

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33974
Docket No. MS-34233
00-3-97-3-742**

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

(David S. Lent

PARTIES TO DISPUTE: (

(MTA Metro-North Railroad

STATEMENT OF CLAIM:

“Claimant, David S. Lent, Employee No. 105614, claims the difference in the rate of pay and lost overtime of Class 1-A Machine Operator at Mott Haven yard, N.Y., for a twenty-four (24) month period ending November 1994, when the assignment was not advertised nor posted and a junior, non-qualified employee was granted the assignment in violation of the collective bargaining agreement in effect.”

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.

On November 10, 1994, the Claimant learned that a junior employee was paid at a higher rate than he and that the employee in question had so been paid since sometime in 1993. The Claimant further learned at that time that the assignment had been made although the position in question had not been advertised. On December 2, 1994, the Claimant filed a claim contesting the action and arguing that the Carrier violated the

governing Agreement when it paid that junior employee at Class 1-A, rather than Class 1, and did so without advertising the position. On December 29, 1994, the Carrier informed the employee in question that there had been an error with respect to his rate of pay and required the employee to "make payment on the error." By January 18, 1995, the matter had been rectified. Nonetheless, the Claimant has pursued the claim.

The Carrier first argues that the claim must be denied because it was not timely filed. In support of its argument it cites to Rule 26(a) which requires that a claim must be presented "... within 45 days of the date of the occurrence. . . ." Thus, since the incorrect rate of pay commenced in 1993, the claim that was filed on December 2, 1994 was not timely. In reply, the Claimant argues that he cannot be required to file a claim over something of which he had no knowledge. Thus, the date on which the 45-day period commenced was on November 10, 1994 and his claim was timely filed. The Carrier points out in rebuttal, however, that Rule 26(a) says nothing regarding any such computation of the period. Finally, both parties have cited authority in support of their respective positions.

The Board determines that on this point the Claimant has the better argument. First, it appears only fair that a party cannot be held to forfeit some right unless it knew that the right in question was at peril. However, the Carrier is correct, and cites authority in support of its position, that Rule 26(a) contains no ambiguity and thus any resort to reason or fairness may be unnecessary. Therefore, we also find that each and every time that the Carrier paid the improper rate to the employee in question pursuant to an assignment that was not advertised it engaged in a discrete and separate violation. Thus, since it appears from the record that it did so on November 10, 1994 and continued to do so until some point thereafter, the claim was timely filed at least with respect to those improper payments that were made within the 45 day period and continuing thereafter.

Timeliness however is not at issue only with respect to the initial filing of claim. The record shows that the claim was discussed in a conference on February 15, 1995 and that because the Claimant provided additional information to the Carrier on March 23, 1995, all agreed that the Carrier's response would be due on April 15, 1995. The record shows that the Carrier's response was set forth in a letter dated April 14, 1995. However, there is no evidence in the record of the date on which the reply was postmarked. On this point the Claimant argues that because the Carrier did no reply within the date on which

the reply was due, his claim must be allowed as provided in Rule 26(d) which provides that if a claim is not addressed by the requisite period it "... will be allowed."

Obviously therefore, the critical inquiry is again the date on which the operative act took place. Under Rule 26 that date is to be determined by the postmark date of the act. However, as set forth above, there is no evidence in the record of the postmark of the date of the April 14, 1995 reply. Thus, we are unable to determine that the reply was timely and, under Rule 26 the "claim will be allowed." Moreover, although both parties cite authority in support of their arguments there is no question that the authority cited by the Petitioner, which stands for the proposition that under such circumstances the claim is to be sustained without an examination of the merits, includes cases involving the same Carrier and therefore is of significant precedential value.

Since the claim, therefore, must be allowed there remains the question of the remedy. As noted above, the Board chooses to view the contract violation as a continuing one, or one at which discrete acts took place during the period when the claim was timely filed. Thus, the remedy shall be limited to only those occurrences that took place after the claim was filed, and until the matter was rectified, and those occurrences that took place during the 45-day period prior to the filing of the claim. The matter is therefore remanded to the parties to make this calculation.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of March, 2000.