PUBLIC LAW BOARD NO. 1844

AWARD NO. 19

CASE NO. 11

PARTIES TO THE DISPUTE

Brotherhood of Maintenace 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 the work of constructing approximately 8300 feet of track and installing five (5) switches near Walnut Grove, Minnesota was assigned to outside forces (System File 81-24-59).

(2) The claim presented by General Chairman S.C. Zimmerman on August 1, 1975 to Division Manager D.B. Carlisle is allowable as presented because said claim was not disallowed by Division Manager Carlisle in accordance with Rule 21.

(3) Foreman Ivan Johnson, Machine Operator Gordon Vik and Trackmen Marvin Drake and K.R. Struss be allowed pay at their respective rates of pay for an equal proportionate share of the total number of man hours expended by outside forces in the performance of this work because of the violations referred to within (1) and/or (2) above."

OPINION OF BOARD:

Claimants in this case are the regularly assigned foreman and members of a section gang assigned to a territory encompassing Walnut Grove, Minnesota, where the Continental Grain Company operates a large grain elevator. In July 1974, Carrier entered into an Agreement with Continental relative to the building of an industry track near the elevator. That Agreement provided inter alia for the construction of trackage part of which was situated on Carrier's right-of-way

and part on Continental property. Construction commenced in late summer of 1975 utilizing outside contractors' forces. Thereafter, under date of August 1, 1975, the Organization's General Chairman filed the following claim letter with Carrier's Division Manager D. B. Carlisle:

"Dear Mr. Carlisle:

"It has been brought to my attention that a contractor, Railroad Service Inc., of Lakeville, Minnesota is constructing approximately 8,300 feet of track plus five (5) switches in addition to the main line switch at the Continental Grain Elevator located one (1) mile east of Walnut Grove, Minnesota. The grading for this trackage was done by Gilb Construction Company, Walnut Gove, Minnesota and they in turn sub-let the gravel hauling to Rodell Construction Company, Westbrook, Minnesota.

"The Transportation Company violated Rule 1 - Scope - of the Agreement, effective date of August 1, 1974.

Citing Rule 1 - Scope (b) first and third paragraphs -

'Employes included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.

In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting tansaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in "emergency time requirements" cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith.'

"The Chicago and North Western Transportation Company did not notify me of its intention to contract this work, therefore, violating Rule 1 - Scope paragraph three (3).

"I am hereby filing a claim in behalf of Messrs. Ivan Johnson, Foreman, Gordon Vik, Machine Operator, Marvin Drake and K.R. Struss, Trackmen. I am asking that each claimant be allowed pay at his respective straight time rate for an equal proportionate share of the total number of manhours consumed by the contractors' forces in performing this work.

"Please advise what pay period the aforementioned men will be compensated.

Yours truly,
/s/ S C Zimmerman
General Chairman"

It is undisputed that Carlisle never did respond to the claim letter and therefore on October 15, 1975 the General Chairman addressed Carrier's Director of Labor Relations (Non-operating) seeking payment of the claim on the basis of Rule 21, the time limits on claim rule as well as on the merits:

"Dear Mr. Fremon:

"On August 1, 1975, I wrote to Division Manager D.B. Carlisle filing a claim for Messrs. Ivan Johnson, Foreman (SSA 469-50-8634), Gordon Vik, Machine Operator (SSA 473-22-0325), Marvin Drake (SSA 468-26-4439) and K.R. Struss, Trackman (SSA 477-60-7191) asking that the aforementioned claimants be allowed pay at their respective straight time rate for an equal proportionate share of the total number of man hours consumed by the contractor's forces in performing the construction of approximately 8,300 feet of track, plus five (5) switches in addition to the main line switches at the Continental Grain Elevator located one (1) mile east of Walnut Grove, Minnesota. Railroad Service Inc. of Lakeville, Minnesota was contracted to perform above mentioned work. The grading for the trackage was done by Gilb Construction Company, Walnut Grove, Minnesota and they in turn sub-let the gravel hauling to Rodell Construction Company, Westbrook, Minnesota.

"The Transportation Company violated Rule 1 - Scope of the Agreement by not notifying the General Chairman of the contracting.

