Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36696
Docket No. MW-36218
03-3-00-3-417

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Baltimore and
(Ohio Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside concern (Loram Ballast Cleaner) to clean and screen ballast on the Metropolitan Subdivision from February 22 through March 18, 1999 [System File G056317899/12(99-0587) BOR].

(2) The Agreement was further violated when the Carrier failed to meet with the Organization's representative and attempt to reach a good-faith resolution of the Carrier's proposed contracting plans as required by Addendum 13.

(3) The claim referenced in Part (1) above, as filed by Claimant J. L. Hogan on April 17, 1999 to Division Engineer K. L. Johnson, shall be allowed as presented because said claim was not disallowed by Division Engineer K. L. Johnson in accordance with Addendum 14.

(4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Trackman J. L. Hogan shall now be allowed two hundred thirty-eight and one-half (238 ½) hours' pay at the operators time and one-half rate."

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.

There is no dispute in this record that the Carrier contracted with Loram Construction to clean and screen ballast in February and March of 1999. The Organization filed a claim dated April 17, 1999 arguing that the Claimant failed to receive 238 ½ hours' overtime as a result. The Carrier denied the claim by letter dated June 18, 1999 asserting that due to the fact that the Allied Federation had been informed of the Carrier's intent to contract and the Claimant had been upgraded to receive Operator's pay when the outside contractor worked his assigned territory, the claim lacked validity.

The Organization pursued the claim based on both procedural error and merits. It argues that the Carrier failed to properly disallow the claim within the required 60 days. Therefore the claim must be allowed as presented. On merits, the Organization asserts that the Carrier did not properly conference the contracting out of this work, in violation of the Scope Rule and Addendum 13.

The Carrier denied the alleged time limits violation and also all issues of merit. It maintains that it properly served a Notice of Intent to contract out on February 1, 1999 and conferenced this issue the following day. The Carrier argues that it responded in a timely manner to the claim at bar on June 18, 1999 and further, that the claim lacked any merit because the Claimant had been upgraded and properly compensated while the contractor worked on his assigned territory.

The Board has held repeatedly that a time limit allegation remains an allegation unless supported with sufficient probative evidence to prove the fact. The Board does not reach conclusions based upon assumptions. The burden of proof lies with the Organization to demonstrate that Rule 50, which requires a denial within 60 days, has been violated by the Carrier. What determines a violation is not the dates on correspondence of either claims or denials. As we have said repeatedly, the determining date for a procedural time limit violation is when a claim is received by the Carrier and its denial letter is postmarked.

In this record the Board finds a dated letter of April 17, 1999 from the Claimant and a response from the Carrier dated June 18, 1999. Importantly, the postmark of June 18, 1999 confirms the denial date was within the 60 days. What is to be proven with evidence is the date the claim was filed. There is nothing in the record to prove that the Carrier received this dated letter of April 17 prior to April 20, 1999. After the Carrier denied a violation, the Organization came forth with no further argument or evidence, other than reassertion of procedural error. Such is insufficient to prove a violation given that April 17, 1999 was a Saturday and April 19, 1999 was a Monday. Nor is there any statement from the employee who made the claim that he either hand delivered or mailed the claim at a post office that assured Monday delivery. Nor is there any proof that Monday delivery of weekend mail was normative, shifting the burden to the Carrier. A claim is filed when the Carrier receives the claim. There is no proof in this record of a time limit violation beyond allegation and assumption.

The Board therefore studied the merits of the claim with the following conclusion. The Carrier provided proof that it served a Notice of Intent to contract out the work due to a "lack of adequate equipment and available, skilled forces." There is proof in the record that a conference was properly held. Although the Organization asserts that this was not a "good faith" conference due to the fact that the Carrier's notice had blind copies addressed to various Engineering Department officers stating in capital letters: "DO NOT START THIS PROJECT BEFORE FEB 22, 1999 OR IT WILL VOID THIS NOTICE," this does not prove that either a contract was signed prior to discussion or that there was a lack of "good faith." Nor does the Carrier's failure to supply the contract prove this fact. The record indicates that the Organization was properly notified and a conference was held. Additionally, payroll records show that the Claimant was paid at the upgraded Class "A" Operator rate of pay, as well as overtime on some dates.

The Board considered the issue of payment for the time that the contractor worked on the property. The Organization's claim is not for the time the Claimant worked his regular tour of duty from 7:30 A.M. to 4:00 P.M., but for the time the contractor worked from 4:30 P.M. until 6:30 A.M. It argues that the Carrier made no attempt to reschedule the Claimant's workweek so as to allow him to perform this work on overtime. There is no proof in the record that the contractor was on the property both when the Claimant performed his regular tour and throughout the night. Nor is there any proof that the Notice of Intent was in error, that the Claimant was qualified and the equipment was available. Accordingly, for all of the above reasons, the claim must be 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 August 2003.