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

Award No. 43796
Docket No. SG-44455
19-3-NRAB-00003-170597

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation:

Claim on behalf of all members of Local 225 located in Buffalo, New York, particularly the 10 employees listed on the Frontier call list for 8 hours pay each at their respective rates of pay, for each day of the last 60 days Carrier worked contractors, account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule and Appendix I, when, starting on February 3, 2015, Carrier permitted outside contractors to install 11 remote control derails at the west end of Frontier Yard, thereby causing the Claimants a loss of work opportunity. The claim also requested that Carrier immediately begin training and maintenance programs for the remote control derail switches. Carrier's File No. 2015-186035. General Chairman's File No. 225-1M-2015. BRS File Case No. 15607-CSX(N)."

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 dispute initially arose on February 3, 2015, when outside contractors began installing eleven remote control derail devices on tracks at the west end of the Frontier Yard in Buffalo, New York. The work continued for approximately two months. Derails are mechanical devices affixed to rails that stop trains; they are used as safety protection for employees working on or near tracks. The Organization filed a claim by letter dated April 10, 2015, alleging that in contracting the remote derail installations, the Carrier had violated the Scope Rule and Appendix I of the parties' Agreement. The Organization specifically referred to Items 4, 7, 22 and 23 of the Scope Rule, which detail specific types of equipment and operations that fall within the Scope Rule. The Carrier responded by letter dated June 1, 2015, denying the claim on the grounds that it was vague and excessive. The Organization appealed by letter dated July 8, 2015, but postmarked July 17, 2015.

On November 29, 2015, the Organization wrote to the Carrier, expressing its opinion that pursuant to Rule 4-K-1 of the Agreement, the Carrier had failed to respond to the Organization's appeal in a timely fashion and demanding that the claim be "allowed as presented." The Carrier contends that on February 19, 2016, its Labor Relations representative held a conference call with Organization representatives in which the Carrier agreed to the Organization's request to conference the claim at a later date "due to reorganization of Union files." On July 26, 2016, twenty claims, including the instant claim, were conferenced in Jacksonville, Florida; by letter dated August 29, 2016, the Organization confirmed that the claims were conferenced. On September 7, 2016, the Carrier's response to the Organization's appeal was sent to the Organization. It again declined the claim on the basis that it was vague and excessive.

By letter dated January 31, 2017, the Organization wrote to the Carrier again asserting that the Carrier had violated the 60-day time limit set in Rule 4-K-1 for it to respond to an appeal from the Organization. It again demanded that the Carrier should pay the claim "as originally presented." By letter dated February 27, 2017, The Carrier denied that it had violated Rule 4-K-1. Its chronology indicated that after the July 11, 2015, appeal was filed, the parties had extended the time limits for conferencing the claim "pending scheduling mutually agreeable time for conference," and that after the

Organization's November 29, 2015, letter regarding timeliness of the Carrier's handling, that the parties had again extended the time limits "pending mutually agreeable time and place for conference." The chronology also included a conference call held between Carrier and Organization representatives on February 19, 2016, agreeing to extend the time limits for conferencing the claim. The letter closed with the statement:

> **"It is the position of the Carrier that the time limits were not violated. The Carrier and Organization have traditionally extended the time limits for purposes of conferencing claims in the interest of efficiency and in order to schedule the conferences for a mutually agreeable date, time and place, as was the case here."**

The parties having been unable to resolve the dispute through the normal claims procedure, the matter was appealed to the Board for final and binding adjudication.

