Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34208
Docket No. CL-35431
00-3-99-3-337

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(CSX Transportation, Inc. (former Baltimore and Ohio
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-12345) that:

1. Carrier violated the Agreement (Scope Rule) on and after September 17, 1990, at Lima, Ohio, when it caused, required or permitted Yardmasters, employes not covered by the TCU Agreement, to perform the duty and function of validating yard job claims and any changes to off time via the computer, a duty and function previously assigned to and performed by TCU covered clerical employes.

2. Because of the above violations, Carrier shall now be required to compensate the Senior Available Employe, extra in preference, at the rate of $107.84, for eight (8) hours' pay at either the straight or punitive rate depending on availability, on a continuous basis on and after September 17, 1990, for 1st shift (7 a.m.- 3 p.m.) until such time as the duty and function is returned to the TCU Schedule Agreement. A joint check of Carrier's records may be necessary to identify actual Claimants, in some cases."

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.

As Third Party in Interest, the United Transportation Union - Yardmasters Department was advised of the pendency of this dispute, but it chose not to file a Submission with the Board.

On November 9, 1990, the Organization initiated a continuing claim on behalf of the senior available employee, extra in preference, at Lima, Ohio, charging that the Carrier violated the Scope Rule of the applicable Agreement beginning September 17, 1990. More specifically, the Organization alleged that the Carrier caused or condoned employees not covered by the applicable Clerical Agreement (Yardmasters) to perform work consisting of validating yard job claims and entering train and engine service employee off time into the computer program. The claim seeks eight hours of pay per day until the Carrier returns the disputed work to employees covered by the Scope of the Clerical Agreement.

The Organization progressed the claim to the Board based on a procedural issue that arose on the property. The Organization did not argue the merits of the claim. Therefore, the Board dismisses that portion of the claim relating to the alleged Scope Rule violation due to want of prosecution.

The Organization argues that the Carrier breached the time limits in Rule 48(a). The Carrier responded that it complied with the time limits and countered that the Organization breached the time limits in Rule 48(b). Rule 48, Paragraphs (a) and (b) read as follow:

> "(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, 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. Should any such claim or grievance be

disallowed, the Carrier shall, within sixty (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.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the mater shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the Parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the sixty (60) day period for either a decision or appeal, up to and including the highest Officer of the Carrier designated for that purpose."

According to the Organization, the Carrier failed to respond to its November 9, 1990 claim. By correspondence dated March 25, 1991 the District Chairman notified the Division Manager that the Organization had not received any response to the claim and, inasmuch as the claim had not been timely rejected, the claim should be paid as presented.

Two months later, the District Chairman requested the General Chairman to further handle the claim. The District Chairman's May 25, 1991 letter to the General Chairman indicates that a copy was sent to the Division Manager. On June 21, 1991, the General Chairman requested the Senior Director of Employee Relations to pay the claim as presented per Rule 48(a).

The parties held a conference on the claim on or about September 14, 1992. According to the Organization, the Carrier did not assert, during the conference, that it had timely denied the claim.

On November 8, 1993, the Senior Assistant Vice President of Employee Relations sent the General Chairman correspondence confirming the conference and denying both the alleged procedural violation and the merits of the claim. Attached to the Carrier's

November 8, 1993 letter was a December 12, 1990 letter from the Division Manager to the District Chairman denying the claim, but without giving any reasons for the disallowance. The Carrier asserts that the Division Manager sent this correspondence to the District Chairman on December 12, 1990.

Next, the Carrier alleges that the Organization breached the time limits by not appealing the claim within 60 days after expiration of the 60-day period for the Carrier to deny the claim. The Carrier points out that the General Chairman did not appeal the claim until June 21, 1991, which was more than 120 days after September 17, 1990.

After carefully perusing the record, we find that the Carrier failed to comply with the 60-day time limitation for denying the claim as set forth in Rule 48(a). The Carrier belatedly produced a denial letter from the Division Manager, but there is no evidence to show that it was timely sent. More importantly, the Carrier inexplicably waited almost three years to produce the letter. The Carrier failed to explain why the Division Manager did not present the letter as soon as he had knowledge that the Organization had not received a denial of the claim. The Division Manager was on notice as early as March 25, 1991 that the Organization had not received the denial letter and the Division Manager was given another reminder on May 25 when the District Chairman forwarded the claim to the General Chairman for further handling. Indeed, there is no evidence that the Carrier took the position that it had timely denied the claim until November 8, 1993. At the very least, the Carrier was under a duty to produce the denial letter in a more expeditious fashion.

Once the Carrier breaches the time limits in Rule 48(a), the Organization cannot possibly breach the 60-day time limit in Rule 48(b) because the 60 days to appeal does not begin to run until the Organization receives the denial of the claim. If the Organization is not in "receipt of notice of disallowance," the 60-day time limit does not commence to run.

