must read rules in Conjunction with others

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32478
Docket No. CL-32972
98-3-96-3-353

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(CSX Transportation, Inc. (former Seaboard Coast Line
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11225) that:

1. Carrier violated the Agreement beginning September 9, 1993, and continuing, when it improperly computed Claimant's 'Red Circle' rate.

2. As a result of the aforementioned violation, Carrier shall now be required to compensate Clerk S. L. Holloway (610375) the following amounts, which represent the difference between Claimant's 'Red Circle' rate and the rate of the position to which assigned:

Payroll Period	Amount Due
March 26 - April 8, 1994	$ 261.40
April 9 - April 22, 1994	261.40
April 23 - May 6, 1994	261.40
May 7 - May 20, 1994	261.40
May 21 - June 3, 1994	261.40
Adjustment claimed	$1,307.00

3. In addition, Carrier shall also be required to compensate Clerk S. L. Holloway the following amounts, which represent the difference in overtime earnings as calculated between the rate of the position occupied and his 'Red Circle' rate:

Payroll Period	Amount Due
March 26 - April 8, 1994	$ 78.42
April 9 - April 22, 1994	352.89
April 23 - May 6, 1994	235.26
May 7 - May 20, 1994	352.89
May 21 - June 3, 1994	352.89
Adjustment claimed	$1,372.35"

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 were given due notice of hearing thereon.

At issue in this case are two questions: First, was the grievance filed timely? And second, precisely what compensation does the Agreement prescribe for the Claimant, entitled to receive a "red circle" rate when transferred to another position as a result of Carrier's post-merger consolidation of certain Chesapeake and Ohio Railway (C&O) functions at Jacksonville, Florida?

With respect to the procedural issue, the record reflects that the Claimant was awarded a five day position in the Jacksonville offices effective September 9, 1993. Inasmuch as the monthly rate of his former position was predicated on 213 monthly hours of service, and the new position contemplated the standard 174 hour month, Claimant made inquiry regarding the basis of his pay in the new assignment. Carrier's response came by letter dated October 7, 1993:

"Records indicated that you have a "red circle" rate of $3189.02 per month, that was derived from a 6-day position which comprehended 213 hours per month.

A 'red circle' rate is actually a form of a guarantee. Therefore, inasmuch as your 'red circle' rate is predicated on 213 hours per month, it will be necessary to set it up for payment on a monthly basis. In other words, any payment due you for the difference between the rate of your CSC position and your 'red circle' rate (monthly guarantee) will be paid in the month following the month in which it is due."

Claimant was paid on the basis described from approximately September 9, 1993 until this claim was filed on June 15, 1994. Rule 37 requires that [a]ll claims or grievances must be presented in writing . . . to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based." Carrier's procedural objection, advanced initially at the second step of case handling on the property, asserted that "a portion of this claim was not timely filed. Several of the dates in question are prior to sixty (60) days before the filing of the initial claim on June 15, 1994. Accordingly, claims for those dates are declined on that basis."

In its Submission, and again in vigorous terms at the Referee Hearing before the Board, Carrier enlarged its timeliness argument to encompass the entire claim, contending that "[t]he record is clear that the Claimant was advised of the manner in which his red circle rate would be calculated in October, 1993 and did not protest until the filing of this claim eight (8) months later."

In recognition of the well developed principle that evidence and argument not presented on the property are generally foregone and may not be raised for the first time at Board level, we must reject Carrier's newly asserted argument that consideration of the merits here is entirely foreclosed by Claimant's delay. While it is crystal clear that the claim does not comply with the time limits established by Rule 37, in conceding that the matter may be characterized as a "continuing violation" despite its October 1993 notification, Carrier waived any absolute procedural objection it may have enjoyed under Rule 37. And, for the reasons stated below, we further conclude it is not necessary to reach the timeliness issue as to those portions of the claim to which it did object on the property.

On the merits, Claimant argues that the rate of pay ascribed to his new position is an affront to the Agreement which established his rights upon transfer. Specifically, his claim centers on that aspect of the parties' New York Dock Section 4 Implementing Agreement dated March 4, 1993, referred to as Side Letter 1 of the C&O Customer Service Agreement (CSA), which protects the rate of pay of employees transferring thereunder to a single field and agency operation at Jacksonville in the following terms:

> "This confirms our understanding and agreement that C&O employees who, as a result of this transaction, transfer to Jacksonville, will be 'red circled' on the position to which initially assigned, i.e., on SCL District No. 18 in Jacksonville, Florida, provided they exercise seniority on the highest rated position to which their seniority entitles them at Jacksonville, and will not be paid less than the rate of the position to which assigned on the C&O immediately prior to the effective date of transfer, so long as they remain assigned to the position initially assigned."

Although there is no dispute as to the general purpose of this Agreement - to insure that transferred C&O clerical employees suffer no wage reductions for accepting positions in the new operation - a more particular issue has been baked hard in the oven of this controversy: when the affected employee is transferring from a monthly rated position to a daily rated one whose hourly rate is based upon fewer monthly hours, what daily rate does the Agreement establish for the new position.

The Organization contends that the Claimant's "red circle" rate should have been computed by dividing his former monthly rate of $3189.02 by 176 hours, yielding a daily rate of $144.96. There is, it argues, no provision in the Agreement authorizing any other divisor. Applying the 213 hour figure, the Claimant was shorted for each day he worked his regular assignment and for overtime worked. Claimant cites C&O Rule 43 (e), reading in part as follows:

> "(e) While monthly rates agreed to as provided for in Section (a) of this rule will be shown on rosters and bulletins, it is understood that the employes will be paid on a daily basis, and for all purposes of the Agreement will be handled in the same manner as though the roster and bulletins carried the daily rate . . . Beginning with the year 1976, the straight time daily rate is to be arrived at by multiplying the straight time

hourly rate of 176. The hourly overtime rate is to be one and one-half times the straight time hourly rate."

