

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20631
Docket Number TD-20525

Robert A. **Franden**, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Burlington Northern Inc.)

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Burlington Northern Inc. (hereinafter referred to as "the Carrier"), violated and continues to violate the currently effective Agreement between the parties, Articles 1(c) and 1(d) thereof in particular, when on or about December 17, 1970 it arbitrarily transferred control of that portion of its Pacific **Division territory** between M.P. 130.9 and M.P. 131.5 at **Colebrook**, British Columbia from the Train Dispatchers in its Seattle, Washington train dispatching office to the jurisdiction and control of **employees** of another company and not within the scope of said Agreement.

(b) Because of said violations, the Carrier shall now be required to compensate the senior available qualified extra train dispatcher one (1) day's pay at the pro-rata rate of trick train dispatcher for each of the first, second and third trick assignments for which they are respectively available, **commencing** with August 16, 1971 and continuing until said violation ceases.

(c) In the event no qualified extra train dispatchers are available on any day or days in the period defined above, then and in such event Carrier shall compensate the senior qualified regularly assigned train dispatcher who is available due to observance of his weekly rest day one (1) day's compensation at the punitive rate of trick train dispatcher for each of first second and third trick assignments for which they are respectively available commencing with August 16, 1971 and continuing until said violation ceases.

(d) Eligible individual claimants entitled to compensation claimed herein are readily identifiable and shall be determined by a check of Carrier's records.

OPINION OF BOARD: In connection with the construction of a new line to serve the port of Roberts Banks in Western British Columbia a Canadian Railway had to cross the Carrier's rail line at **Colebrook**, B.C. Due to the nature of the terrain, rather than construct an interlocking facility it became necessary for the Canadian Company to utilize some **.6** of a mile of the Carrier's line with a **turn** in and turn out at either end of **.6** mile stretch. Prior to the construction of this crossing the movement of trains through this point was controlled by the train dispatchers in the Carriers, Seattle train dispatching office. **When** the joint use of the trackage was instituted the **.6** miles was placed under the Centralized Traffic Control (C.T.C.) system manned and operated by Pacific and Great Eastern (The Canadian Company) employes.

The Organization alleges that the transfer of control **over** this trackage to employes of the Pacific & Great Eastern violated provisions of Rules **1(c)** and **1(d)** of the effective Schedule Agreement.

Rule **1(c)** reads in appropriate part

"Trick train dispatchers' positions shall include positions in which the duties of incumbents are to be primarily responsible for the movement of trains by train orders, or otherwise."

Rule **1(d)** reads as follows

"Centralized Traffic Control machines at present in service and in the future installed will be manned and operated by train dispatchers when the machine is located in offices where train dispatchers are employed. When a C.T.C. machine is located in an office where train dispatchers are not employed and it is manned and operated by other employes, a train dispatcher shall have and exercise complete authority over the movement of, and shall control and direct all train movements in such territory.

NOTE: This shall not affect the present manning of **CTC** machine by telegraph operators at **Pasco**."

At the outset the Carrier has set up the time limit rule **(24f)** as a defense. The Organization has responded that the violation is a continuing violation and exempt from the rule.

". . . (f) GRIEVANCES - - **CLAIMS**

"A train dispatcher who considers himself unjustly treated shall present his grievance or claim in writing direct, or through his duly accredited representative, to the superintendent within sixty (60) days from date of occurrence on which it is based, and decision of the Superintendent shall be rendered within sixty (60) days from date grievance or claim is received, **or** from date of conference, if one is had thereon. If the train dispatcher is not satisfied with the decision rendered, appeals may be made subject to the order of progression, time limits, etc., provided in Section (c) of this Article."

We must find for the Carrier on this point. This claim is based on a violation alleged to have been committed on or about December 17, 1970, i.e., that the Carrier "arbitrarily transferred control of a portion of its Pacific division territory. . . from the train dispatchers in its Seattle, Washington, train dispatching office to the jurisdiction and control of **employees** of another company and not within the Scope of the Agreement."

The consequences of the Carrier's actions on the claim date quite naturally extend forward in time from that point. It is similar to the contracting out case decided in Award 18667 wherein we said, "The facts of record show that the contract was let on that date. Of course, work under it continued for some time." **The** Board went on to hold that the date of contract was the date from which the time limit ran.

In Award 14450 (Ives) we said:

"Recent awards of this Board consistently have held that the essential distinction between a continuing claim and a **non-**continuing claim is whether the alleged violation in dispute is repeated on more than one occasion or is a separate and definitive action which occurs on a particular date. (Award Nos. 12045 and 10532.) Here, the action complained of was the abolishment of the section gang, including the position of Section Foreman, with headquarters at Franklin, **Missouri** and the assignment of the territory to headquarters in **Boonville, Missouri**. It is undisputed that the abolishment and transfer of territory by Carrier **occurred** on or about July 21, 1958. Therefore, we find the Time Limit Rule is applicable as the claim was not filed within sixty days after the date of the occurrence upon which it is based. (Award Nos. 14131 and 12984.)"

In the case at hand the transfer of control of the territory in question took place on or about December 17, 1970. That is the date of the **occurrence** upon which the claim is based and from which the time limit ran. The claim was not presented until September 24, 1971. Since we do not find that it is a continuing claim we must find that it is barred.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employes** involved in this dispute are respectively Carrier and **Employes** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claim is barred.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 7th day of March 1975.

Labor Member's Dissent to Award 20631, Docket TD-20525

Award 20631 dismissed the claim presented in Docket TD-20525 ruling the Organization failed to present the claim within sixty (60) days from December 17, 1970 and, therefore, the claim was barred.