The Organization contends first that the Carrier's response to its timely appeal was so egregiously late that the claim must be "allowed as presented," as stated in Rule 4-K-1(b). The language of paragraph (b) is clear and unambiguous and has a solid foundation in arbitral precedent from the Board that enforces the language as written, allowing the claim to be presented when the Carrier fails to respond within the provided 60-day time period. Here, the appeal requested a conference, which was not held until July 26, 2016, 384 days following the date of the appeal and well beyond the 60-day time limit. The Carrier did not dispute the facts or that the time limits had been exceeded, but offered the defense that there were time limit extensions. However, Rule 4-K-1 requires that times limits may be extended only by written agreement, and there is no evidence in the record of any written agreements to extend the time limits in this case. Regarding the merits of the dispute, the Carrier violated the Scope Rule. The derail installation is covered under the Scope Rule which lists as covered systems: "remote control of switch and signal systems"; "cab signal, train control or train stop systems other than that portion on moving equipment"; "electric lighted switch lamps"; and "pipelines and pipeline construction used for mechanical operation or locking of derails, switches and signals." Photographs in the record establish that those are the type of work that was involved in installing the remote derails. Even if these "specific derails" were not covered by the Scope Rule, as the Carrier contends, they are covered under Appendix I, which requires the Carrier to "train BRS-represented employees on the

installation and maintenance of new and/or advanced technology applicable to systems protected by the Scope."

The Carrier maintains that it properly and timely responded in accordance with Rule 4-K-1. Paragraph (b) states that "… A grievance or claim will be discussed *on a mutually agreed upon date*. When a grievance or claim is not allowed, the highest designated Carrier Labor Relations Officer will so notify, in writing, whoever listed the grievance or claim (employee or his representative) *within sixty (60) calendar days after the date of appeal or the date the grievance or claim was discussed (whichever is applicable)* of the reason therefore." The Organization incorrectly interprets the language to require the Carrier either to conference the claim or to send a written denial within sixty days of the date of the appeal. The language clearly and unambiguously states that if the claim is not allowed, the Carrier will notify the Organization in writing within sixty days after the date of the appeal OR the date the claim was discussed. Rule 4-K-1(b) further states that conferences will take place on a *mutually agreed date*. The times lines were extended three times so that the parties could secure a mutually agreeable time for conference. The conference was held July 26, 2016, and the Carrier timely denied the claim by letter dated September 7, 2016, well within the sixty-day limit. Regarding the substance of the claim, there has been no violation of the Agreement. If the work took place in the area described in the claim, it is not scope covered, nor is it work that has historically and traditionally accrued to members of Local 225. The work described in the claim is in an area within the "blue light" limits on Mechanical Department track and would have been under the control of the Mechanical Department crafts. Moreover, remote control derails are an isolated track protection system—they are not connected to the signal system and do not control the movement of trains. The Organization has the burden to show the claimed work is within the Scope Rule and it has not done so, nor can it show the claimed work has been historically and customarily performed by BRS forces.

The Board must first address the procedural issue of whether the Carrier violated Rule 4-K-1 in responding to the Organization's appeal of July 17, 2015. The parties have negotiated detailed procedures for handling claims, including specific time limits for advancing claims through the process. Rule 4, Time Allowances, states, in relevant part:

"4-K-1

(a) All grievances or claims other than those involving discipline must be presented, *in writing*, by the employee or on his behalf by a Union representative, to the designated Supervisor *within sixty (60) calendar days* from the date of the occurrence on which the grievance or claim is based. Should any such grievance or claim be denied, the Carrier shall, *within sixty (60) calendar days* from the date same is filed, notify whoever filed the grievance or claim (employee or his representative) *in writing* of such denial. If not so notified the claim shall be allowed as presented.

(b) A grievance or claim denied in accordance with paragraph (a) shall be considered closed unless it is appealed, *in writing*, to the highest designated Carrier Labor Relations Officer, by the employee or his Union representative *within sixty (60) calendar days* after the date it was denied. A grievance or claim will be discussed on a mutually agreed upon date. When a grievance or claim is not allowed, the highest designated Carrier Labor Relations Officer will so notify, *in writing*, whoever listed the grievance or claim (employee or his representative) *within sixty (60) calendar days after the date of appeal or the date the grievance or claim was discussed (whichever is applicable)* of the reason therefore. When not so notified, the claim will be allowed as presented.

. . . . .

(e) … The time limits at any stage of handling may be extended *by written agreement* between the highest designated Carrier Labor Relations Officer and the Union representative. (Emphasis added.)"

