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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37366
Docket No. MW-36563
05-3-01-3-16

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Extra Gang 6083 Assistant Foreman J. M. Miller to perform the duties of an extra gang foreman (getting track and time for locomotive cranes and various other extra gang duties not working under the jurisdiction of Extra Gang 6083) beginning July 9, 1999 and continuing, instead of assigning Track Foreman G. L. Purkey (System File J-9920-72/1213764).
- (2) The Agreement was further violated when the Carrier failed and refused to advertise and assign an extra gang foreman position on the Idaho Division for the performance of the extra gang foreman duties described in Part (1) above, as contemplated by Rule 20.
- (3) As a consequence of the violations referred to in Part (1) above, Claimant G. L. Purkey shall now be compensated for the difference in pay between that of a section foreman and that of an extra gang foreman for all straight time and overtime worked by Mr. Miller and for the per diem allowance of forty-eight dollars (\$48.00) per calendar day beginning sixty (60) days retroactive from October 27, 1999 and continuing until

the extra gang foreman position is correctly assigned by bulletin.

- (4) As a consequence of the violation referred to in Part (2) above, the Carrier shall be required to advertise and assign an extra gang foreman in compliance with the provisions of Rule 20."

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 Carrier raised a threshold procedural issue which the Board finds that, after careful study of the entire record before us, is dispositive of the claim. According to the Carrier, the instant claim, submitted on October 27, 1999, is based on the specific date of July 8, 1999, when an advertised position of Assistant Extra Gang Foreman was assigned to Assistant Foreman J. M. Miller. Thus, the Organization's submission of the claim was clearly beyond the 60-day time limit prescribed in Rule 49(a) and the Board should dismiss the claim in its entirety for that procedural reason, it emphasized.

In response, the Organization urged the Board to reject the Carrier's procedural challenge and afford this claim full consideration on its merits. The Organization averred that the claim was timely submitted for a continuing violation pursuant to Rule 49(b) and that the monetary claim has been properly limited to the 60-day period immediately prior to the October 27, 1999 claim date. Rule 49(b) reads as follows:

“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. . . .”

The Board carefully reviewed the entire record with regard to the Carrier's threshold procedural argument and the Organization's response to the contrary. We find that the factual record, when considered in light of the available arbitral precedent on timeliness challenges in similar claim situations involving the advertisement and awarding of Maintenance of Way Department positions, supports the Carrier's timeliness argument. See on-property Third Division Awards 31043 and 28826. We are compelled to follow the Board's line of reasoning in those cases, because here the Carrier's action in awarding the position of Assistant Foreman in Extra Gang 6083 to J. M. Miller, instead of bulletining a Foreman's position in that gang, which the Organization urges was in fact the job needed to be done, occurred on the specific date of July 8, 1999, and formed the basis of the claim, as the record clearly sets forth. Thus, in light of the complete record before us, we hold that the Organization's initial claim of October 27, 1999 exceeded the 60-day time limit prescribed in Rule 49(a) which states:

“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 occurrence on which the claim or grievance is based. . . .”

Third Division Award 29260 involved a similar time limit challenge resulting in the Board's dismissal of what was purportedly a continuing claim. In that case, the Board, which included the Referee assigned to the instant case, reached a similar conclusion as here, and in doing so quoted Third Division Award 14450 which set forth a “definitional standard” as to whether a dispute should be characterized as a continuing violation. Thus, we quote Third Division Award 14450, as follows:

“... the essential distinction between a continuing claim and a non-continuing claim is whether the alleged violation in dispute is repeated on more than one occasion or is a separate and definitive action which occurs on a particular date.”

As the Board found Third Division Award 29260, and again, in on-property Third Division Awards 31043 and 28826, cited above, a “separate and definitive” event giving rise to the current claim arose on July 8, 1999 when the Assistant Extra Gang Foreman position was assigned to Miller. The Board understands that from a factual standpoint, the core dispute involved the Organization’s position that the work actually performed by Miller was that which accrued to a Foreman. Consequently, in the Organization’s view, the Assistant Extra Gang Foreman position advertised on July 1 and awarded to Miller on July 8, 1999 should have really been “put up” as a Foreman’s position on Extra Gang 6083, and because Miller held no seniority as a Foreman, he should not have been assigned to it. Thus, we reason that because the present claim had its genesis in the award date of July 8, 1999 when Miller obtained the Assistant Foreman’s assignment, if not the bulletin date of July 1, 1999, the Organization’s submission of the claim on October 27, 1999 was unequivocally outside the 60-day time limit specified in Rule 49(a) as we previously stated.

Additionally, we note that the Carrier’s raising of the time limit objection was set forth in its April 5, 2000 letter of denial to the General Chairman, in response to his February 11, 2000 appeal. Thus, we are satisfied that the time limit objection was appropriately raised during the parties’ on-property handling of this matter. The record actually establishes that the Organization did not file its Notice of Intent with the Third Division until January 4, 2001. Furthermore, there is no evidence that the Organization was granted a time-limit extension for submitting the claim beyond the contractually specified time limit.

Therefore, given the Board’s reasoning, as set forth above, the instant claim is untimely. The Board is precluded from considering the claim on its merits. Thus, it must be dismissed.

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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 24th day of February 2005.