

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company

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

(1) The Carrier violated the Agreement when it failed to timely bulletin the temporary vacancy in the Track Inspector's position between Glenwood and Thief River Falls thereby depriving Mr. L. Sjodin an opportunity to fill said position (System File R301 #1490S/800-46-B-269).

(2) The claim* as presented by General Chairman G. Western on July 25, 1986 to Regional Engineer T. M. Parsons shall be allowed as presented because said claim was not disallowed by Regional Engineer Parsons in accordance with Rule 13-1(a).

(3) As a consequence of Parts (1) and/or (2) above, Mr. L. Sjodin shall:

'... be made whole for the difference in pay lost to him as a result of being deprived of the opportunity to obtain the disputed position due to the Carrier's failure to make that position available by bulletin in clear violation of Scheduled Rules.'

*The letter of claim 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.

The essential facts are not in dispute. On March 8, 1986, Carrier's Track Inspector began a sick leave. Although the duration of his sick leave was not known at the time, it eventually extended well beyond 30 consecutive days. The effective Agreement contains provisions requiring Carrier to bulletin the vacancy if it continued in excess of 30 days and assign the senior qualified applicant. At no time did Carrier bulletin the vacancy.

By letter dated July 25, 1986, more than three months after Carrier's obligation to bulletin arose, the Organization filed a Claim. It contained, as its initial paragraph, the following:

"This claim is presented on behalf of Lowell Sjodin, seniority date 01/26/83 on the Relief Track Inspector's Roster for Seniority District No. 3, for the Carrier's continued violation of Bulletin Rules 7(b) and 7(d) of the Schedule Agreement dated June 15, 1978."

(Underlining supplied by the Board)

The Agreement contained the following procedural requirements for claims:

"RULE 13 - Time Limit on Claims, Grievances And Discipline

1. All claims or grievances shall be handled 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 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee 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 the Carrier as to other similar claims or grievances.

2. 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. ...

(Underlining supplied by the Board)

Carrier did not respond to the Claim within 60 days of its receipt. By letter dated November 5, 1986, the Organization notified Carrier of its failure to respond and claimed the contractual allowance of its Claim by default. By letter dated January 2, 1987, Carrier declined the Claim alleging it was unspecific and untimely.

In subsequent handling on the property, both parties maintained their procedural positions described above. The Organization contended its Claim was timely because it alleged a continuing violation. Therefore, when Carrier failed to respond on time, its Claim won by contractual default. Carrier, on the other hand, says there was only a single incident and no continuing violation. In its view, the Claim was not filed timely and was, as a result, invalid. Being invalid, ab initio, Carrier had no obligation to respond to it. Therefore, its failure to respond is of no consequence in their opinion.

The Claim can be resolved on the basis of whether the Claim in question was a continuing Claim. If it was not, then the Claim was not timely and the Carrier's subsequent time limit handling is irrelevant. If it was a continuing Claim, it is a valid Claim which the Carrier was obligated to respond to. Their failure to do so would as a consequence require the Claim to be sustained, but there would be no recovery further back than 60 days from the date of the Claim.

It is the conclusion of the Board that the Organization validly alleged a continuing violation of the Agreement. The Carrier became obligated to bulletin the job after it existed 30 days and to properly fill the job. Its obligation to bulletin the job and fill it properly continued until that obligation was fulfilled. Having not bulletined the job, it was no less obligated to bulletin the vacancy on the 100th day than it was on the 31st day. Having successfully alleged a continuing violation, the Organization is entitled to expect and demand compliance on the Carrier's part with its time limit obligations.


The Parties clearly carved out an exception to the basic 60-day Time Limit Rule for "alleged continuing violation(s)". They may be filed at any time. While the nature of a continuing violation is sometimes difficult to define and while it depends on the facts and circumstances of each case, the Board is compelled to find that this was a continuing violation. If this is not a continuing violation, then Rule B Section (2) would be a nullity. All the provisions of the Agreement must be observed and given meaning and effect. The Board also rejects the Carrier's contention that the Claim is vague. The Claim is sustained but retroactive recovery is limited to the 60-days prior to the actual filing of the Claim.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. O'Leary - Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1991.