an award based on a procedural issue that is in conflict with settled precedent of this Board. Given its erroneous findings and its conflict with established precedent, this award should be given no precedential value and treated like the anomalous outlier that it is.

This was a contracting out claim centered on Rule 1 work reservation in connection with the building of a switch. To be reserved under the language of Rule 1, work requires several express characteristics, one of which is that it be used: "*in the performance of common carrier service*". It was this characteristic that was the final element needed to establish work reservation in this case and thus making "all work in connection with" the switch reserved to Maintenance of Way employes

Rule 21 states a claim must be presented "*within sixty (60) days from the date of the occurrence on which the claim or grievance is based.*" The instant claim was centered on Rule 1 work reservation, so the Rule 21 "date of occurrence" was the date the work became reserved under Rule 1. Here, work reservation was ascertained with the installation of the switch on August 12, 2004 because that is the date the switch became used in the performance of common carrier service. Consequently, the Rule 21 "occurrence" was August 12, 2004, which was the FIRST date the work met all of the Rule 1 express characteristics of work reservation. The fact that the claimed work took place more than sixty (60) days prior to the last element of work reservation being established on August 12, 2004 is inconsequential, particularly here where it was undisputed that the Carrier failed to provide advance notice of the contracting and: "*** The Carrier knew well in advance that the contractor was going to perform this work. ***" (Employes' Exhibit "A-3").

The General Chairman laid out the situational facts that show a claim filed prior to August 12, 2004 would have been speculative and would not have contained all of the elements of Rule 1 work reservation. The pertinent part of the General Chairman's statement reads:

> "While the switch might have been built June 15, 16 and 30, 2004, the switch was not installed until Thursday, August 12, 2004. Until that time, the Carrier could have refused to allow this switch to be installed, brought in another switch that was built by Carrier employees or even build another switch at the location by Carrier employees. The switch that the contractor's employees built could have been dismantled at any time or installed within the limits of the ethanol plant's internal trackage. It did not become a violation until the Carrier allowed the switch to be installed in their mainline. Therefore, the filing of the claim is well within the 60 calendar day time limit as defined in Rule 21 A." (Employes' Exhibit "A-3")

It is perplexing that the Majority did not provide an analysis, or even comment on the General Chairman's assertions. Equally disturbing is that this decision flies in the face of prior award precedent. In fact, in order to meet the Majority's rationale here, the Organization would have had to file a speculative and hypothetical claim. However, speculative and hypothetical claims are considered not actionable given that it is a "*** *long standing doctrine in this industry (as in the courts) that cases must be ripe for adjudication and not hypothetical.* ***" (PLB No. 5247 - BLE vs. ATSF).

Additionally, First Division Award 17064 and Third Division Award 26290 held:

AWARD 17064: (First)

"We think the function of this Board is the adjustment of actual rather than potential and hypothetical claims."

AWARD 26290: (Third)

"*** As we have said on numerous occasions (e.g. Second Division Award 9685 and Third Division Award 20244), the Board does not decide hypothetical Claims and no Rules give employees the right to file grievances over events which have not yet transpired. ***"

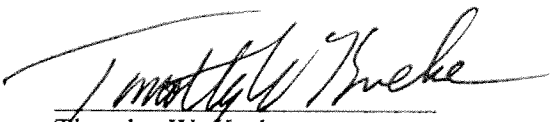
Presenting the instant claim prior to August 12, 2004 would have been very similar to the circumstances addressed in Third Division Award 29360, which held:

"While the record indicates that the Carrier purchased the wear plates, there is nothing of record to suggest that the Carrier used them. Regardless of the various arguments of the parties concerning the appropriate contract interpretation by the Organization, the extent of the scope clause, etc., we find that this dispute is premature and moot. We do not determine if there would, or would not, be a violation if the Carrier used the purchased material; the fact remains that it did not use the wear plates. One can speculate as to the ultimate purpose of the purchase, but the mere fact of the purchase does not give rise to an actionable claim under the Agreement."

A proper analysis of the procedural violation in this case demanded exploration of the Organization's work reservation claims and the General Chairman's assertions that a claim could not be filed on speculation. However, an analysis of the General Chairman's assertions about the date of the "occurrence" is nonexistent in this award. The Majority did address the applicability of the continuing violation theory. But, there was never an assertion by the Organization that this case involved a continuing violation. The only discussion about the continuing violation theory was contained in the Carrier's submission in an out of context defense addressing such violations.

Previous board awards would have rejected this claim as hypothetical if it had been filed before all the elements of an actionable claim were established, yet this award rejected a claim as untimely, given that the Organization waited until all of the elements of an actionable claim were met. This Majority provided the Organization with a genuine catch-22 and an impossible situation. This award overlooks the work reservation language of Rule 1, misinterprets Rule 21 and is contrary to reasoned arbitral precedent. Therefore, I emphatically dissent.

Respectfully submitted,



Timothy W. Kreke
Labor Member