On or about December 17, 1970 the .6 mile of track was changed from a timetable and train order controlled territory (supplemented by an automatic block signal system) to Centralized Traffic Control territory. The Centralized Traffic Machine governing the movement of trains by signal indication alone was not installed in an office where train dispatchers are employed by the Carrier. Carrier's train dispatchers were not allowed or required to have and exercise complete authority over the movement of trains by controlling and directing all train movements in this CTC territory.

It cannot be disputed that the .6 mile of trackage was changed into CTC territory only once or that the CTC machine was placed in service only once on or about December 17, 1970. Award 20631 found that this was not a continuing claim after stating "In the case at hand the transfer of control of the territory took place on or about December 17, 1970. That is the date of the occurrence (sic) upon which the claim is based and from which the time limit ran."

Award 20631 cites two Awards, Numbers 18667 and 14450, in support of the finding in favor of the Carrier's contention that the claim was not timely filed. Award 18667 considered a dispute wherein the Carrier entered into a contract with an outside contractor to perform certain specified work. While the Carrier in Award 18667 was required to give prior notice prior to contracting out work, the Employes failed to enter a claim within the limits provided in the Agreement with the time limits tolling from the date the contract was let for the work in question. In the instant case the Carrier did not contract out the work but instead entered into a joint operation permitting the Canadian Railroad to operate its trains over the .6 mile of Carrier's track and for which the Canadian Railroad is required to pay a fixed sum of money to Burlington Northern (the instant Carrier) annually. Award 14450 considers an abolishment of a section gang with the assignment of the section territory to another of Carrier's section gangs and the Board ruled the date of abolishment was the date of the occurrence when the time limits started to toll for a claim in that regard and, therefore, it was not a continuing claim. The instant claim does not consider an abolishment of positions nor territory being given to Carrier's employes of the same class or craft. While Awards 18667 and 14450 do support and/or rule that claims must be timely filed similar to the ruling in Award 20631, it is clear that Award 20631 ruled only on "the transfer of control of the territory in question" and that this "took place on or about December 17, 1970". This is

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the only action or occurrence contained in the statement of **claim** or established in the record, **albeit** it was contended that the Agreement continues to be violated without a showing or evidence of proof of such violations.

Awards **20631**, **18667** and **14450**, which dismiss claims because claims were not timely filed, do not serve to insulate or protect a Carrier from repeated and/or continued violations of the Agreement. Award **10644**, considering a claim where the Board held the claim itself had no merit but must be **sustained** in part because of Carrier's failure to timely deny the **claim**, states:

"*** A party's failure to make a timely denial of a continuing claim, or to make a **timely** appeal from a denial of such a **claim**, does not mean that the substantive nature of the **continuing** claim therefore must be granted or denied for the unlimited future, however, regardless of the merits of the claim. To hold **otherwise** would lead to absurd results--such as work properly belonging to a given craft being indefinitely lost to it because of failure to take timely action on an appeal, or a Carrier **being** required for the indefinite future to **pay employees** for work to which they are not contractually entitled and which is properly **being** performed by others. The **purpose** of the Time Limit Rule is to provide for the expeditious handling of claims, not to fasten **upon** the parties a system wherein a single lapse can produce continuing or repeated injustices thereafter."

Award **19** of Special Board of Adjustment No. 252 states:

"The right of the **Employees** to progress a new grievance, after default, for an alleged continuing violation is equally apparent. A claim may be filed at any time for an **alleged** continuing violation and all rights of claimants are fully protected by filing one claim. ***"

Therefore, Award **20631**, ruling that the transfer of control on December 17, 1970 was an occurrence causing the time limits to toll for a claim regarding objection to the transfer of control, does not serve to bar or prohibit **submitting** claims (either specific or continuing claims) for work which is **supported** by the Agreement rules, i.e. work which is reserved to the craft by the Agreement rules regardless of the fact that the claim protesting the transfer was dismissed. Award **20631** could not and did not consider **any** specific work involved because the record contained no evidence of the work being taken from the craft on a continuing and/or reoccurring basis. Award **20631** considers **only** the change from train order and timetable territory to Centralized Traffic Control territory and

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as this change or transfer of control occurred **only once and** on or about December 17, 1970, Award 20631 is not wrong in holding that the claim **was** not timely filed in the absence of a showing of specific duties and/or work being **performed** which **would** have **made** the claim a continuing claim and, therefore, not subject to dismissal on the **time limits** but **merely** subject to a time **limitation** on the recovery or **claim** for **damage**.

Award 18539 considers a Carrier **change** similar to that involved **in** the instant dispute, i.e. another Carrier obtaining trackage right but using its **own power and** crews. In Award 18539 the Carrier changed its practice regarding the handling of train orders and the **Employees** failed to grieve within a time **limit identical** to that in the instant Agreement. **The Board** had evidence (absent in **this** docket) in Award 13539 to show the specific work or duty of **handling** train orders, which **was** reserved to the Carrier's telegraphers, was being **performed** by persons not covered by the Agreement. Award 18539 sustained the claim but limited the retroactivity **concerning monetary** claims to sixty (60) days.

The Board is not empowered to change the Agreement **between** the parties. Award 20631, ruling that Docket TD-23525 did not contain evidence to **show that** there was, in fact, a **continuing** violation of the Agreement **cannot** serve to rewrite **the** Agreement or defeat **timely** presented **claims** for specific violations of the Agreement.



J. P. Erickson
Labor Member