

PUBLIC LAW BOARD NO. 5567

AWARD NO. 10  
NMB CASE NO. 10  
UNION CASE NO. ~~880465~~ N.A.  
COMPANY CASE NO. ~~N.A.~~ 880465

PARTIES TO THE DISPUTE:

Union Pacific Railroad Company  
(Former Missouri Pacific Railroad Company)

- and -

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned System Rail Gang No. 9111 to perform routine maintenance work (changing anchors, spot gauging and rattle spiking) between Gardner Avenue in the Kansas City Terminal and Dobson, Missouri from February 3 through 21, 1988. (Carrier's file 880465).
2. The claim as presented by Second Vice Chairman B. R. Palmer on March 10, 1988 to Superintendent C. O. Malone shall be allowed as presented because the claim was not disallowed by Director of Labor Relations J. J. Shannon (appealed to him on May 6, 1988) in accordance with rule 12, Section 2.
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, the fifty (50) senior furloughed Kansas City Terminal employees\* listed below shall each be allowed compensation for all straight time, overtime and holiday pay lost from February 3 through 21, 1988. In addition, each Claimant shall be reimbursed for any out-of-pocket expense he may have incurred as a result of the Carrier's failure to pay health and welfare benefit premiums during the claim period.

\*CLAIMANTS

FOREMAN

T. L. Shewell

ASST. FOREMEN

R. H. Elias  
K. W. Rust

TRACKMEN

R. L. England  
J. Stroud  
A. B. Butler  
S. A. Parker  
G. L. Bacon  
M. A. Moshier

MACHINE OPERATOR

J. A. Leckner, Jr.

TRACKMEN/DRIVERS

E. D. Perez

C. Withers, Jr.

M. Cunningham, Jr.

TRACKMEN

T. E. Paige

R. E. Soverns

F. J. Garcia

J. J. Gladbach

J. Meza

J. I. Moreno

J. R. Nance

G. Arredondo

D. G. Wilson

W. T. Bishop

W. Parker

W. J. Chatman

R. T. Kirby

M. A. Adams

S. Hernandez ~~xz~~

G. Taylor

J. W. Horn

G. E. Meeks

K. E. Mosby

R. A. Davenport

J. K. Kennedy

W. M. Thomas

M. J. Howard

M. L. Martens

M. R. Kinney

R. K. Lappat

G. R. Cordonier

T. W. Robles ~~xz~~

J. R. Lityma

S. P. Jackson

S. M. Serroque

K. D. Jaster

R. J. Utter

J.L. Conley"

OPINION OF BOARD:

By letter of March 10, 1988, the BMW Second Vice Chairman filed this claim with Superintendent Malone, alleging violations of Rules 1 and 2 of the controlling Collective Bargaining Agreement. That claim was timely denied by the Superintendent on March 18, 1988, following which the General Chairman appealed to the Director of Labor Relations, via a certified letter, return receipt requested, dated May 6, 1988. It is not disputed that the appeal letter was received in the Labor Relations Office on May 9, 1988. For reasons not indicated in this record, Carrier never did respond to the Organization's Step 2 appeal. Following a conference discussion and additional correspondence, on March 1, 1988 the General Chairman requested payment of the claim "as presented"

under the time limits of rule 12.2.a:

"TIME CLAIMS AND GRIEVANCES":

Rule 12. Section 2. (a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within 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 carrier shall, within 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 carrier as to other similar claims or grievances. (Emphasis added).

