Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 43323
Docket No. MW-44530
19-3-NRAB-00003-170682

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The claim* as appealed by General Chairman Dennis R. Albers, by letter dated October 18, 2016 to VP Labor Relations-Corporate Secretary A. Godderz, shall be allowed as presented because said appeal was not disallowed by VP Labor Relations-Corporate Secretary A. Godderz in accordance with Rule 14 (System File KCS493RR16/K0416-6854 KCS).

***The initial letter of claim will be reproduced within our initial submission."**

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.

By letter dated August 1, 2016, the Organization submitted a claim to the Carrier on behalf of J. L. Crayon and B. L. Moore protesting the assignment of work to an outside contractor (picking up old ties between Mile Post 127 and Mile Post 90 in Ruston, Louisiana) performed by the contractor during the period June 27, 2016 through July 3, 2016.

The Carrier received the claim on August 11, 2016 and by letter dated October 5, 2016, the Carrier denied the claim.

By letter dated October 18, 2016 – received by the Carrier on October 20, 2016 – the Organization appealed the Carrier's denial.

By letter dated March 15, 2017 – received by the Carrier on March 20, 2017 – the Organization notified the Carrier that the Carrier had not responded to the Organization's appeal within the contractually designated time limits in Rule 14 (60 days) and stated that the claim should be allowed as presented.

As shown by the Carrier's letter dated May 18, 2017 which followed an April 26, 2017 claims conference, there is no dispute that the Carrier failed to deny the Organization's appeal within 60 days. In that letter, the Carrier denied the claim ("... the Carrier can find no merit to them [the claims] and therefore, they all remain denied in their entirety for the reason(s) set forth in the initial declination and its claims conference response.").

The Organization progressed the dispute to the Board solely on the Carrier's failure to respond to the Organization's October 18, 2016 appeal within the 60-day time provisions of Rule 14 and not on the merits of the underlying contracting dispute.

Rule 14 provides:

"RULE 14
Time Limit on Claims and Grievances

14-1. 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 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.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

*** * ***

(c) The requirements outlined in paragraphs (a) and (b) of this rule, pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier 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 (sic) or regional Board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months" period herein referred to."**

"... [B]ecause the Organization has the burden in this case, the first inquiry is whether clear contract language supports the Organization's position." Third Division Award 35457. Clear contract language supports the Organization's position.

Rule 14-1(a) provides that for initially filed claims "[s]hould 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 ... [and i]f not so notified, the claim or grievance shall be allowed as presented ...." Rule 14-1(c) provides that "[t]he requirements outlined in paragraphs (a) ... of this rule, pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer ...." That is clear contract language requiring that the Carrier must deny an appeal from the denial of a claim within 60 days and if the Carrier does not do so "the claim or grievance shall be allowed as presented ..." [emphasis added]. The phrase "shall be allowed as presented" leaves nothing to discretion.

The Carrier did not respond to the Organization's October 18, 2016 appeal within the 60-day time provisions of Rule 14. By operation of clear contract language, the claim must be allowed as presented. The claim shall therefore be sustained.

In this case, the Carrier's arguments in its Submission that late denials of claims or appeals from denials of claims merely toll the Carrier's liability for procedural violations along with its further assertion that National Disputes Committee (NDC) Decision No. 16 has the same effect tolling any liability after the

date the Carrier denies the claim or appeal do not change the result. Putting aside the Organization's position that the Carrier's raising of a tolling argument – particularly under NDC No. 16 – cannot be considered by the Board because the Carrier's position amounts to new argument (which the Carrier disputes), even if the Board could consider the Carrier's tolling argument, the result in this case would still require a sustaining award.

The Carrier cites to Third Division Award 41437 – a discipline case and not a rules case such as this – for support of its tolling arguments. See Carrier Submission at 5. That award held that "[t]he Board will ... sustain the instant claim ... until the date of the ... untimely declination."

According to the Organization, the period of relief covered by the claim is from June 27, 2016 through July 3, 2016 when the contractor performed the work. Under the Carrier's tolling arguments, its liability would therefore cease as of May 18, 2017 when it denied the Organization's October 18, 2016 appeal. However, by the time the Carrier denied the Organization's appeal, the Carrier's potential liability had already ended – i.e., as of July 3, 2016 when the contractor allegedly completed performance of the work. That being the case, the Carrier's tolling arguments are moot and need not be addressed.

Under the facts of this case, just as the Carrier would properly rely upon the time provisions in Rule 14 obligating the Organization to timely file claims "... within 60 days from the date of the occurrence ..." and to appeal denials of claims "... within 60 days from receipt of notice of disallowance ..." with the consequence that "[f]ailing to comply with this provision, the matter shall be considered closed ...", the Organization can rely upon the similar provisions in Rule 14 that, with respect to appeals of denials, the Carrier "... shall, within 60 days from the date same is filed, notify whoever filed ... [and i]f not so notified, the claim or grievance shall be allowed as presented ...."

In light of the above and given that clear contract language governs this case, the Carrier's position that the underlying contracting dispute lacked merit is not relevant. If the procedural prerequisites requiring timely denials of appeals do not apply in this case, then the Organization would have the same ability to argue that untimely filed claims or appeals that have merit should nevertheless be considered and sustained by the Board even though the Organization's claims or appeals of denials are untimely. In this case, clear language is clear language and the Carrier's tolling arguments – even if considered – would not change the result and are moot

as the work ended prior to any tolling that might occur under the Carrier's arguments. In this case, we therefore express no opinion on the merits of the Carrier's tolling arguments.

The bottom line in this case is that the result is driven by clear contract language and the Board has no authority to ignore that language. See Third Division Award 35515:

> **"... However, a fundamental rule of contract construction is that clear language must be enforced even if harsh or against the expectations of one of the parties. This is such a case. The language is clear. The result is unavoidable.**
>
> **See also, First Division Award 24819:**
>
> **The language is clear. We can go no further. The interpretation must therefore be literal. ... The Board simply has no authority to change or ignore clear language, no matter what inequities the employees may perceive. Clear language must be enforced even if the result is unfair. ..."**

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 14th day of December 2018.