

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5086

BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES

and

ELGIN, JOLIET & EASTERN RWY CO.

Case Nos. 1 & 2
Award Nos. 1 & 2

John C. Fletcher, Chairman & Neutral Member
J. F. Ingham, Carrier Member
K. L. DeCamp, Organization Member

Hearing Date - May 3, 1991

STATEMENT OF CLAIM:

Docket No. 1:

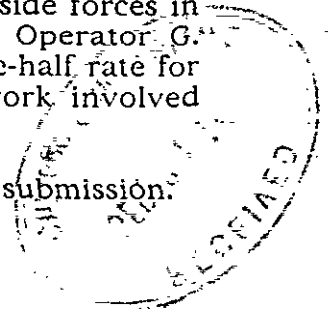
Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces to perform the work of replacing monitor windows on the roof of the Steel Car Shop with corrugated fiberglass panels beginning on September 25, 1987 (System File BJ-17-87/UM-26-87).

(2) The claim* as presented by Vice General Chairman K. L. DeCamp on November 23, 1987 to Division Engineer S. C. Chambers shall be allowed as presented because the claim was not disallowed by Division Engineer Chambers in accordance with Rule 59 (a).

(3) As a consequence of Parts (1) and /or (2) above, B&B Foreman J. Valek and B&B Carpenters M. Bachmann, M. Clinton and J. Quirk shall each be allowed pay at their respective time and one-half rate for an equal proportionate share of the total man-hours consumed by the outside forces in performing the work involved here. In addition, B&B Crane Operator G. Haggerty shall be allowed eight (8) hours pay at his time and one-half rate for the crane operator work performed in connection with the work involved here.

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



Docket No. 2:

Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces to perform the work of repairing the roof of the Steel Car Shop beginning on September 25, 1987 (System File BJ-18-87/UM-27-87).

(2) The claim* as presented by Vice General Chairman K. L. DeCamp on November 23, 1987 to Division Engineer S. C. Chambers shall be allowed as presented because the claim was not disallowed by Division Engineer Chambers in accordance with Rule 59 (a).

(3) As a consequence of Parts (1) and/or (2) above, B&B Foreman J. Valek and T. Legner and B&B Carpenters M. Bachman, M. Clinton, J. Quirk, B. Ruzich, J. Manstis, G. Haggerty, O. Salaiz, J. Cherney and G. Grencik shall be allowed pay at their respective time and one-half rates for an equal proportionate share of the total man-hours consumed by the outside forces in performing the work involved here.

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

FINDINGS:

Public Law Board No. 5086 upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

Commencing on or about September 25, 1987, Carrier utilized the services of a contractor to replace monitor windows on the roof of its Steel Car Shop (Claim No. 1). At the same time a spray foam application was applied as a roof coating to the Shop (Claim No. 2). The Organization contended that its agreement was breached when Carrier engaged the services of a contractor to perform these tasks and filed two claims with Carrier's Division Engineer on the matter on November 23, 1987. The Organization contends that it did not receive a timely denial to either claim and appealed the dispute to Division 3 of the National Railroad Adjustment Board on both the procedural time limit issue and the substantive merits of the contracting out issue. While the disputes were pending at the NRAB, Carrier exercised its right to have the matter heard by a Public Law Board. Before this Board Carrier maintains that a timely denial was made on the November 23, 1987 claims and contends that use of a contractor to perform the tasks involved in the claims was not at odds with the Maintenance of Way Agreement.

In looking at the time limit issue it is noted that on November 23, 1987 K. L. DeCamp (at the time Local Chairman) hand delivered two separate claim

letters to Division Engineer S. C. Chambers. Mr. Chambers signed a receipt indicating that he had received the letters. According to the Organization, when an answer was not forthcoming within sixty days as required by Rule 59, a demand was made by Mr. DeCamp (now the General Chairman) on February 22, 1988, (again in separate letters) that the claims be paid as presented. On April 14, 1988, Division Engineer Chambers (under his file numbers UM-26-88/BJ-17-88 and UM-27-86/BJ-18-87) responded, stating:

This will confirm my previous verbal advice that subject claims dated November 23, 1987, covering Organization's BJ-17-87 and BJ-18-87 were declined in my letters to you dated January 15, 1988, and assigned Carrier Case Numbers UM-26-87 and UM-27087, respectively. Copies of my January 15, 1988 letters were also sent to Local Chairman J. C. Quirk.

The next day a revision letter was sent the General Chairman altering the file numbers to read UM-26-87/BJ-17-87 and UM-27-87/BJ-18-87.

