

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43940
Docket No. MW-44678
20-3-NRAB-00003-180152**

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

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (R. J. Corman) to perform Maintenance of Way work (tamp, regulate and install ties and excavate ditches) between Mile Posts AKA 333.0 and AKA 370.5 on the Florence Division beginning on October 12, 2015 and continuing through November 7, 2015 (System File B15911715/2015-198705 CSX).**
- (2) The Agreement was further violated when the Carrier failed to comply with the Agreements advance notification and conference provisions in connection with the Carriers plans to contract out work.**
- (3) The claim* as presented by Vice Chairman R. Farmer on December 4, 2015 to Mr. R. Elliot must be allowed as presented because said claim was not disallowed by Mr. R. Elliot in accordance with Rule 24A.**
- (4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Claimants A. Folk, E. Horton, T. York, U. Lykes, H. Folk and A. Sibert shall now each be compensated for ten (10) hours at their respective straight time rates of pay, six (6) hours at their respective overtime rates of pay and eight (8) hours at their**

respective double time rates of pay for each day the violation occurred with all time credited to vacation and retirement.

*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.

The Organization filed this claim on December 4, 2015 alleging that the Carrier hired outside forces to perform work without notice of intent to contract with evidence of postmark on December 4, 2015. By letter dated January 25, 2016, the Carrier denied the claim with no evidence of postmark. On November 15, 2016, the formal conference was held. The parties were able to resolve the dispute and the claim was advanced. This matter is before this Board for final resolution.

The Organization contends that the Agreement was violated when the Carrier assigned outside forces to perform work which is customarily performed by Maintenance of Way Employee without proper advance notice of its intention to do so. The Organization also contends that the claim was properly presented to the designated officer who failed to deny the initial claim within sixty (60) days as required by Rule 24(a). The Organization argues that the record confirms that the Organization filed a claim with the Carrier by letter dated December 4, 2015. The record fails to establish or support that the Carrier timely denied the Organization's claim. The Organization asserts that the claim as presented in accordance with Rule 24(a). The Organization contends that the Carrier violated the agreement when it failed to assigned the disputed

work to the Claimants. The Organization argues that the record does not support the position of the Carrier that an emergency existed. Further, the Organization contends that the remedy is appropriate. The Organization argues that due to the procedural default, the Agreement states that the claim should be allowed. The Organization also argues that due to the violation of the agreement, the Claimants were deprived of work opportunities and the resulting monetary compensation. It is the position of the Organization that the claim should be sustained.

The Carrier contends that the Organization failed to meet its burden of proof showing that the Carrier failed to disallow the claim pursuant to Rule 24 (a). The Carrier asserts that claim was properly disallowed pursuant to Rule 24(a), and the Organization failed to timely list this claim for appeal. The Carrier argues that the declination was entered into the Carrier's claim tracking system (LCAT) as evidence of mailing. The Carrier argues that the declination was sent by regular United States Postal service, and, pursuant to the "mail box rule" the Carrier is entitled to presumptive of delivery. The Carrier maintains that the agreement only states that the declination must be in writing; there is no requirement that the Carrier must mail the declination by certified mail. The Carrier also contends that the Organization failed to list the claim for discussion and appeal to the HDO within sixty (60) days pursuant to Rule 24 (b). The Carrier asserts that the claim was properly expired on April 18, 2016. Further, the Carrier contends that the Organization failed to show that the Carrier violated any rules or agreements. The Carrier maintains that the claim fails on the merits, and asserts that an emergency, flooding, existed. The Carrier argues that the Agreement permits the use of outside forces when an emergency exist, and the notification requirement is suspended. Lastly, it is the position of the Carrier that the Organization has failed to prove remedy. The Carrier asserts that Claimants, and all employees in the affected areas, were fully employed; therefore they were unavailable and ineligible for any monetary remedy. It is the position of the Carrier that the claim should be denied.

Applicable Agreement Provisions

The pertinent provisions of the Agreement Between CSX Transportation, Inc and Its Maintenance of Way Employees Represented by the Brotherhood of Maintenance of Way Employees, effective June 1, 1999 are Rule 24(a)-(d), the Scope Rule, Rule 1, 3, 4 11 and 17. These rules are incorporated herein as if fully rewritten.

The Board has carefully reviewed the record, and specifically Rule 24 to consider the Rule 24 challenge. It is not disputed that there is a significant time lag in responses on appeal. The Agreement provides that the Organization has sixty (60) days to file an appeal from the date of first declination. The Carrier cannot establish documentary evidence that the declination was mailed. The Carrier argues that evidence that the initial declination was uploaded to its system should also be evidence of the mailing date.

The Carrier further asserts that the procedural issues presented herein represents a conflict of material fact. The Carrier asserts that it mailed the declination in its customary handling of claims. The Organization conversely asserts that it did not receive the document. The Carrier cites arbitral precedent to support its position that when irreconcilable conflicts in material fact regarding procedural cross contentions, the claim may be judged on the merits.

The Board finds that the parties negotiated and agreed to the provisions set forth in Article 24, and it is the responsibility of the Board to apply and enforce said provisions. The Organization correctly points out that Article 24 addresses this situation, and directs any disputes in the timeframe should be resolved in accordance with postmarks. Consequently, although the Agreement does not specifically require evidence of mailing, such evidence is required when disputes arise. Article 24(d) reads "When the U.S. Mail is used; the postmark will govern in determining compliance with the various time limits." Article 24 (a) also provides for the consequences if the parties do not comply with the various time limits. Article 24 (a) reads "When not so notified, the claim will be allowed."

Based on the record presented, the Board finds that the evidence does not establish that the Organization was not notified of the Carrier's written declination within the 60-day time frame, therefore, the claim is allowed and the contract remedy is granted.

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 March 2020.