

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31043
Docket No. MW-30409
95-3-92-3-150

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company

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

- (1) The Agreement was violated when the Carrier assigned B&B 1st Class Carpenter/Lead Workman E. J. Kennon to perform the duties of a B&B foreman on Gangs 6827, 6828 and 6829, beginning January 1, 1990 and continuing instead of assigning B&B Foreman D. H. Hector (System File S-361/900605).
- (2) The Agreement was further violated when the Carrier failed and refused to advertise and assign the position of a Group 3, Class A B&B Foreman's position, for Gangs 6827, 6828 and 6829, as contemplated by Rule 20.
- (3) As a consequence of the violation referred to in Part (1) above, B&B Foreman D. H. Hector shall be compensated "... at his applicable B&B Class A Foreman's rate, pay for all work/time lost, with it being understood that payment of this claim will be governed by the restrictions of Rule 49(b) and the claim is to be considered as continuing in nature until the violation of the Agreement ceases.'
- (4) As a consequence of the violation referred to in Part (2) above, the Carrier shall be required to advertise and assign a Group 3, Class A B&B Foreman's position for Gangs 6827, 6828 and 6829 in compliance with the provisions of Rule 20."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

By claim dated July 19, 1990, the Organization asserted a violation of the Agreement by the Carrier "... when on January 1, 1990 through July 19, 1990 and continuing, it failed to assign the duties and responsibilities of a B&B Foreman for Gangs 6827, 6828 and 6829 to Mr. Hector and instead assigned said duties and responsibilities to B&B Carpenter/Lead Workman E. J. Kennon ... thereby denying Claimant Hector of work and compensation he is entitled to by virtue of his established seniority."

The Carrier asserts the claim is untimely. The Organization replies that the claim is of a continuing nature and therefore timely.

Rule 49(a) states:

"All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of occurrence on which the claim or grievance is based...."

On the property, this issue has been resolved against the Organization. See Third Division Award 28826 (involving a February 23, 1987 assignment of a Welder Helper to fill a Foreman's position and a claim filed May 15, 1987 protesting that assignment with the Organization taking the position that "the Claim reflected a continuing violation, since each day Carrier allowed the junior employee to remain in the Extra Gang Foreman's position, it violated the Agreement ... each day was a separate violation"):

"In considering this dispute, specifically the timeliness issue, the Board concurs with Carrier's position, that the Claim is not continuing. To be sure, there are many variations and factual distinctions that arguably blur the dividing line between continuing and noncontinuing claims, but the Claim herein is not continuing. The alleged assignment of the Welder Helper to the Extra Gang Foreman's position on or about February 23, 1987, was a separate and definitive action which occurred on a certain date but it was not an action repeated on more than one occasion. In Third Division Award 25538, where outside forces were used to perform rail laying work for several months, the Board held that the actual violation occurred on the first day that outside forces were used. It stated in pertinent part,

'The instant claim is based on an act that occurred on September 21, 1981, and consistent with solid body of case law on this point is not continuing, although a continuing liability may flow from the specific pivotal act.'

Award 28826 is not palpably erroneous. Taken to its logical extent, under the Organization's theory, the Organization could have waited years to file a claim based upon the assignment in this case. Such a result would cause the time limits specified in Rule 49(a) to have little meaning.

The claim is therefore untimely under Rule 49(a) as it was filed on July 19, 1990, which is more than 60 days from the date of the occurrence—that date of occurrence being the date of the assignment, January 1, 1990. The claim shall be dismissed.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

Form 1
Page 4

Award No. 31043
Docket No. MW-30409
95-3-92-3-150

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of September 1995.

LABOR MEMBER'S DISSENT
TO
AWARD 31043, DOCKET MW-30409
(Referee Benn)

In the instant case, the Carrier assigned a junior employe to fill the position of a B&B foreman rather than advertise and assign the position in accordance with the Agreement. The Organization filed a continuing claim in accordance with Rule 49(b) based on the continuing nature of the Carrier's violation. This Board has previously determined that this type of violation is a continuing violation as that term is used in this industry. For instance, Third Division Award 28744 held:

"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 anytime. 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. ***"

Labor Member's Dissent
Award 31043
Page Two

This same Majority has often expressed its regard for the value of the principle of stare decisis. The trouble with this Majority is that it often has trouble identifying which precedent awards are closely similar for the purpose of applying that principle. In the instant case, the claim involved the failure to advertise and assign a position in accordance with the requirements of the Agreement. Inasmuch as the dispute was nearly identical to that involved in the dispute decided by Third Division Award 28744, the Majority should have applied the principle of stare decisis based on Award 28744 and found the violation to be continuing in nature. However, instead of identifying an award in a similar dispute on which to base its decision, this Majority chose to search for a dismissal award in order to rationalize the dismissal of this claim. Contrary to the Majority's erroneous finding, the issue of whether the Carrier's failure to bulletin a vacancy is a continuing violation was not decided in Third Division Award 28826. In fact, that issue was not even before the Board. Instead, Award 28826 addressed a dispute over the assignment of an advertised position to a junior employee. The Board's rationale was that the award of an advertised position by bulletin is a specific act from which the claim flows, hence there is a definitive occurrence on which the claim is based and the sixty (60) day time limit starts from that date. Hence, aside from any determination of whether or

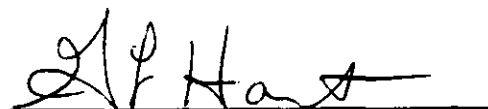
Labor Member's Dissent
Award 31043
Page Three

not Award 28826 was decided correctly, it is clearly not on point with the dispute under consideration here.

While the principle of stare decisis is laudable, it has value in cases before this Board only if the Majority is careful to apply it correctly by ensuring that the facts and issues involved in the dispute in the prior award are truly similar to those present in the dispute to be decided. The Majority in this case demonstrated an unconscionable disregard for the facts by citing dissimilar Award 28826 as a basis for its decision rather than identifying the nearly identical factual situation found in Award 28744 to correctly apply stare decisis and find the allegation of a continuing violation to have been properly made.

Inasmuch as the award cited by the Majority as a basis for its decision is inapposite and inasmuch as Award 31043 is contrary to the established precedent on the subject, yet does not find the precedent to be palpably erroneous, it is itself palpably erroneous and valueless as precedent.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'G. L. Hart', is written over a horizontal line.

G. L. Hart
Labor Member