The task before the Board in this case is to determine the parties' intent in the specific contract provision, Rule 4-K-1(b). The Organization contends that the Carrier is required by paragraph (b) to respond in writing to a timely appeal within sixty days, regardless of whether a conference has been held or not. The Carrier reads the language to mean that it must respond within sixty days of *either* the date of the appeal *or* the date of any conference "whichever is applicable"— and it contends that since the conference was not held until July 26, 2016, its September 7, 2016, response to the appeal was timely.

There is no dearth of Board awards that address timeliness issues related to the claims procedure. In Third Division Award No. 31345 (Wallin, 1996), the Board considered a time limits provision virtually identical to Rule 4-K-1(b). In discussing the structure of the language and what it meant, the Board held:

> **"Rule 17 contains ten subdivisions. The first three include multiple references to 60-day limitations for the taking of action by one party or the other. Subdivision (e) also provides for extension of the applicable time limits by agreement. When read in its entirety, Rule 17 contemplates that the various claim handling activities will occur within 60-day intervals unless extensions are agreed upon. . . .**
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> **Given the manner in which the procedural issue is postured here, Carrier's position is, effectively, as affirmative defense. Accordingly, it has the burden of proof to establish the validity of its position. . . . .**
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> **If Carrier's contention regarding automatic extension [that every time the Organization asked for a conference, the time limit was extended] is taken to its logical conclusion, there would never be a time limit on its response to the Organization's appeals as long as it did not actually participate in a conference. If Carrier were so inclined, it could resist agreeing to a conference indefinitely and, thereby, interminably delay the claims process. Nothing in the language of Rule 17 explicitly supports such a result . . . . Quite to the contrary, Rule 17(e) provides only for extensions by agreement. . . ."**

The opinion goes on to note that if the Carrier encountered difficulty in scheduling a conference, it could have requested an extension of the time limits or, in the alternative, have issued a denial to protect the time limits until a conference date could be agreed upon.

Read as a whole, Rule 4-K-1(b) establishes similar 60-day intervals for various claim handling activities. The Carrier contends that the language of paragraph (b) that requires it to within sixty days of *either* the date of the appeal or the date of the conference gives it leeway to respond later than sixty days from the date of the appeal. The contract language in Award No. 31345 was exactly the same, and Referee Wallin pointed out the logical problem associated with the Carrier's argument: that

interpretation could lead to situations where there would never be a time limit on when the Carrier had to respond to an appeal, as long as it did not participate in a conference. This Board finds the reasoning in Award No. 31345 persuasive and hereby adopts it in this case. To do otherwise would allow the Carrier to derail the claims procedure unilaterally, which was clearly not the parties' mutual intent when they drafted Rule 4-K-1(b).

As Referee Wallin pointed out, the Carrier can always protect itself by requesting extensions on the time limits. Here, however, Rule 4-K-1(e) requires that all such extensions be *in writing*—as, in fact, all aspects of claims handling are required to be. The Carrier contends that the parties mutually agreed to multiple extensions on the time limits in this case, but the record is devoid of any evidence of such extensions. Accordingly, the Board must conclude that the Organization did not agree to any extensions of the time limits for the Carrier to respond to the claim.[1]

The Organization filed its appeal to the Carrier's original declination of the claim by letter postmarked July 17, 2015. The Carrier did not issue its response until September 7, 22016, well over a year later. In the absence of any evidence that the parties mutually agreed to extend the time limits for the Carrier to respond to the appeal, the Board has no choice but to find that the Carrier did not respond timely, in violation of Rule 4-K-1(b). Paragraph (b) clearly states: "When not so notified, the claim will be allowed as presented." The claim is sustained in accordance with these findings.

AWARD

Claim sustained in accordance with the Findings.

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[1] **Indeed, the record includes two letters from the Organization, dated November 29, 2015, and January 31, 2017, asserting that the Carrier had exceeded the time limits for responding to the Organization's appeal. It is unlikely that it would have sent such letters if it had agreed to extend the time limits as claimed by the Carrier.**

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 16th day of July 2019.