"The aforementioned claim should be allowed not only on its merits but by the default provisions of the claim and grievance rule (Rule 21) which specifically stipulates that should any claim be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim in writing of the reason for disallowance. If not so notified the claim or grievance shall be allowed as presented. The claim being presented to Division Manager D.B. Carlisle within the time limit provided in Rule 21 was not answered.

"The claim should be allowed as presented based on the merits of the case and on the basis of default.

"Please advise.

Very truly yours,

/s/ S C Zimmerman

General Chairman"

Finally, under date of December 10, 1975, Carrier's highest appellate officer declined the claim on the merits while conceding a time limit violation as follows:

"Dear Mr. Zimmerman:

"Please refer to your letter of October 15, 1975 appealing claim of Foreman Ivan Johnson, Machine Operator Gordon Vik, Trackmen Marvin Drake and K.R. Strauss, Central Division, account contractors' forces constructing approximately 8300 feet of track for the Continental Grain Elevator, Walnut Grove, Minnesota.

"The contention you have made in the instant case that this is Transportation Company maintenance of way work contracted in violation of existing agreements is erroneous. This is a contention similar to that made in a number of previous cases of track construction by outside contractors for grain companies.

"In the instant case a portion of the trackage involved was constructed by the industries' contractor on railroad land and right-of-way, leased to the industry under an agreement dated July 29, 1974. Copy of this agreement together with a map showing all trackage involved is included in our file and will be available to you during conference discussion. The industry furnished the material for the turnout, however, the main line turnout was constructed and installed by Transportation Company forces.

"In such circumstances, in my opinion there is no support based on its merit for the penalty claim appealed in your letter of October 15, 1975. Failing support, the penalty claim is declined in its entirety.

"Insofar as concerns the failure of the Central Division to reply to your claim letter of August 1, 1975 to Mr. D.B. Carlisle, we are advised the Central Division file in this case was misplaced during the movement of files into the new building at Mason City. Your letter of August 1, 1975 was misplaced and consequently was not responded to. It is requested we discuss this phase of the claim in our next conference discussion.

Yours truly,

/s/ W J Fremon

Director of Labor Relations
(Non-operating)"

The foregoing establishes the factual parameters of this case. At the Board hearing the parties stipulated that despite extended efforts to reach a settlement on the time limits aspect of the case, they were unable to do so. For its part the Organization cited a substantial body of authority to support payment of the claim as presented because of the Rule 21 time limits violation. The Organization also contended arguendo that the claim should be sustained on its merits. Carrier did not deny that Carlisle had failed entirely to deny the claim within the sixty-day time limit but asserted a two-fold defense as follows: (1) the claim letter had become misplaced during the movement of office files and (2) even though not timely denied, the claim itself was fatally defective because "too vague and indefinite." Finally Carrier argued that the claim was without support either in fact or in the Agreement.

We have reviewed the record carefully as well as the authorities cited by both parties and conclude that Rule 21 mandates a sustaining award with no need to consider the merits of the claim. Rule 21 is clear and unambiguous on its face and except for that class of claims governed by NDC Decision No. 16 and our recent Award No. 5, Case No. 17 it has been construed strictly. We can find no basis in the record before us to depart from the firmly established line of precedent enforcing the time limit on claims rule by requiring payment as presented of those claims not properly denied within sixty days from date of filing. See Awards 12233, 15788, 16000, 16001, 16559, 17085, and 20900 et al. Carrier's assertions of vagueness and ambiguity in the instant claim are raised de novo at the Board level and would fail for that reason even if we could look beyond the timeliness question to entertain the merits of this dispute. We resist the invitation to speculate that enforcement of the award required by Rule 21 might prove difficult. To the extent that Award No. 15631 excuses an outright failure to deny a claim on such grounds it flies in the face of the better reasoned cases. Should a problem of computation of damages arise the services of this Board are available in an interpretation proceeding and of course other forums are available for enforcement proceedings. Given the clear language of Rule 21, the remedy mandated by the Agreement is an order that the claim be paid as presented on August 1, 1975.

FINDINGS:

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

1. That the 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

Pursuant to the requirements of Rule 21 the claim dated August 1, 1975 is 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.

Carrier is directed to comply with this Award within 30 days of issuance.

Dana E. Eischen, Chairman

O. M. Berge, Employee Member

R. W. Schmiege, Carrier Member

Dated: 11/29/77