

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36076
Docket No. SG-35850
02-3-99-3-859

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Two (2) claims on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad (former Missouri Pacific):

CLAIM A

Claim on behalf of A.F. Durkee for payment of 59.3 hours at the half time rate and 25 hours at the time and one-half rate, account Carrier violated the current Signalmen's Agreement, particularly Rules 35(a), 7(h), and 26(b), when on several instances between September 9, and October 6, 1998, it held the Claimant away from his proper assignment and required him to work in areas that were actually a separate territory, and then failed to compensate him at the correct rates for this service. Carrier's File No. 1163127. General Chairman's File No. 98-59-C-A. BRS File Case No. 11169-MP.

CLAIM B

Claim on behalf of A.F. Durkee for payment of 83.3 hours at the half time rate and 8.7 hours at the time and one-half rate, account Carrier violated the current Signalmen's Agreement, particularly Rules 35(a), 7(h), and 26(b), when on several instances between November 4, and December 24, 1998, it held the Claimant away from his proper assignment and required him to work in areas that were actually a separate territory, and then failed to compensate him at the correct rates for this service. Carrier File No. 1173877. General Chairman's File No. 98-61-C-A. BRS File Case No. 11169-MP.”

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 in these two disputes was regularly assigned as a Signal Maintainer (Gang 3942) with headquarters at Chicago Heights, Illinois. The claims here under review concern applications of three separate portions of the negotiated Rules Agreement, namely, Rule 7 - Overtime, Rule 29 - Time Claims and Grievances and Rule 35 - Territorial Changes.

Rule 7 - Overtime reads in pertinent part as follows:

“RULE 7 - OVERTIME

- (h) Monthly rated employees assigned to the maintenance of a territory who are required by the Carrier to perform work outside the limits of their assigned territories during their regularly assigned hours, will be additionally compensated therefor on the minute basis at one-half the straight time hourly rate applicable to such monthly rated employees, with a minimum of three hours from the time notified until they return to their work location during their tour of duty, or headquarters point after end of tour of duty; time after end of tour of duty to be compensated for at the time and one-half rate on the minute basis. When called outside their regularly assigned hours, the call rule will apply. However, the provisions of this paragraph (h) shall not be applicable where compensation in addition to the monthly rate is payable under paragraph (b) of Rule 26.”

Rule 29 - Time Claims and Grievances reads in pertinent part as follows:

- “(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 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.**

* * *

- (d) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the Claimant or Claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than sixty (60) days prior to the filing thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.”**

Rule 35 - Territorial Changes reads in pertinent part as follows:

- “(a) When two or more maintenance territories are consolidated, the senior employee involved whose position is abolished may displace the junior employee involved in the consolidation of territories. Should the senior employee choose not to exercise this right, the next senior employee involved whose position is abolished will then be granted the displacement opportunity.**

NOTE: In the application of paragraph (a), it is understood the employees ‘involved’ in a consolidation are those employees

required to take all or a portion of the abolished territory and those employees whose positions are abolished. The territorial limits of two or more adjoining maintenance territories must be changed simultaneously in order to be considered a part of the consolidation.

- (b) When a change is made in location of an employee's headquarters or when the territorial limits are materially changed, the position will not be rebulletined as a new position unless requested by the employee involved and/or the General Chairman within twenty (20) days after date of change.

Paragraph (b) is applicable where a material change in territorial limits is made and/or where a change is made in the location of an employee's headquarters.

Employees involved in the application of paragraph (a) or (b) who do not desire or are unable to place themselves in the consolidated or changed territories will be permitted to place themselves in accordance with the provisions of Rule 22, but shall remain on the changed positions until released by the General Signal Engineer.

- (c) Established positions shall not be abolished or discontinued and new one created under a different title or rate of pay covering relatively the same class of work for the purpose of reducing the rate of pay or changing headquarters or evading the application of the rules of the agreement."

The fact situation as found in the case record shows that on July 27, 1998, the Claimant's assigned work territory was consolidated with the territory of Gang 3929. There was no change made of the Claimant's headquarters. There was no request made by either the Claimant or the Organization to rebulletin the position which included the combined territories. There was no request made by the Claimant to place himself on another position in accordance with the provisions of Rule 22 as permitted in Rule 35(b). The initial complaint relative to the combining of the territories is found in the Organization's October 27, 1998 letter in which the claim identified as claim "A" above was presented to the Carrier.

Both on the property and before the Board the Organization argued that the combining of the two territories was little more than a subterfuge by the Carrier and that the two territories together were too large for one employee to maintain. It contended that when the Claimant was required to perform service within the limits of the newly added territory he was entitled to compensation under the provisions of Rule 7. The Organization further contended, but offered no probative evidence in support of its contention, that "another employee" performed overtime work on weekends in the territory in question. Finally, the Organization insisted that the claim as filed on October 27, 1998, was a "continuing claim" and "was filed within sixty days of the first date listed in the claim."

The Carrier's position began with a contention that the time limits provisions of Rule 29 had been violated by the Organization and on that basis alone the claims as listed should be dismissed. The Carrier argued that the date on which this dispute is based was July 27, 1998, the date on which the territories were combined. It insists that this situation is not a "continuing claim" as defined in Rule 29(d) but rather is based on a single action that occurred on a date certain. On the merits, the Carrier contended that the clear, unambiguous language of Rule 35 permitted the combining of the territories in question; that Rule 35 permitted the Claimant to leave the combined territory position if he wished to; that Rule 35 permitted the Organization to request that the combined territory position be rebulletined. Inasmuch as neither the Claimant nor the Organization chose to act as permitted by Rule 35, they cannot now be heard to complain and the untimely filed claim has no merit.

From the Board's review of the applicable Rules and the facts of record, it is our conclusion that the Carrier's position has greater merit and is upheld.

On the time limits issue, it is obvious to the Board that the single act of combining the two territories was the triggering action for the filing of a claim or grievance. Even though continuing liability could possibly have flowed from the single act, that does not convert the action to a "continuing claim."

On the merits, if we were able to get that far, the Organization has not shown by any probative evidence that the two territories were not, in fact, combined into one position as envisioned by the language and obvious intent of Rule 35. There is no proof of "sharp practice tactics" or of a violation of "the spirit of the Agreement" by the Carrier. Assertions without more are not proof. The Board finds no justification on

which to overturn the action taken by the Carrier. Accordingly, the claims as presented are 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 18th day of June, 2002.