\* \* \*

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the carrier, shall govern in appeals taken to each succeeding officer, except in appeals from the decision of the highest officer designated by the carrier to handle such disputes. \*\*\*

On July 12 and 13, 1989, the Parties held a claims conference to review a number of claims, several of which were held in abeyance and 'tied to the outcome' of a 'lead case' (Carrier File No. 880236 MPR), ~~which is before this PLB Board 5567 as Case No. 8).~~ Carrier representatives believed that this particular claim (Carrier Case No. 880465) was among those which the Parties agreed to "tie to" <sup>Carrier file No. 880236</sup> ~~Case No. 8.~~ By letter of August 7, 1989, Carrier's Assistant Director of Labor Relations requested written confirmation of that linkage, but the General Chairman responded by letter of August 21, 1989, reading in pertinent part as follows:

I am NOT agreeable to the conditions you have specified because this case No. 880465 is due and payable under the time limits provisions in rule 12, Section 2(a). As I have advised you on August 24, 1988 and on March 31, 1989, Mr. Shannon failed to render a written decision to my appeal of this claim to him on May 8, 1988-6. Your letter of August 7, 1989, is the first letter from Labor Relations level actually denying the claim and affixing a file number thereto. Therefore, I cannot agree to attaching this case No. 889465 to the outcome of Case No. 880236. (Emphasis in original)

The matter remained unresolved in further handling until final appeal to this Board for determination.

No one's veracity or good faith is impugned by observing that, unfortunately, misunderstandings and breakdowns in communications do occur in negotiating situations. Imperfect as the English language sometimes is as a medium of communication, most important oral agreements eventually are reduced to writing. In this case, there is no written agreement to "tie" this particular claim to the outcome of File No. 880236. The parole evidence simply does not clearly and convincingly demonstrate a meeting of the minds to do so. Since this particular claim is so plainly allowable "as presented" due to the time limit violation of Rule 12.2.a, the burden of persuasion was on Carrier to demonstrate convincingly that the Parties mutually agreed to tie this claim to the merits of File No. 880236. This Board must conclude that Carrier failed to carry that burden of persuasion.

Accordingly, the claim must be paid "as presented" under the express language of Rule 12.2.a. In that regard, Award 3-25089 between these same Parties is instructive.

Petitioner presents this instant claim on a time limit basis. It contends that the claim was filed on October 3, 1979, and was not denied by Carrier within the 60-days required by Rule 12 Section 2(a) of the Agreement. As such, it should be paid as submitted.

Carrier contends that the claim was not filed within 60 days of the event that triggered the claim, as is also required by Rule 12 Section 2(a), and that as such, the claim was untimely filed and should be dismissed.

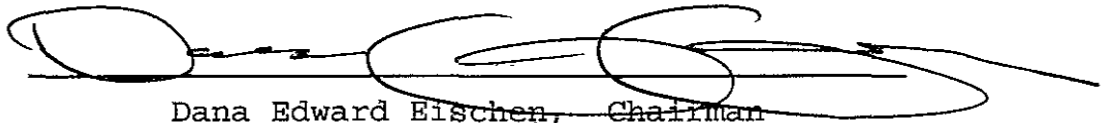
This Board has reviewed the claim and counterclaims submitted on the record of this case, just as it has reviewed the awards submitted for consideration. Based on this review, it is the opinion of this Board that Carrier should have declined the October

3, 1979, claim, stating that it was untimely filed or that it had no merit within the 60-day period specified in Rule 12 (2) (a). Its failure to do so constitutes default and this Board is required to sustain the claim.

See also, NRAB Third Division Awards 10500, 17085, 21755, 27480 and 27692. It should be noted that in deciding this claim "as presented" and "without prejudice," under Rule 12.2.a, this Board neither expresses nor implies any opinion concerning the underlying merits.

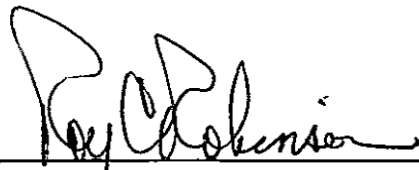
AWARD

- 1) Claim allowed "as presented" due to violation of Rule 12.2.a.
- 2) Carrier shall implement this decision within thirty (30) days of its execution by a majority of this Board.



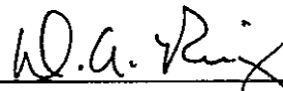
Dana Edward Eischen, Chairman

Dated at Ithaca, New York on September 7, 1994



Union Member

Dated at Chicago, Ill.  
on September 12, 1994



Company Member

Dated at Omaha, Nebraska  
on September 12, 1994