Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27339
THIRD DIVISION Docket No. MW-25917
88-3-84-3-253

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation
(Amtrak) - Northeast Corridor

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

(1) The Agreement was violated when the Carrier assigned M of E Department Boilermakers E. E. Wisnieki and M. Ganc to lay out, fabricate and weld switch heater brackets at the Wilmington Boiler Shop in Wilmington, Delaware beginning on March 4, 1982 (System Docket NEC-BMWE-SD-499).

(2) The Agreement was further violated when Division Engineer Dunn failed to disallow either of the two (2) claims presented to him on May 25, 1982, as contractually stipulated within Agreement Rule 64(b).

(3) As a consequence of either or both (1) and/or (2) above, the claims* shall be allowed as presented

*The two (2) letters of claim presentation will be reproduced within our initial submission."

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.

At the time of the events at issue in this claim, Claimants held seniority as welders in the Carrier's Bridge & Building subdepartment, and were assigned to B & B Gang C-092 headquartered at Wilmington, Delaware. In the Spring of 1982, the Carrier needed to fabricate metal brackets for use in fastening switch heaters to tracks. Claimants were apparently assigned to fabricate these brackets initially. Their claims assert that they had done about 150 hours of such work when, as of March 4, 1982, the Claimants were reassigned to other work. The Carrier then reassigned the fabrication of the switch heater brackets to Maintenance of Equipment Boilermakers at the Wilmington Boiler Shop.

Contending that the switch heater fabrication work belonged to Maintenance of Way employees, Claimants filed these claims on May 25, 1982. The claims were filed with the Carrier's Division Engineer. When the Division Engineer did not respond to the claims, the Organization progressed them to the next level in an August 26, 1982 letter to the Carrier's Assistant Chief Engineer - Structures. That letter both reasserted the merits of the claims and argued that the Carrier's failure to timely answer them at the first level required that the claims be paid as presented, under Rule 64(b) of the Agreement.

When the Division Engineer received his copy of the Organization's August 26, 1982, letter to the Assistant Chief Engineer, he immediately wrote the Organization. The Division Engineer's letter, dated August 27, 1982, offered the Organization a ten percent "partial settlement" or "temporary payment," in return for a 30-day extension of the time limits, "so that he could once and for all straighten this matter out." The Organization agreed to this arrangement on August 27, 1982. The claims were never "straightened out" to the mutual satisfaction of the parties, and the Organization has now progressed them to the Board.

At this level, each of the parties argues that the other should be defaulted for failing to comply with the time limits contained in the Agreement. The Organization continues to assert that the Carrier failed to answer the claims in a timely fashion at the initial level. The Carrier argues that the Claimants failed to file the claims in a timely fashion to begin with.

Rule 64(b) of the Agreement states:

> "All claims or grievances must be presented in writing by or on behalf of the employe involved, to the designated officer of AMTRAK authorized to receive same, within sixty (60) days from the date the employe received his pay check for the pay period in which the alleged shortage occurs.
>
> Should any such claim or grievance be disallowed, AMTRAK shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe 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 AMTRAK as to other similar claims or grievances."

Although no evidence of this was presented on the property, the Carrier now contends that the pay checks covering the date of March 4, 1982, when the switch heater bracket work was reassigned to Maintenance of Equipment

employees, were issued to the employees on March 19, 1982. That was 66 days before the claims were filed. Consequently, the Carrier argues that the claims were untimely from the very beginning.

After the claims were filed, it is undisputed that the Carrier did not respond to them within the 60 days allowed under Rule 64(b). When the Carrier did respond, it did not raise the issue of the claims being untimely filed. The Carrier did not make that assertion until the third step. At the initial step the Carrier sought to settle or resolve the matter on its merits.

Nevertheless, the Carrier refers to prior awards of this Board in which it has been held that a claim which is not filed within the applicable time limits is void ab initio, so that the carrier is not required to respond to it within any particular time frame. See, Third Division Awards Nos. 16164 and 15631. However, Award 16164 arose from what the Board described as "a single event, the abolishment of two positions and consolidating these into one." Therefore, the commencement of the time period for filing that claim was apparent on the face of the claim. In this case, the time period did not commence to run until pay checks were issued covering the dates when the bracket fabrication work was transferred from Claimants to the M of E employees. The date when those pay checks were issued is not apparent on the face of the claims, but instead must be established by evidence. Moreover, the Organization contends that this is a "continuing" claim, because the work in question continued to be performed by inappropriate employees of the Carrier on succeeding dates after March 4, 1982. See, Third Division Award 22508.

Because of the uncertainties surrounding the date(s) on which the time limits for filing this claim initially arose, the Board finds that this case is more appropriate for application of precedents which hold that a carrier's failure to assert a timeliness defense at the initial level of the consideration of a claim operates to waive that defense. Here, the defense was not asserted until the third level, and the evidentiary basis was never developed by the Carrier on the property. As this Board said in Third Division Award 11570, "this is a matter of procedure, which could not be raised at this late date." At the initial levels, this claim was handled on its merits and "[u]nder these circumstances, we hold that the bar was not timely invoked and must be deemed to have been waived by carrier in this particular case." Third Division Award 12516.