The last sentence of Rule 48(a) provides that when the Carrier breaches the time limits, the claim "shall be allowed as presented." On this Division, the Carrier's submission of the denial letter on November 8, 1993 constituted a cure of the time limit violation.

Therefore, the Carrier was in breach of Rule 48(a) from September 17, 1990 through November 8, 1993 and the claim shall be allowed as presented for that time span.

To reiterate, the claim is sustained on the procedural grounds and the claim on the merits is dismissed.

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 23rd day of August, 2000.

SERIAL NO. 386

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 34208

DOCKET NO. CL-35431

NAME OF ORGANIZATION: (Transportation Communications International Union

NAME OF CARRIER: (CSX Transportation, Inc. (former Baltimore and
(Ohio Railroad Company)

On August 23, 2000, the Board issued Award 34208 sustaining the claim as presented from September 17, 1990 through November 8, 1993, because the Carrier breached the Rule 48(a) 60-day time limitation. The Board dismissed the claim on the merits inasmuch as the claim was progressed to the Board solely on the issue of whether the Carrier and/or the Organization had breached the relevant time limits.

On November 30, 2001, the Organization requested the Board to interpret the remedy specified in Award 34208. We ruled that the claim ". . . shall be allowed as presented . . . from September 17, 1990 through November 8, 1993." The residual dispute between the parties concerns the meaning of the term "as presented" and more specifically, how to calculate the monetary damages due to the Claimants.

The Organization and the Carrier concur that Clerks D. C. Post and R. L. Basinger are the only two employees that could be characterized as the senior available employee, extra in preference, as stated in the Organization's Statement of Claim. The Carrier submits that it has fully complied with Award 34208 by disbursing $21,543.44 to Clerk Post and $22,793.22 to Clerk Basinger. The Organization charges that the Carrier owes both Claimants additional sums.

The Organization argues that the Carrier must apply the following formula. The Organization starts by counting the calendar days from September 17, 1990 to November 8, 1993. Next, it multiplies the number of regular workdays by $107.84 and the number of rest days by the punitive rate of pay. The Organization then subtracts

payments that the Carrier already expended from this aggregate amount and then divides the remaining sum by two which should be paid equally to the two Claimants. In essence, the Organization submits that the Carrier must pay one day's pay (at the straight or punitive rate, whichever is applicable) for each and every day between September 17, 1990 through November 8, 1993 to the Claimants. The Organization argues that because the claim was sustained as a consequence of the Carrier's time limit violation, the Carrier cannot offset the damages for days that the Claimants were unavailable, working at other jobs, paid a guarantee, or when the Carrier experienced a work stoppage. The Organization also alleges that, because the Board did not reach the merits of the claim, whether or not a Yardmaster was on duty during the first shift at Lima, Ohio, on any day between September 17, 1990 and November 8, 1993 is immaterial when computing the monetary remedy.

The Carrier asserts that it paid the claim as presented. The Carrier contends that neither Claimant is due any money on days when it could not possibly have violated the Agreement and thus, it did not pay the Claimants for those days when a Yardmaster did not work the first shift at Lima. In addition, the Carrier argues that it properly deducted guarantees, wages or vacation pay that the Claimants received on any claim date. Finally, the Carrier argues that the Claimants are not entitled to any recovery on days when they were unavailable for work including days when the Carrier was the target of a strike. The Carrier vigorously argues that the Claimants would receive a windfall if they receive any more money than the Carrier has already paid them. The Carrier further points out that the Organization's Statement of Claim refers to a joint check of the Carrier's records and thus, the Carrier examined its records to determine on what days it could have violated the Agreement and what days the Claimants could have been called to work on the first shift at Lima. The Carrier emphasizes that it made the Claimants whole and additional monies would unjustly enrich them.

The Board finds that the dispute over calculating the appropriate remedy revolves around three separate issues. First, may the Carrier take into account those days when a Yardmaster was not assigned to the first shift at Limo, Ohio? The Carrier did not pay any money to the Claimants for 200 dates during the time span from September 17, 1990 through November 8, 1993 because a Yardmaster could not have performed clerical work if no Yardmaster was on duty. Second, may the Carrier consider compensation the Claimants received from protective guarantees so that the guarantees operate as an offset against monies due the Claimants? On those days that an Agreement violation could have occurred, the Carrier deducted any guarantee from

a day's pay on the grounds that pyramiding the guarantee on top of regular wages would give the Claimants more than they would have received if this claim had been sustained on the merits. Third, may the Carrier refrain from paying the Claimants for those days when the Claimants were unavailable because either they were away from the property (on vacation or a work stoppage) or they were working the first shift and receiving a full day's compensation for their labor.

Both parties directed the Board's attention to several Awards. Except on the first issue, the Board finds more persuasive and precedential those decisions where the Board sustained claims for time limit violations as opposed to those Awards where the claim was sustained on its merits.

