NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26328
THIRD DIVISION Docket Number CL-24966

George V. Boyle, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(Northeast Illinois Regional Commuter Railroad
(Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-9752) that:

1. Carrier violated the Agreement Rules, particularly Rule 63, when it established new hours of assignment for the first and second trick positions and relief positions at Washington Heights, 103rd Street Tower, to reflect the hours of assignment of 5:30 A.M. to 1:30 P.M., first trick and 1:30 P.M. to 9:30 P.M., second trick.

2. Carrier shall now be required to compensate Claimants H. Sharpe, J. Vonfeldt and M. Ahrendt three (3) hours at the pro rata rate of their assignments beginning sixty (60) days prior to the date of April 14, 1981, and continuing each workday thereafter until such time as the violation ceases."

OPINION OF BOARD: The Carrier heretofore had maintained a three shift operation at the Washington Heights Tower until January 1981. At that time it reduced the operation to two shifts and established new starting times of 5:30 A.M. and 1:30 P.M. On April 14, 1981, the Organization filed Claim for the above named Claimants alleging that the Carrier had violated "Rule 63-Starting Time", which states:

> . . . (c) Except as provided in paragraph (d) below, at locations where more than one position is assigned to work during the twenty-four hour period, such position may be started anytime at or between the hours of 6:00 A.M. and 12:00 midnight."

The Carrier responded on June 2, 1981, that the, "change was made due to the requirements of service," and denied the Claim on the grounds that, "there is no basis in accordance with the current agreement." An identical response was made by the Carrier in a letter of June 19, 1981.

The Organization indicated that the denial letter of June 2 was initiated by an improper Official and that since the second letter of June 19 had come from the authorized representative, the Carrier had overstepped the procedural time limits and therefore the Claim must be sustained.

On this matter "Rule 55. Time Limit on Claims and Grievances" refers to presentation of Claims, "in writing . . . to the officer of the Carrier authorized to receive same." The response, if disallowed, must come from "the Carrier" within 60 days. Rule 55 does not state or require that the reply must come from "the officer of the Carrier authorized to receive same." Presumably the Carrier is free to designate any of its personnel to act officially on its behalf. In the instant case, the June 2 reply came from "R. B. Rickerson, Assistant Supervisor-Station Services" and was an official reply from the Carrier.

Subsequently, the Carrier, by letter of August 26, 1981, reaffirmed its denial of the Claim on two grounds:

"1) That the provisions of Rule 63(c) are permissive, allowing the Carrier to establish a 5:30 A.M. starting time and that the 1:30 P.M. starting time is clearly within the period referred to, '6 A.M. and 12:00 midnight.'

2) That the claim was time barred, since it was not presented within 60 days of January 30, 1981, the date the new starting times were inaugurated."

With respect to the permissiveness of Rule 63, the Rule does not say that "such position may be started at any time." "Any time" is qualified by the phrase "at or between the hours of 6:00 A.M. and 12:00 midnight." This allows the Carrier great latitude, eighteen (18) hours, within which to set starting times. The language, however, precludes starting times within the six (6) hour period of 12:00 midnight and 6:00 A.M. To hold that the use of the permissive word "may" enabled the Carrier to set a starting time at any designated moment within the twenty-four (24) hour period would render the qualifying phrase meaningless and redundant. Since the phrase appears in the Agreement it must have the meaning herein delineated. Accordingly, the Carrier has violated the Agreement to the extent of the 5:30 A.M. starting time but not the 1:30 P.M. time.

With respect to the time bar, the Board must agree with the Carrier's view. Rule 51 states:

> "Section l(a). All claims must be presented . . . within 60 days from the date of the occurrence on which the claim or grievance is based. . ."

Section-2 of the same rule indicated the only condition for a valid Claim beyond 60 days:

> "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 claim shall be allowed retroactively for more than 60 days prior to the filing thereof . . ."

The question of whether this violation is a "continuing" one must be resolved in the negative. Numerous Awards have delineated the essential character of continuing violations. Third Division Award No. 14450 states, "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."

Third Division Award No. 20631 affirms the same distinction, pointing out that, "The consequences of the Carrier's action on the claim date quite naturally extend forward in time from that point . . . ." The Board went on to hold that the date of contract was the date from which the time limit ran.

Third Division Award No. 21322 which dealt with the abolition of positions and referral of work to other employees, similarly relies upon the principle and language of Award 14450: "These are not continuing violations as we have defined that term in previous awards . . . . The abolishment of the Granite City position and referral of the work to gang signal maintainers is the occurrence on which the Claim or grievance is based. The occurrence took place on July 30, 1971 but these Claims were not filed until May 14, 1972, more than nine months later. In rejecting the Organization's assertion that these are 'continuing claims' we adhere to the principles stated in our Award 14450 from which we quote . . ." The excerpt of that Award is then quoted at length.

Similar instances of reliance upon Award 14450 are found in Third Division Awards 21376, 24023, 23953, 25538 and others.

In this instance, on the "date of occurrence" there was a single act, not a continuing one, as defined above, and therefore this is not a continuing Claim. Thus the filing date of the Claim, April 14, 1981, was well beyond the 60 day term following January 30, 1981, and the Claim is time 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:: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 8th day of June 1987.