

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Western Maryland Railway Company

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

(1) The Carrier violated the Agreement when it used Foreman McKnight, Class A Machine Operator Davis and Assistant Foreman Borum to perform trackman's work on the Port Covington Yard Seniority District (System File MW-09).

(2) Because of the aforesaid violation, the senior furloughed trackman holding seniority on the Port Covington Yard Seniority District shall be compensated for all wage loss suffered beginning sixty (60) days retroactive from March 28, 1985 and continuing until the violation referred to in Part (1) is terminated."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Before considering the merits of this matter we must first deal with the contention of the Carrier that the Claim before the Board has been altered sufficiently so that it is not the same Claim that was handled on the Property and, also, that the initial Claim that was filed is barred by the provisions of the Time Limit Rule.

The initial Claim that was filed on the property read:

"1. That the current MW Agreement, particularly the scope rule, rule 1, rule 2, rule 3(d), rule 18 and Rule 47 was violated when the Carrier elected to establish a Yard gang at Port Covington without a trackman. The gang has been established with a foreman, assistant foreman chauffeur and Class A Machine Operator. This gang is responsible for the daily maintenance and repair of the yard at

Port Covington. A significant amount of this work normally and customarily performed by a trackman with the Carrier routinely using the incumbents of the above listed classifications to perform this work.

2. Using these various other classifications to regularly perform trackman work is a violation of the Agreement as specified above in section 1 of this claim. This principle is upheld in National Railroad Adjustment Board Award Number 25282.

3. In settlement of this claim we would like the Carrier to immediately post a trackman position at Port Covington. In addition we would like the Carrier to recall the senior furloughed trackman to the position pending award of the position and to compensate the recalled trackman for all lost time starting back sixty days from receipt of this claim. If the Carrier fails to immediately post the position and recall the senior furloughed trackman please consider this a continuing claim in accordance with Rule 165, section 3 until such time as the claim is resolved."

In comparing the above with the Claim submitted to our Board we note that while certain variations exist between the text of the two these appear to be more of form rather than of substance. In Award 16251 we observed that minor variations between the text of the claim handled on the property and that referred to our Board was not necessarily fatal to our consideration. It is when substantial variances are present that the Claim requires dismissal, (Award 18322). Accordingly, we will not dismiss this Claim on the allegation that it was not the same Claim that was handled on the property.

On the matter of the Claim's timeliness, Carrier argues that the changes, that were made in restructuring track gang personnel at Port Covington, occurred with the abolishment, effective December 10, 1984, of a trackman position. It wasn't until March 28, 1985, that the Organization filed a Claim alleging that the Agreement was violated by having a track gang perform track work without a trackman assigned. March 28, 1985, was well beyond the sixty day period within which the Organization could timely file a Claim on the incident.

The Organization contends that the situation involves a continuing violation and under its Time Limit Rule, claims may be filed any time for such violations.

Continuing claims are a device created to avoid a multiplicity of claims thereby eliminating a need for filing a new Claim every day for that day's violation. (Second Division Award 3298). And the language of the Agreement permits the filing of a continuing claim "at any time," however, retroactivity of more than sixty days on monetary Claims is not allowed. At issue here, though, is whether or not claims disputing work assignments resulting from a single occurrence, such as the abolishment of a position, are considered continuing Claims which may be filed beyond sixty days after the occurrence of the abolishment.

There are a host of Awards, of this and other Divisions, which conclude that such claims, disputing prospective work assignments, while exhibiting characteristics similar to a continuing Claim with regard to not being required to file a new Claim every day there after, are not continuing Claims that may be filed at any time. To be timely they must be filed within sixty days of the date of occurrence giving rise to the incident, i.e., the abolishment. Typical of these is Third Division Award 14450, holding:

"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 the Section Foreman, with 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)."

When the original claim filed by the Organization, (quoted above), is examined alongside the holdings of Award 14450, it can be seen that the two fit like hand and glove. The very first sentence of the Claim, initially filed in this matter, states that the Agreement was violated, "when Carrier elected to establish a Yard gang ... without a trackman." This is the action the Organization complained about. This action occurred when the trackman's assignment was abolished on December 10, 1984. The abolishment and the restructuring of the gang, so that thereafter track work was being performed without a trackman assigned, occurred only on one occasion and was a separate and definitive action. It was the initial triggering event to the prospective changes in work assignments and the Organization had sixty days from that date to file a Claim. This was not done. (See Third Division Award 23953)

Inasmuch as the initial Claim of the Organization was not timely filed we must dismiss the matter and are unable to consider the grievance on its merits.

A W A R D


Claim dismissed.

Form 1
Page 4

Award No. 27327
Docket No. MW-27178
88-3-86-3-248

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of August 1988.