

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44377
Docket No. MW-45344
21-3-NRAB-00003-190228**

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

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

PARTIES TO DISPUTE:

(Escanaba and Lake Superior Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The claim as presented by Vice Chairman B. Rumler on November 20, 2017 to President J. Larkin and Attorney D. Kelly shall be allowed as presented because it was not disallowed by the Carrier in accordance with Rule 52 (System File B-1701E-101/04085.080 ELS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Grailer, G. Willman, B. Lina, J. Gravely, T. Davis, J. Brousseau, W. Hall, J. Berg and D. Homernik shall now each be compensated ‘... for and (sic) equal and proportionate share of the total man/hours worked by the outside forces in performance of track rehabilitation on the E&LS Railroad property. ***’ ” (Emphasis in original).**

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 has filed this claim alleging that outside forces performed work on Carrier property and that bargaining unit members were not given the work. The Organization continues that the claim was submitted in a timely manner pursuant to the applicable provisions of the Agreement. The claim was not answered by the Carrier within the time frame of Rule 52. By operation of Rule 52, the claim should be granted and the Carrier ordered to pay the cited Organization members for their share of that work.

The Carrier responds that the claim should be denied. The Organization filed a claim for work that was being done by contactors of the Michigan Department of Transportation. Carrier had no involvement in the project, did not fund the project, and had no involvement with the project. There are no payments that should be made because there were no outside forces engaged by the Carrier.

This Board notes that the instant claim presents a unique situation. The evidence shows that the Carrier did not reply to the claim within the timeframe required by Rule 52.

The evidence shows that this work was not done by Carrier subcontractors, but rather the work was part of a state project. There is no nexus between the Carrier and the project. Simply, it was not a Carrier project. Even if the Carrier wanted to pay this claim, which it does not, there would be no way to calculate the payment because there is no evidence within the Carrier's or the Organization's control. Even if this Board would grant the claim, there are no damages that would be payable.

AWARD

Claim denied.

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 13th day of April 2021.

LABOR MEMBER'S DISSENT
TO
AWARD 44377, DOCKET MW-45344

(Referee Brian Clauss)

In this case, I must dissent to the Majority's findings. Initially, the majority correctly found that the evidence shows that the Carrier did not reply to the claim within the timeframe required by Rule 52. However, the majority failed to apply the clear and unambiguous language within Rule 52 to the dispute. Specifically, Rule 52 states, in pertinent part:

“*** 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.”

It was improper for the Board to comment on the merits of the Carrier's defense. The Organization did not submit any evidence to challenge or refute the Carrier's defense as the only question submitted to the Board was the Carrier's alleged default. The fact that this claim must be sustained on the default is supported by a multitude of on-property awards including Third Division Awards **25119**, **25121**, **25166** and **25493**. Typical thereof are Awards **25119** and **25493** which, in pertinent part, read:

AWARD 25119:

“A review of the record evidence convinces us that the claim must be sustained. It clearly reveals that Carrier did not timely respond to the Organization's claim on June 5, 1981. Rule 52 provides that claims must be disallowed within sixty days from their filing. Since Carrier failed to deny the claim on a timely basis, it must succeed.”

AWARD 25493:

“A review of the record convinces the Board that the claim must be sustained. Under Rule 52, a claim must be allowed as presented if the Carrier fails to disallow the claim within the 60 day limit. See Third Division Award 25122.”

Moreover, arbitral panels have routinely held that it is essential for the parties to an Agreement to follow contractual time limit provisions as drafted. In support of our position in this regard are Third Division Awards 20900 (BNR), 29496 (HBT), 30596 (LNR), 32727 (BOR), 32806 (LNR), 32887 (CSX), 33417 (WMR), 34080 (BOR), 34196 (WMR), 34208 (BOR), 34995 (BNR), 35928 (CSX-TCU), 36365 (BOR), 36551 (BOR), 36711 (CSX-TCU), 37269 (BNR) and 37285 (BOR).

Labor Member's Dissent

Award 44437

Page 2

Lastly, it is a well-established principle that the merits of a claim are not to be considered if either party is guilty of a procedural defect. The awards on this issue are too numerous to provide an exhaustive list. However, a sampling of awards holding to this effect are Third Division Awards 2222, 2224, 2765, 3053, 3502, 3605, 3697, 4529, 4554, 5574, 6010, 6031, 6117, 6228, 6244, 6361, 6396, 6446, 6789, 6864, 7144, 7713, 8086, 8101, 8160, 8297, 8564, 8714, 8797, 8804, 9253, 9492, 9578, 10138, 10165, 10173, 10199, 10313, 10500, 10576, 11326, 14759, 16564, 17227, 22682, 22710, 23265, 36551, 42706, 43698, 43796 and 43950.

For the reasons expressed herein, I must dissent.

Respectfully submitted,



Zachary C. Voegel
Labor Member