NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22769
THIRD DIVISION Docket Number CL-22216

Rolf Valtin, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Illinois Central Gulf Railroad

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8446) that:

(1) The Carrier violated the, terms of the Agreement between the parties hereto at South Tower, Joliet, Illinois when on December 8, 1974 it required the Towermen on the third trick *to* perform duties of a higher rated nature, formerly performed by Yardmaster, in violation of Rules 36 and 37, among others of the Agreement in effect between the parties.

(2) The Carrier shall compensate the occupants of the third trick Towerman's position at South Tower, Joliet, Illinois for the difference between the yardmaster's rate of pay of $52.88 per day and that of towerman rate of pay of $42.60 per day for all dates beginning December 8, 1974 and each day thereafter that the Towermen are required to perform the higher rated duties of Yardmaster.

(3) Proper Claimants are readily ascertainable by joint check of payroll records which is hereby requested,

OPINION OF BOARD: The central facts in this case are as follows:

- As of October 15, 1972, the Carrier de-activated the Third-Trick Yardmaster position at the South Tower, Joliet, Illinois. In the succeeding period of approximately 27½ months, the South Joliet Yard on the Third Trick was substantially a closed yard. By way of regular exception, there was one south-bound and one north-bound train during the course of the night.

- The Organization contends that the Third-Trick Towermen were called upon to perform Yardmaster work and that they therefore should have been compensated at the Yardmaster rate. The duties which are listed in support of the contention are these: 1) assigning tracks

to inbound and outbound trains; 2) calling crews for road and yard engines; 3) handling of radios; 4) keeping AR times for T.P. Clerks when they are not on duty; 5) giving call figures to the EJE Dispatcher; 6) physically showing Brakeman on through freights when and where to set out cars.

- The Organization relies on Rules 36 and 37. Rule 36 is titled "New Positions -- Bating Positions". Its paragraphs (d) and (e) read as follows:

> "(d) When there is an increase in the duties and responsibilities of a position or a change in the character of the service required, the rate of pay for such position shall be subject to review and adjustment by agreement between the Director of Labor Relations and the General Chairman,
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> (e) When positions are consolidated, the higher rate of pay of the consolidated positions shall apply. "

Rule 37 is titled "Preservation of Rates". Its paragraphs (a) and (b) read as follows:

> "(a) An employee temporarily assigned to a higher rated position shall receive the higher rate for the entire day. An employee temporarily assigned to a lower rated position shall not have his rate reduced.
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> (b) A 'temporary assignment' contemplates fulfillment of the duties and responsibilities of the' position during the time occupied whether the regular occupant of the position is absent or whether the temporary assignee perform the duties irrespective of the presence of the regular employee."

- The Carrier in part defends on the merits and in other part asserts that the claim should be dismissed for lack of timely filing. The latter position is based on Rule 25, titled "Time Limits -- Grievances". Portions of it read 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 days from the date of the occuurrence on which the claim or grievance is based ...
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> * * * *
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> (d) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby-shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, *continues.* However, *no monetary* claims shall be allowed retroactively for more than sixty days prior to the filing thereof ..."

The Carrier is saying that the de-activation of the Third-Trick Yardmaster position was "the occurrence on which the claim or grievance is based" -- and that, as the claim was filed long after 60 days beyond that event, it must be declared to have been filed in untimely fashion. The Organization is saying that the non-payment of the Yardmaster rate to the Third-Trick Towermen marks a "continuing violation" -- and that it follows that the claim is properly determinable on its merits. Both parties cite past Board Decisions in support of their respective contentions on this score.

- As of February 3, 1975, pursuant to the Merger Protection Agreement between the Carrier and the Yardmasters' Association of North America, the Third-Trick Yardmaster position was re-activated. The *Organization's* claim concededly ceases with this re-activation.

- The claim was filed on the succeeding day -- i.e., on February 4, 1975. As can be seen, it makes December 8, 1974, the starting point for the requested payment of the Yardmaster rate. The record cannot possibly be read as revealing an event or events which rendered the Third-Trick Towermen's work on that day and the succeeding days distinguishable from their work in the preceding approximately two years. Presumably, therefore, the reference to December 8, 1974, is a matter of *the Organization's recognition* of the monetary-liability limit of Rule 25. A 60-day retroactive period from the claim-filing date does not end precisely on that date.

But there is no other reasonable explanation for-the reference to it.

On the evidence before us, we do not believe that we can correctly hold that the Towermen assumed Yardmaster duties to the sort of substantial degree which would warrant viewing them as having functioned as Yardmasters. This conclusion, manifestly, renders Rule 37 inapplicable.

It also forecloses the application of paragraph (e) of Rule 36 (the "consolidation" paragraph). The most that can legitimately be found to have happened is that the Towermen performed certain duties beyond their regular job content so as to have made paragraph (d) of Rule 36 operative -- i.e., so as to have wade the Towermen's rate "subject to review and adjustment by agreement between the Director of Labor Relations and the General Chairman." But the fact is that the Organization never so moved during the time in which the Third-Trick Yardmaster position was in a de-activated status.

The claim which it filed upon that position's re-activation sweepingly invokes Rules 36 and 37. Nevertheless, as this invocation incorporates reliance on paragraph (d) of Rule 36, we confront the question of whether the parties should now be directed to undertake the action called for by that paragraph or whether such a directive is barred by the timeliness requirement of Rule 25.

We hold that the latter is true. Much -- and much which is diverse -- has been written and held on what is and what is not a "continuing violation", and a case can here obviously be made out for viewing the claim either as inseparably linked to the de-activation event or as properly arising at any stage at which, by virtue of the de-activated status of the Yardmaster position, the application of the Towerman rate to the Third-Trick Towermen was subject to challenge and review. We grant that there would have been a real question as to whether the claim was properly viewable as one covering a *continuing* matter had *it* been brought at some stage beyond sixty days following the de-activation event but within the duration of the de-activated status of the Yardmaster position. But this is not what the case presents. The claim was filed, rather, when the de-activated status of the Yardwaster position was no longer in being -- or, what is quite the same thing, when the allegedly

improper wage payment was no longer in being. In this circumstance to view the claim as having standing under the "continuing" standard is to proceed in self-contradictory fashion. Au alleged violation simply cannot have vanished and still be continuing.

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 apprwed June 21, 1934;

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

That the Agreement was not violated.

A W A R D

Claim in part denied and in part dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of February 1980.