

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40434
Docket No. MW-40040
10-3-NRAB-00003-070248
(07-3-248)

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
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(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it held Foreman J. K. Skurat on the Paynesville Maintenance Crew and from his assigned (per Bulletin No. 146A dated June 6, 2005) section foreman position at Paynesville, Minnesota beginning June 27 and continuing through August 19, 2005 (System File C-05-040-029A/8-00430-007).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. K. Skurat shall now be compensated for one hundred seventy-two (172) hours at the time and one-half rate of pay for all overtime hours worked by the Paynesville section foreman beginning June 27 and continuing through August 19, 2005.”

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.

On September 19, 2005, the Organization initiated the instant claim, alleging that the Carrier held the Claimant to his former assignment past the 20 days allowable under Rule 10(h) of the Agreement, notwithstanding his request to be released. The Organization asserted that this was a continuing claim and sought overtime compensation for the period of June 27 through August 19, 2005.

There is a threshold issue that must be addressed before turning to the merits of the case. During handling of the claim on the property, the Carrier argued that the claim was neither presented nor appealed within the required 60-day time limit in accordance with Rule 21 of the Agreement. As a result, Carrier contends, the claim must be dismissed.

The pertinent provisions of Rule 21 read as follows:

“RULE 21 - TIME LIMIT- CLAIMS OR GRIEVANCES

1. (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 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 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 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 matter 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 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose. . . .

2. 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 60 days prior to the filing thereof. . . .”

The claim in the instant case alleges that the Claimant was assigned to a Foreman position on Crew 767 on June 6, and should have been permitted to assume the duties of that position by no later than June 27, 2005. The claim asserts that the violation commenced on June 27 and continued until August 19, 2005. This was the period that the Carrier withheld the Claimant from his Foreman’s assignment, the Organization alleged.

As the Organization correctly pointed out on the property, Rule 21(2) expressly allows for the filing of a claim at any time for an alleged continuing violation of the Agreement. We find that the claim in the instant case fits within the category of a continuing grievance. Unlike a claim where there is a fixed date when the occurrence giving rise to the claim has taken place, the act complained of in the instant case was repeated on an ongoing basis until the Claimant was permitted to report to his assignment. Because the claim fits within a continuing course of conduct, it is not procedurally defective or time-barred under the provisions of Rule 21.

The Carrier is equally unpersuasive when it asserts that the Organization appealed the claim beyond the prescribed time limits. The initial claim was disallowed by letter dated November 17, 2005. The Organization asserts, without contradiction, that the declination was received on November 22, 2005. Rule 21 (b) states: “If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance” and “the Carrier shall be notified in writing within that time of the rejection of his decision.” (Emphasis added) In this instance, the Organization’s appeal was dated January 16, and the Carrier asserts that it was received on January 18, 2005. The Carrier was notified of

the appeal within 60 days from November 22, 2005, the date when the Organization received the disallowance of the claim. The appeal was timely and, therefore, the merits are properly before the Board for review.

On the merits, we find that the language of Rule 10(h) is controlling. It provides as follows:

“(h) An employee making application for and who is assigned to a bulletined position must take the position within twenty (20) calendar days from the date of assignment, unless he is prevented from doing so because of illness or other reasonable cause.

During the twenty (20) calendar day period referenced above, an employee assigned to a bulletined position who requests to be released from his former assignment to take such position may be held to perform temporary relief on his former assignment in the event no qualified relief is available. When qualified relief is available to protect the former assignment, the employee must be permitted to take the new assignment.

An employee who fails to take a position to which assigned by bulletin will forfeit all rights to such position and the position will be rebulletined. The employee will be considered furloughed, and governed by Rule 13.”

The Carrier contends that it did not violate the Agreement provisions because no qualified relief was available to fill the Claimant’s former position. This same argument was raised and rejected in a prior case involving these same parties and the identical Agreement language. In Third Division Award 38203, the Board stated:

“The Carrier’s position ignores the inherent time limit spelled out in the second paragraph of Rule 10(h). The Carrier may hold a successful bidder on his former position only 20 calendar days from the date of his assignment. The only exception is if the successful bidder has not asked to be released from his former position to take the new one. Evidence on this record indicates that the Claimant did, in fact, indicate that he would take the higher pay position ‘once he was released from his former position.’ Thus, the Carrier’s latitude to

retain the Claimant on his old position was limited to the contractual 20 calendar days. As the Board commented in Third Division Award 35437:

. . . Rule 10(h) rather clearly limits the permissible length of the holdover to the 20 calendar day period specified. It is not an indefinite right. We must find, therefore, that Carrier did violate the Agreement when it refused to release Claimant after 20 calendar days. . . .”

The logic and reasoning expressed above is equally persuasive here. The Board finds that the Carrier violated Rule 10(h) of the Agreement. The Claimant is entitled to the overtime hours that he would have worked had he been timely and properly released to the new position beginning June 27, 2005. There is a dispute as to how many overtime hours are involved and, therefore, the Claimant is to be made whole by means of a joint review of the Carrier’s records.

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 14th day of May 2010.