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

Award No. 43643
Docket No. MW-42811
19-3-NRAB-00003-140529

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures work (building repair work) at the south wall of the car shop in the Havelock Shops in Havelock, Nebraska beginning on June 17, 2013 through October 9, 2013 (System File C-13-C100-345/10-13-0587 BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notice of its intent to contract out said work or 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 claim* as presented by Local Chairman M. Sailors under date of July 13, 2013 to Director Maintenance Support M. Tripp shall be allowed as presented because said claim was not disallowed by Director Maintenance Support M. Tripp in accordance with Rule 42.

(4) As a consequence of the violations referred to in Parts (1) and/or (2) and/or (3) above, Claimants R. Thoms, R. Malcolm, R. Wall, C. Nielsen and G. Waegli shall each '... be paid for the hours that the

contractor charges to do this job at the appropriate rate of pay as settlement of this claim.'

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

This claim concerns the use of outside forces, MSA Contractors of South Dakota, between June 17, 2013 and October 9, 2013, to remove windows, cut and pull down stucco and top lintel block and some brick on the lower wall of the south wall of the car shop at the Havelock Shops in Havelock Nebraska. The Claimants have established and hold seniority in various classifications within the Bridge and Building (B&B) Subdepartment of the Maintenance of Way and Structures Department on the Lincoln District 400.

The Organization filed a claim on July 13, 2013, which was received by the Carrier on July 19, 2013. The Organization received the Carrier's disallowance of the claim on September 18, 2013. In response, the Organization informed the Carrier that the claim should be sustained on the basis of the Carrier's failure to comply with the time limits of Rule 42. The parties were unable to resolve the dispute on-property and the claim is now properly before this Board for final adjudication.

The Organization contends that the Carrier failed to timely respond to the Organization's initial letter of claim within 60 days, which triggered the default provisions contained in Rule 42A.

The Organization contends that the disputed work is reserved to the Carrier's Maintenance of Way forces under Rules 1, 2, 5, 55 and the Note to Rule 55 and should have been assigned to them, rather than to outside contractors. The Organization contends that there should be no dispute that the work has been customarily performed by BMWE-represented employes for decades. The Organization further contends that the Carrier failed to notify the General Chairman in advance of its plans to assign outside forces to perform this work.

The Organization contends that the Carrier's defenses should be rejected as without merit. The Organization contends that the Carrier's alleged asbestos abatement defense must fail, because the Carrier has failed to submit any evidence to support its assertion. The Organization contends that the claimed work was not for asbestos abatement. The Organization contends that the Claimants are entitled to the claimed remedy.

The Carrier contends that its response to the Organization's October 14, 2013, letter was timely, because the declination was delivered to UPS on the 59th day from the Carrier's receipt of the claim. The Carrier contends that arbitral precedent supports its position that "notify" refers to the time of dispatch, not the time of receipt. Third Division Award 32727. Public Law Board 3460, Award 18.

The Carrier contends that this case is about asbestos abatement, a task that BMWE-represented employees do not perform, nor do they possess the skills to perform it. The Carrier contends that it is not required to piecemeal a portion of the asbestos abatement project.

The Carrier contends that the Organization has failed to produce evidence that the work occurred as claimed, or to show the work was actually performed by a contractor. The Carrier further contends that the Organization has failed to demonstrate that this work was customarily performed by its members. Finally, the Carrier contends that the Claimants are not entitled to any monetary remedy.

The first issue that must be resolved is whether the Carrier failed to comply with Rule 42A when it mailed the disallowance on the 59th day after receiving the Organization's claim.

Rule 42A states, in part:

> **"A. All claims or grievances must be presented in writing by or on behalf of the employe 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 employe 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."**

A number of prior arbitral awards have dealt with the meaning of "notify" in Rule 42A. The Carrier has presented a number of awards that held that the "mailbox rule" should apply as it does when a claim is presented. For instance, see Third Division Awards 32727 ("The Board has held numerous times that it is the date of posting (mailing) of the denial, not the date the letter is written that determines the date of denial." At the same time, the Organization cites to several more recent and on-property awards that determined that "notify" refers to the date the Organization receives the denial.

In Public Law Board 7738, Case 30, the Board addressed the conflict head-on:

> **"The Board recognizes that the "mail box rule" is often applied in contract disputes regarding time frames, especially where there is ambiguity in the language of the contract. But here the language in Rule 42 is not ambiguous. It clearly states "notify". How can the Organization be officially notified within the time frames if they don't get notification of the response until after sixty (60) days? There is a clear violation of Rule**

> **42….Under Rule 42, the term "notify" is interpreted to mean actual notification, not dispatch of notification."**

In Third Division Award 42698, this Board reviewed awards on both sides of the conflict and followed the line of cases that found a violation of Rule 42A when the Carrier's response was not received within 60 days. See, Third Division Award 32811. That Board wrote,

> **"Third Division Award 32889 explained, "We follow this [Marx Award] precedent because to do so provides the parties with a greater degree of certainty and predictability in their claims handling process." This Board, subscribing to the reasoning expressed in the Third Division Award, follows the precedent set in the latest, definitive on-property award, and thus finds a violation of Rule 42.A."**

Thereafter, in Third Division Award 42966, another on-property award, this Board followed this more recent precedent and concurred with the reasoning of these prior awards. This Board sees no reason to depart from this more recent line of well-reasoned cases. Rule 42.A. makes clear that when a party is not notified of a disallowance within 60 days from the date the claim is filed, the claim shall be allowed as presented. Resolution of the claim on this procedural ground makes consideration of the merits of the claim unnecessary.

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 17th day of May 2019.