With regard to the first issue, the Awards which addressed the merits of claims clearly rule that a claimant is entitled to pay for each day the railroad commits an Agreement violation. (See Interpretation No. 1 to Third Division Award 30778.) Although Award 34208 sustained the claim "as presented" due to the Carrier's breach of the time limits, the Organization's Statement of Claim referred to work allegedly covered by the Clerical Agreement being assigned to and performed by Yardmasters, employees not covered by the Clerical Agreement. The claim goes on to state that the designated Claimant is entitled to the straight-time rate on a continuous basis. It does not state on a daily basis. The phrase "continuous basis" refers back to those instances when Yardmasters were permitted to perform what was purportedly clerical work. Therefore, a payment is only due to the Claimants when a Yardmaster worked the first shift at Lima, Ohio. In Interpretation No. 1 to Third Division Award 18004 the Board remarked that payments must be made to the claimant on each day that he was not permitted to work. Award 18004 sustained the claim for a time limit violation, but found that the remedy must be restricted to those days when there could possibly have been a Rule violation. In this case, the Carrier could not have violated the Agreement on those dates that it did not assign a first shift Yardmaster at Lima. The Statement of Claim in Award 34208 explicitly restricted the continuous recovery to those days when a Yardmaster worked on the first shift at Lima. Therefore, the Carrier need not pay the Claimants on those days that it did not assign a first shift Yardmaster at Lima.

As to the second issue, the Board aptly observed in Third Division Award 21787 that the term "as presented" has been strictly interpreted to prohibit any offsets. For the reasons enunciated in our discussion of the third issue (below), it was improper for

the Carrier to offset protective guarantee payments because the remedy for the Carrier's time limit violation is not predicated on the make whole doctrine.

With regard to the third issue, the precedents provide that when a carrier breaches the time limits, it may not deduct amounts that a claimant earned by working other positions even on the same shift. (See Interpretation No. 1 to Third Division Award 11798 and Third Division Award 21787.) In the former decision, the Board observed that the make whole doctrine is inapplicable to a time limit violation. The purpose of a remedy in a time limit violation is not so much to compensate a claimant but to incite a carrier to, in the future, abide by the time limits. It may be true, as the Carrier argues, that the Claimants will receive more compensation than if the claim had been sustained on the merits. They will be made more than whole. However, the make whole standard is inapplicable just as the make whole concept is inapplicable when the Organization breaches the time limits causing the claim to expire. In other words, the Claimants herein reap a windfall because the Carrier breached the time limits, but the Carrier reaps a windfall when the Organization breaches the time limits on a claim that otherwise would have been sustained on its merits. Furthermore, the Board in Award 34208 never reached a decision on whether the Carrier violated the Scope Rule. If it had, the make whole doctrine would have some relevance to calculating the remedy. But, because the Board sustained the claim based solely on the Carrier's time limit violation, any remedy presumptively constitutes a windfall to the Claimants. Stated differently, assume that the Carrier did not violate the Scope Rule. Then, even the sums that it has already paid to the Claimants is a windfall. Thus, in calculating the remedy for a time limit violation, the Board is unconcerned with making the Claimants whole or more than whole. Rather, the Board is concerned with encouraging the Carrier to refrain from violating the time limits by strictly enforcing the limits which the parties incorporated into Rule 48(a) of their Agreement.

Further, with regard to the third issue, prior Awards, starting with National Disputes Committee Decision 16, unequivocally hold that a carrier may not take into account a claimant's availability when calculating the remedy for the carrier's time limit violation. In Interpretation No. 1 to Third Division Award 18004 the Board held that Decision 16 does not relieve a carrier of liability for payments on a claim when it failed to comply with the time limits remedy because the claimant was unavailable due to a vacation or a leave of absence. These considerations may be valid offsets when the claim is sustained on the merits, but not when the claim is sustained due to a time limit violation. (See Third Division Awards 31790 and 29240.)

Therefore, the Carrier could not consider those dates when the Claimants were purportedly unavailable because of being on vacation, leave of absence, already working a first shift position, or any other type of unavailability.

We also note that the Carrier, in its payments to the Claimants, increased the applicable rate of pay to reflect general wage increases. Because the term "as presented" is strictly interpreted, the Carrier need not raise the daily rate by subsequent wage increases absent an express reference to future wage increases in the Organization's Statement of Claim. Thus, in the recalculation, the Carrier is free to utilize the rate specified in the claim ($107.84 per day) at the applicable straight-time or punitive rate, whichever is applicable, for the entire span of time running from September 17, 1990 through November 8, 1993.

As a result of this Interpretation, the Carrier owes the Claimants additional monies. We remand this claim back to the property so that the parties can jointly calculate the amounts due the Claimants in accord with this decision.

Referee John B. LaRocco who sat with the Division as a neutral member when Award 34208 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 12th day of July 2002.