If the claim was not untimely as filed, the Carrier's failure to timely respond to it would ordinarily require that the claim be paid as presented, under Rule 64(b). However, the Organization agreed to Division Engineer Dunn's request for an extension of the time limits on August 27, 1982. The Organization vigorously argues that its agreement to that extension did not waive the Carrier's failure to make a timely response at the initial level. The wording of the extension agreement is not explicit as to precisely what requirements the parties intended to waive or extend. However, the extension was given to the Division Engineer at his request, and he was the Carrier official to whom the claims were presented at the first level. It was accordingly his response which was then late unless the applicable time limit were

to be extended. It would not be unreasonable, therefore, to construe the extension agreement as embodying the Organization's waiver of the lateness of the Division Engineer's response. Considering this together with all the ambiguities surrounding the timeliness questions in this case, the Board cannot conclude that the Carrier's failure to respond within the 60-day period of these claims requires that they be paid regardless of their merits.

Turning to the merits, it is the burden of the Organization to prove that the work in question was reserved to its members and could not appropriately be reassigned to Maintenance of Equipment employees. The Organization relies upon the Scope and Classification of Work rules in the Agreement. However, those rules are cast in general language and do not specifically provide that the welding of switch heater brackets is reserved to Maintenance of Way welders such as the Claimants. This Board has repeatedly stated that where the language of a Scope or Classification of Work rule fails to specifically address a particular type of work, but makes only general references, the burden remains on the Organization to establish that the specific work in question historically has been regarded as belonging exclusively to the craft. See, Third Division Awards 24853, 24410, 24028, 19921, and 18471. The Awards cited by the Organization are not contrary to this proposition; they simply hold that Classification of Work rules must be given effect when they clearly reflect the parties' bargain to reserve particular work to a particular craft. The rules do not clearly do so in this case.

The Organization in this case has offered no evidence of the historical or traditional distribution of the work in question, except its assertions that the Claimants were briefly assigned to perform it and accumulated some 150 hours doing so before the work was reassigned to the Maintenance of Equipment employees. The Carrier has explained that the welding at issue involved only sixteen prototype brackets of a new design. The Carrier contends that it had decided to use its own forces to fabricate the prototype brackets for testing on its system. According to the Carrier, its practice had long been to contract for the fabrication of switch heater brackets, and it intended to do so again if the prototype design proved workable and an improvement over the design it was then purchasing.

The Carrier argues that, since it had traditionally contracted for the manufacture of such appliances, the Organization cannot possibly show that the work in question was historically reserved to its members. The Organization argues, on the other hand, that once the Carrier elected to have the prototypes fabricated by its own forces, it was obliged to reserve the work to Maintenance of Way employees.

Precisely because the work was new, involving a new design being produced for testing by the Carrier, it would be difficult or impossible for the Organization to demonstrate an historical practice with respect to the work. The mere fact that the brackets had not been produced previously, however, should not defeat the Organization's claim to the work. Otherwise, a carrier could consistently defeat an organization's claim to new work that is

not specifically mentioned in the Scope or Classification rules, simply by rotating the work among various crafts so as to prevent the development of an exclusive practice. Such manipulation would not serve any legitimate labor relations purpose. Under the circumstances, given the facts that the switch heaters are themselves unquestionably Maintenance of Way materials, and that the bracket fabrication work was at first given to the Claimants, and that such a distribution appears to have been most consistent with the general language of the rules, the Board concludes that the Claimants have satisfied their burden of establishing a claim for the work. However, the Organization must also establish the extent of the alleged violation.

In this case it has not done so through the presentation of any evidence as to the number of hours devoted to the bracket fabrication work by the Maintenance of Equipment boilermakers. The Organization has simply asserted, in the original claims, that the boilermakers had spent "100 hours so far," later enlarging the assertion to "at least 1000 hours." The Carrier argues that these assertions are too vague, exaggerated and lacking in support to present a meritorious claim.

The Organization refers us to prior awards in which the Board has seen fit to uphold claims that depended upon facts easily ascertainable from the records of the carriers. See, Third Division Awards 22194 and 20841. In this case, however, the Carrier asserts that the facts as to the hours spent cannot be readily ascertained from its records, because the employees were assigned to fabricate the prototype brackets on a noncontinuous or sporadic basis whenever they had spare time. The Carrier contends that the total number of hours involved by the boilermakers, while not precisely determinable from its records, must have been far less than the 100 hours originally claimed by the Claimants, inasmuch as only sixteen brackets were involved.

As the Carrier points out, the Claimants in this case were in an apparently superior position to adduce evidence as to the hours actually spent by the boilermakers in fabricating the brackets, because the work was done where it could have been observed by the Claimants. By the time the claims were filed on May 25, 1982, the Claimants should have been able to identify the dates subsequent to March 4, 1982, on which the boilermakers engaged in the work in question. Therefore, the absence of evidence on this matter, which is ordinarily the Claimants' burden to establish, cannot in this case be readily excused on the ground that the Carrier's records should contain it.

Partly because the records relevant to this matter were unclear, the Carrier offered to settle the claims at the first level based on payment to the Claimants for forty hours of work. The Board does not construe that offer as in any way acknowledging the Carrier's liability in this matter, nor do we regard it as prejudicing the Carrier's defenses. However, in the absence of evidence by the Organization establishing the number of hours of work Claimants lost to the M of E employees, the Board accepts the Carrier's offer of settlement as fairly approximating the hours involved. Accordingly, the Board will sustain the claims and order the Carrier to reimburse Claimants for 40 hours work at the straight time rate in effect in March 1982, said amount to be divided equally between them.

A W A R D

Claim sustained in accordance with the Findings.

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.