Later it was argued that the form of delivery of the January 15, 1987 letters involved placement of copies intended for Mr. DeCamp in a "slot" which is located outside the track foreman's office in the truck garage and turning over "letters and/or envelopes" intended for "Representative" J. C. Quirk to a B&B supervisor for placement on a B&B desk where they could be picked up. The Carrier has argued that hand delivery of claims letters has been the accepted practice followed for a number of years and that the dual delivery followed in this case was prompted by confusion connected with the retirement of a former General Chairman and the assumption of his duties by DeCamp, with Quirk taking over as Local Chairman.

The Organization disputes that hand delivery is the practice followed and suggests that there had ought not to have been confusion connected with changing officers because on December 20, 1987, Carrier was given notice in writing as to who would be functioning as local officers.

The Board is unable to accept the notion that changes in the Organization's officers were confusing so as to require special procedures for responding to the two claims involved in these dockets. Carrier was placed on notice on December 20, 1987, twenty-five days before the declination letters were stated to have been placed in a slot and on a desk for delivery, as to the names of the individuals who would be the Local Chairmen and the Assistant Local Chairman effective January 1, 1988. If confusion existed, it certainly cannot be visited upon the Organization.

It is also noted that the two letters were shown to be addressed to DeCamp at 1226 Brown Avenue, Joliet, Illinois. However, never has the Carrier even hinted that the letters were placed in envelopes, properly addressed, with sufficient postage affixed, for delivery through the U.S. mails. A strong presumption exists in the arbitral and legal communities that an envelope which is properly addressed with adequate postage affixed on its face, when

placed in an official mail repository has been delivered by the U.S. Postal Service. This presumption does not exist when other forms of delivery are utilized.

Carrier has directed the Board's attention to a statement from one of its steno's, which it characterizes as an affidavit averring that she handled the letters in the usual and customary manner. The Board has problems accepting this document as an affidavit for a host of reasons, not the least among them being that the statement does not indicate that it was made under oath, the author has not been identified and/or qualified at any place within its text, nowhere is it indicated that the Steno was the one preparing the letters or even remotely responsible for insuring their delivery, etc. Additionally, the statement was prepared on April 29, 1988 and the letters were to have been delivered (in some fashion) on January 15, 1988, but the statement doesn't include that date any place within its text. Also, there is no proof that the Steno was at work on January 15th.

With regard to substantive comments in the Steno's statement, problems also abound. For instance item 1 reads:

... place letters and/or envelopes for K. L. DeCamp in his slot which is located outside the track foreman's office in the truck garage.

The Board is not told who, if anyone, was given the letter/and or envelopes to place in the slot on January 15, 1989. Additionally, we are not told if the letters were loose or in envelopes and if in envelopes how were they addressed..

Item 2 of the Steno statement reads:

... gave letters and/or envelopes for J. C. Quirk to B&B supervisor who hand delivered to the B&B Shop (Base B), or place them on B&B supervisor's desk in truck garage where B&B employees picked up.

The Board is not told the name of the B&B supervisor who was to have taken custody of the letters. Also it has not been told if Quirk's letters were in envelopes or loose or booth and if in envelopes were they sealed or the multi-use packet which is used over and over again for routine Company matters. Obviously, alternatives and options were available to the unnamed supervisor - hand deliver the letters or place them on a desk to be picked up. Carrier has not suggested to the Board which option was used, if either and there is no statement from the Supervisor as to what he may have recalled about the incident.

The Steno's note (and that is all that it can be classified as - it certainly does not remotely meet any semblance of an affidavit) illustrates why an item deposited in the U.S. Mail is presumed delivered and why this presumption is not valid when other modes of attempted delivery are utilized. It is the business of the Post Office to deliver U. S. Mail. The Post Office has no other

function. Its employees are professionals in this area and delivery of mail is all that they are concerned with. On the other hand when delivery is attempted through others, in this case an unnamed B&B supervisor, their business is something different. They have a multitude of task and responsibilities and being a messenger or delivery boy for a steno is not high among their priorities. Additionally, the Postal Service places mail in only acceptable receptacles, while at least in this case the method of final delivery is unknown - an attempt at hand delivery or drop them on a supervisor's desk where they would lay until being picked up.

Carrier had an obligation to not only answer the two claims timely but to effect a form of delivery which would insure that the Organization received its denials. It opted to utilize a form of delivery which is fraught with potential defects and open to cumulative error. This delivery process selected failed and Carrier is not entitled to rely on a presumption that its denial letters were received the same as if they had been turned over to the Post Office for handling. A letter turned over to an unnamed B&B supervisor for delivery can never be considered in the same class as a letter turned over to the Post Office for delivery simply because it is the exclusive function of the Post Office to deliver mail and B&B supervisors, while qualified and perhaps considered expert in all facets of their work, would not normally place such delivery at the top of their priorities.

