

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34140
Docket No. MW-32456
00-3-95-3-355**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior employe D. Foley to perform machine operator duties (operating a yard sweeper) on the Mingo Junction Subdivision beginning January 10, 1994 and continuing, instead of recalling and assigning senior furloughed Machine Operator R. Goosby to perform said work (System Docket MW-3408).**
- (2) As a consequence of the above-stated violation, furloughed Machine Operator R. Goosby shall be allowed ‘ . . . 10 hours per day, all overtime, credit for day and month, to be made whole.’”**

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.

The Claimant was a furloughed Machine Operator. In January 1994, the Carrier assigned a junior furloughed Machine Operator to work operating a Yard Sweeper.

On April 1, 1994, the Organization filed claim seeking redress retroactively to January 10, 1994, account the Carrier using an employee junior to the Claimant to operate the Yard Sweeper.

At first, the Carrier denied the claim solely on the merits contending the Claimant was not qualified to operate the Yard Sweeper.

There exists a certification card referenced as an MW-200 card which lists all the machines an individual may operate, with various Supervisors initializing the machine(s) which the employee is qualified to operate.

When the Organization disputed the Carrier's position that the Claimant was not qualified, it stated that he had the MW-200 card properly marked attesting to the Claimant's ability to operate the Yard Sweeper.

The Carrier Officer authorized to handle claims on the final appeal rejected the claim with only one argument that the claim had not been timely presented within 60 days of the date of the occurrence upon which it was based.

The Organization, following the final appeal officer's declination, never responded thereto, but did progress same to this Board.

The Organization, before the Board for the first time, raised two defenses to the Carrier's argument relative to the claim being barred, but because neither was raised on the property, they are de novo arguments and we must not consider them, because to do so would violate Circular No. 1 of the Board.

The argument about this being a continuing claim should have been advanced shortly after the last Carrier Officer raised the procedural issue, and the issue of a too late time limit argument raised at the final appeal level should also have been raised.

The claim of April 1, 1994, seeking redress retroactively until January 10, 1994, was not filed within 60 days of the date the alleged Rules violation occurred, and no

defense can be considered as being abandoned unless the party who raised an issue on the property chooses not to further that same issue before the Board.

The Carrier raised both the time limit argument and the merit issue on the property and before the Board. (See Award 22 of Public Law Board No. 3775; Third Division Award 31293). Neither was abandoned nor untimely raised.

The claim is improperly before this Board as it was not filed within 60 days of the date upon which it was based.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of June, 2000.