

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when outside forces were used to perform hauling and excavating work in connection with a tie renewal project at West Chicago, Illinois on September 6, 7, 8 and 9, 1974 (System File 81-1-218).
 - (2) The Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plans to assign said work to outside forces.
 - (3) The Claim* presented by General Chairman S..C. Zimmerman on September 23, 1974 to Division Manager D. R. Freyer is allowable as presented because said claim was not disallowed by Division Manager D. R. Freyer in accordance with Rule 21.
 - (4) Because of (1), (2) and/or (3) above, Machine Operators R. Wohlrabe and D. E. Harriss and Assistant Foreman-Truck Drivers A. Serna and R. Fleming each be allowed pay** at their respective rates of pay for an equal proportionate share of the total number of man hours consumed by outside forces in performing the work referred to in Part (1) hereof.
- (*) The letter of claim will be reproduced within our initial submission.
- (**) The claim contemplates that all service performed by said outside forces during straight-time hours will be allocated to the claimants on the basis of the claimants' straight-time rates and that all service performed by said outside forces during the claimants' overtime hours will be allocated to the claimants on the basis of their overtime rates."

OPINION OF BOARD:

On its merits this claim involves alleged violation of the Scope Rule by subcontracting of covered work and failure to provide notification. A separate and additional ground for the claim is alleged violation of Rule 21, the time limit on claims rule of the Agreement. For reasons developed in detail infra the procedural/jurisdictional questions raised by Rule 21 in this case are dispositive and preclude our reaching the merits relative to the Scope Rule. Rule 21 reads in pertinent part as follows:

"(a) All claims or grievances must be presented in writing by or on behalf of the employee 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 employee 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."

Pursuant to the quoted language of Rule 21 (a), Carrier by letter dated August 30, 1973 advised the Organization as follows:

"Will you please immediately change the procedure of submitting and appealing cases as follows

"Claims and grievances should initially be submitted to the Division Manager of the Operating Division on which the employee involved is employed. Appeal from this decision and final appeal on the property will be to the Director of Labor Relations (Non-Operating). The present incumbent of this position is the undersigned.

"Will you please arrange to handle all future claims and grievances in accordance with the above.

Yours truly,

/s/ W. J. Fremon"

The record shows that during September 1974 Carrier utilized certain rental equipment and outside operators to assist its regular M of W forces on a rail renewal project. Thereafter on September 23, 1974 the General Chairman of the Organization submitted the instant claim to Carrier's Division Manager. This manner of presentation was in compliance with Rule 21 of the Agreement and the directive of Carrier issued thereunder quoted supra. The "claim or grievance as presented" read as follows:

"Mr. D. R. Freyer, Division Manager
Chicago & North Western Transportation Company
500 West Madison Street
Chicago, Illinois 60606

"Dear Mr. Freyer:

"I am submitting a claim in behalf of Machine Operators R. Wohlrabe and D. E. Harriss and Assistant Foreman-Truck Drivers A. Serna and R. Fleming for work performed by Contractor Lockerts on Track #3 immediately west of the depot at West Chicago, Illinois on the dates of September 6, 7, 8 and 9, 1974.

"This is in violation of Rule 1(b) of the Agreement between the Chicago and North Western Transportation Company and its employees represented by the Brotherhood of Maintenance of Way Employees, effective August 1, 1974. The General Chairman was not notified in writing of the contracting. The Seniority Rule 4(a) and Classification of Work Rule 3(j) and (l) were also in violation.

"The work performed by the contractor consisted of excavating and hauling work in connection with a tie renewal project in the immediate area. The contractor's equipment consisted of a back-hoe, and loader and two (2) trucks which were operated by the contractor's machine operators who do not have any seniority with the Chicago and North Western Transportation Company.

"I am filing a claim in favor of the beforementioned employees who have seniority as machine operators and Assistant Foreman-Truck Drivers in the Seniority District involved. The four (4) employees should be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work in question. Inasmuch as straight time and overtime are involved that service performed by said outside forces straight time rate will be allocated to the aforementioned

claimants on the basis of claimants' straight time rate and that all service performed by said outside forces during the claimants' overtime hours will be allocated to the claimants' overtime hours on the basis of the claimants' overtime rate.