The Claims will be sustained on procedural violations of the time limit provisions of the Agreement. The merits of the Claims are not addressed.

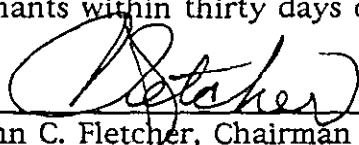
A W A R D

The Claim in Docket No. 1 is sustained as presented.


The Claim in Docket No. 2 is sustained as presented.

O R D E R

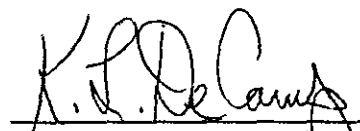
Carrier is ordered to comply with this Award and make any payments due the listed Claimants within thirty days of the date two members affix their signatures hereto.



John C. Fletcher, Chairman & Neutral Member



J. F. Ingham
Carrier Member



K. L. DeCamp
Organization Member

Dated at Mt. Prospect, IL., this ` day of April, 1992

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO 5086

BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES

and

ELGIN, JOLIET & EASTERN RAILWAY

INTERPRETATION NO. 1

to

AWARDS NOS. 1 & 2

In May 1992, PLB 5086 sustained two claims "as presented" on procedural grounds. Thereafter a dispute arose concerning the amount of money due Claimants under the Awards. With regard to Award No. 1, Carrier maintains that the Contractor expended 139 man-hours to "lift and install the fiberglass panels and appurtenances thereto on the Steel Car Shop roof," thus, that is all that was required to be allowed under the Award. With regard to Award No. 2, Carrier maintains that the Contractor expended 544 hours "to complete the foam spraying of the Steel Car Shop roof," thus, this too, is all that was required to be allowed under the Award. The Organization, on the other hand, contends that the Claims clearly intended that "all of the work performed by the outside concern on the instant project" be covered.

Review of the material in this record indicates that if it was the intent of the Organization that "all work performed by the [Contractor] on the ... project[s] " be covered by the Claims, this intent was not clearly articulated in the two letters of claim filed with Carrier's Division Engineer on November 23, 1987. For example, the letter under file BJ-17-87 demanded a remedy of:

In accordance with the above stated Rules and Third Division Awards 5172, 2706, 323, 1314, 3314, 3684, 5441, and those Awards previously mentioned, this Organization requests equal proportionate share of man hours expended by contracting forces to complete the lifting and installation of corrugated Fiberglas panels, as well as all appurtenances thereto, at the time and one-half rate of pay for senior bridge and building carpenter foreman J. Valek (7407), senior bridge and building carpenters M. Bachmann (50634), M. Clinton (50644), J. Quirk (50038) and eight hours pay at his time and one-half rate for senior B&B crane operator G. Haggerty (50010).

(Underlining added.)

And the letter under File BJ-18-87 sought a remedy of:

Therefore, in accordance with the above stated Rules and Third Division Awards 5172, 2706, 323, 1314, 3314, 3684, 5441, and those Awards previously mentioned, this Organization requests

equal proportionate share of man hours expended by contracting forces to complete the foam spraying of the Steel Car Shop roof, at the time and one-half rate, for senior Bridge and Building Sub-Department carpenter foreman J. Valek (7407) and T. Logner (50572); carpenters M. Bachmann (50634, M. Clinton (50644), J. Quirk (50038), E. Ruzich (50830), and J. Manstis (51008); crane operators with seniority as carpenters, G. Haggerty (50010), O. Salaiz (30792), and J. Cheney (50641); and water service mechanic with carpenter seniority, G. Grecik (72263).

(Underlining added.)

These remedy requests are detailed and specific. Of particular interest is the fact that some specific functions performed by the contractor are included, while other functions connected with the projects are not mentioned. If it was the intent of the Claims to encompass "all of the work performed by the outside concern on the ... project[s]" it would have been quite simple to clearly and positively state this intent in the text of the Claims. This was not done and because of the detailed specificity articulated, it cannot now be inferred to have been done.

Accordingly, to comply with Awards Nos. 1 and 2 Carrier need only provide named claimants with an equal proportionate share of the man hours expended by the contractor to complete the tasks mentioned in remedy requests of the two Claims. Payments of the equivalent man hours expended are to be at time and one half rates.



John C. Fletcher, Referee
Chairman, PLB 5086

Mt. Prospect, Illinois
December 21, 1992