Carrier asserts that use of the 176 hour divisor misreads Rule 43 (e), whose reference to that number is preceded by the following paragraph:

> "(d) Effective May 1, 1954, all monthly rates, the hourly rates of which are predicated on 169-1/3 hours, shall be adjusted by adding the equivalent of fifty-six (56) pro rata hours to the annual compensation (the monthly rate multiplied by twelve (12), and the sums shall be divided by twelve (12) in order to establish a new monthly rate." (Emphasis added.)

The underscored clause establishes, in Carrier's view, that the Organization's use of the 176 hour figure is misplaced because (d) shows that the parties contemplated using a divisor reflecting the number of hours employees were required to work each month, i.e., initially 169 - 1/3, later rising to 176 hours, for computing daily and hourly rates. With that predicate in place, Carrier contends that because Claimant's former position entailed 213 hours per month, use of the 176 hour divisor would produce daily and hourly rates in excess of those intended by the Agreement.

Those toiling to construe these competing positions will quickly note that the Draftsmen left little behind when they broke camp. Nonetheless, although ambiguous, the terms of Side Letter 1 of the C&O CSA, Rule 43 (d) and Rule 43 (e) can be harmonized in a way that gives meaning to all and appears to best reflect the intentions of the Drafters, based upon the words they used.

We take as our starting point the basic proposition that the employee transferring under Side Letter 1 has been guaranteed by that Agreement an artificially inflated rate if he accepts a lower rated position in the new operation for as long as he remains the incumbent therein. The accent in the C&O CSA is entirely on the avoidance of subjecting clerical employees to wage reductions upon transfer. Here Claimant earned $3189.02 per month in his former position based upon 213 hours of work, although it is unclear on the record whether he was actually required to work such hours each month. From October 1993 through June 1994, Claimant realized actual earnings ranging from $4336.93 to $6297.46, averaging $5175.47 monthly, far in excess of his guarantee. The number is the product of various elements, including straight time hours, overtime worked, several types of paid leave, holiday pay, and training time and logically has

little to do with the real issue raised here, which involves "rate" and not "yield." But it does suggest that the claim of being "shorted" lies juxtaposed against earnings which jumped roughly 62% in the months following transfer to a position requiring 17% fewer hours.

The Board's function, however, is not abject deference to the equities of the situation, but to decide what appears to have been intended by the terms of the Agreement. The Claimant contends that because 176 hours is the only divisor provided for in Rule 43 (e) it was improper for the Carrier to employ a different and higher figure to develop Claimant's daily rate upon transfer. But that argument is fallacious to the extent it fails to give any account to the language of the preceding paragraph relied upon by the Carrier.

Rule 43(e) appears to set forth a formula for computing daily pay rates from monthly rates. What the Rule says is simply that "the straight time daily rate is to be arrived at by multiplying the straight time hourly rate of 176." At first blush, the provision appears confounding because it sets forth no multiplicand, involves a grammar issue centered on the use of the word "or" rather than "by," and gives no hint as to where the straight time hourly rate came from. Nonetheless, no one appears to question the meaning of the provision, which is apparently familiar and understood to say that the straight time daily rate is computed by dividing the monthly rate by 176, and multiplying the resulting hourly rate by eight.

Rule 43 (d) must be read in context with Rule 43 (e), and reconciled with it if possible. Although it is sometimes said that analysis of punctuation should be resorted to only when other means fail, in this case the parties themselves appear to have signaled their intent when they supplemented the phrase "all monthly rates" in Rule 43 (d) with the following clause set off by commas: "the hourly rates of which are predicated on [176] hours." The use of a nonrestrictive clause introduced by the words "the hourly rates of which. . ." to supplement the main clause dealing with "all monthly rates" suggests the Drafters assumed the reader already knew that fact - that monthly rates are normally based on 176 hours. The entire sentence is a combination of two thoughts, each of which could stand independently. If split into two independent statements, the first would read: "All monthly rates shall be adjusted . . . etc." The second would say: "The hourly rates of all monthly rates are predicated . . . etc." Thus, it appears that the Drafters operated on the assumption that they were addressing those monthly rates whose hours were based on 176 hours, and meant to convey that it is those monthly

positions predicated upon such a monthly work schedule which require the use of that divisor. If Rule 43 (d) had been intended to apply more broadly, presumably the parties who developed the language would have provided for such an outcome in Rule 43, where it easily could have been fit. We simply see no other possible meaning to be given to the parenthetical clause supplementing the main clause of Rule 43 (d).

Accordingly, reading Rule 43 (e) in conjunction with Rule 43 (d), the Board concludes that the parties adopted a Rule limited to the most common fact pattern on the railroad - monthly jobs of 176 hours - and attempted to develop no further formulae for those less common positions, such as Claimant's, involving more hours, or those, if any, involving fewer. In situations such as presented here, where the employee's *rate* is protected by the Carrier's action in employing a divisor congruent with both the employee's actual work month and the agreed upon principle underlying the 176 hour formula for computing daily rates, we conclude the result is consistent with the language, spirit and intent of the Agreement and in no way unfair to the Claimant.

For the reasons stated, the claim is denied.

AWARD

Claim denied.

ORDER

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of February 1998.