"Please advise when Messrs. Wohlrabe, Harriss, Serna and Fleming will be compensated and what pay period the compensation will be paid.

Respectfully yours,

/s/ S. C. Zimmerman

S. C. Zimmerman
General Chairman"

The claim was denied on October 30, 1974 not by the Division Manager to whom the General Chairman had presented the claim but by the Assistant Division Manager. Subsequently on January 14, 1975 the General Chairman appealed the claim to the highest level on the property on the alternative grounds of a violation of Rule 21 as well as the merits of the Scope Rule claim. Carrier does not deny that the Division Manager did not respond to the claim submitted locally but contends that the response of the Assistant Division Manager is sufficient for compliance with Rule 21. Thus, Carrier maintains that the case should be decided on its merits, if any. In support of its contention Carrier cites Third Division Award 20790. The fact that Award 20790 involves these same parties and Agreement would carry more weight if Rule 21 were a local rule but in fact that Agreement provision flows from the August 21, 1954 National Agreement. The question presented herein is not one of first impression and the great weight of authority on this subject is contra to Award 20790. In the most recent of these controlling precedents which has been brought to our attention, the Third Division sustained a similar claim and stated as follows:

Award 21297

"Claimant argues that since the Carrier designated the Division Engineer as the Officer of the Company with whom claims should be filed (Carrier's letter of January 14, 1974), then it is the responsibility of the Division Engineer to respond to the claim.

"Carrier on the other hand argues that Rule 29 (a) provides only that 'the Company' shall notify whoever filed the claim or grievance. There is no language specifying that the Officer of the Carrier with whom the claim is filed must be the one to reply.

"Moreover, Carrier argues in the instant case that the Division Engineer was in no position to over-rule the decision of the Division Superintendent (a superior officer), who had notified Claimant originally of his dismissal.

"Previous Awards of this Board have held that the Officer of Carrier designated by Carrier to receive claims or grievances must be the one to reply to same.

"Award 18002:

We agree with the Organization that Carrier violated Section 1(a) of Article V of the August 21, 1954 National Agreement, governing the parties to this dispute, when it permitted its Roadmaster, R. C. Mingus, to decline the claim, rather than having its Assistant Division Engineer of Track, A. W. Wilson, who was authorized by Carrier to receive claims on its behalf, deny the claim.

"Award 17696:

We agree with the Organization that Carrier violated Section 1(a) of Article V of the August 21, 1954 Agreement when it permitted Roadmaster Mingus to decline the claim rather than Assistant Division Engineer of Tract, A. W. Wilson, to whom the claim was presented. Therefore, we will sustain the claim.

"Award 4529:

We think the rule requires that a decision actually has to be made by the officer of the Carrier on whom that responsibility has been placed, which in this case was Manager Keene, within the time as therein specified, that Rule 22 requires that he give his reasons for so doing if the claim is disallowed, and that the employee and his representative be notified thereof in writing within the time as required by Rule 44(c). Having failed to comply with Rule 44(c) the claims, by the express provision thereof, must be allowed. Nor does the provision of the rule contemplate, when it is applicable, that the merits of the claim shall be considered. Consequently, we shall not do so."

For other cases with similar results see Awards 11374, 14031, and 16508.

We find that Carrier failed to comply with Rule 21 and by its express terms that Rule requires that the claim or grievance shall be allowed as presented. We have no need or authority in the circumstances to review the merits of the claim. The claim must be sustained and paid as presented.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

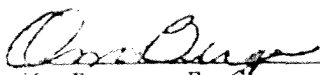
1. That Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
 2. that the Board has jurisdiction over the dispute involved herein;
- and
3. that the Agreement was violated.

AWARD

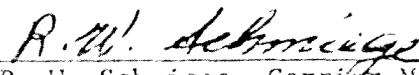
The claim is sustained and shall be paid as presented.



Dana E. Eischen, Chairman



O. M. Berge, Employee Member



R. W. Schmiede, Carrier Member

Dated: Aug 18, 1977