NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25498
THIRD DIVISION Docket Number CL-24808

George V. Boyle, Referee

PARTIES TO DISPUTE: (Southern Railway Company
(
(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes

STATEMENT OF CLAIM: Carrier did not violate the Agreement with the Brotherhood of Railway, Airline and Steamship Clerks, as alleged by the Organization, "account persons not covered by the Agreement, namely, employees of the Intermodal Facility at the indicated location, performing schedule clerical work on the designated claim dates.

H. A. Poore	Greenville, TN	August 22, 1981
L. R. Trent	Morristown, TN	August 8, 1981
W. C. Raby	Cleveland, TN	July 28, 1981
J. H. Carter	Knoxville, TN	July 28, 1981"

Since the Agreement was not violated, the four above listed claimants, or "the senior idle employee, extra in preference, at the four locations listed" are not entitled to be compensated a day's pay for each claim date and "for each date thereafter so long as the violation continues to exist", as claimed by the Clerks' Organization.

OPINION OF BOARD: The claim brought before the Board by the Carrier involves the use of Cathode Ray Tubes (CRT's) at four (4) intermodal locations, (i.e. rail-highway/piggyback facilities). The facilities are operated by independent contractors who have clerical employees to handle necessary reports and data dealing with the flow of trailers loaded on the Carrier's line. The contractors have performed these functions at these locations for at least seven (7) years and in one case for twenty (20) years.

The CRT's were installed and began operating at:

Greenville on November 20, 1980
Morristown on November 20, 1980
Cleveland on December 3, 1980
Knoxville on April 1, 1981

Claim was filed by the Employee Organization on September 16, 1981 for the dates of July 28, 1981 at Cleveland and Knoxville, August 8, 1981 at Morristown, August 22, 1981 at Greenville and "for each date thereafter so long as the violation continues to exist."

It is the Employees' contention that the BRAC covered employees had performed work prior to the installation of the CRT's which now was performed by the employees of the outside contractors, thus violating the Scope Rule of the Agreement, Rule A-1, as amended November 1, 1980, where it states:

"Positions or work within Rule A-1 -- Scope shall not be removed from the application of the rules of the Schedule Agreement, as amended, except by the concurrence of the General Chairman and the Assistant Vice President of Labor Relations."

It is the Carrier's contention: that the claims are barred by the time provisions of Rule C-3; that the work was not within the cited Scope Rule: that the Employees had not established that the work was exclusively their's; that the Employee Organization had failed to establish that the Agreement had been violated in such manner as to require that penalty claimed.

On these grounds it is necessary to deal with the question of the time bar before touching the merits of the claim.

The Employees filed the four claims on September 16, 1981 for work performed on the four dates noted above, i.e. July 28, 1981 (2), August 8, 1981 and August 22, 1981 and all dates of work thereafter. These dates are within sixty (60) days of filing the claim and about this there is no dispute. The question to be resolved is whether the Employees filed a claim within sixty days of the "occurrence of which the claim is based," as provided in Rule C-3, paragraph 1(a) and relevant to this is whether or not this is a "continuing claim."

The Carrier notes that the intermodal operations began at each of the facilities many years ago, the most recent date of which is January 1, 1974.

The Employees, in their rebuttal, argue "... we will state here that this claim was instigated when the Carrier installed the CRT machines in its intermodal locations for the purpose of transmitting data to the computer, not when the Carrier initiated its intermodal operations, as has been alleged by the Carrier." (Page 1, emphasis added) But the uncontested dates when the CRT machines were installed were as follows:

Greenville 11/20/80
Morristown 11/20/80
Cleveland 12/3/80
Knoxville 4/1/81

All these dates are well beyond the sixty (60) day limit when the claim was filed on September 16, 1981.

Thus the central issue to be determined is whether this constitutes a "continuing violation," as alleged by the Employees. In this matter the Organization relies upon 1971 Third Division Award No. 18539 wherein the Board did not bar a claim filed eleven (11) months after the General Chairman of the Employees became aware of the action which was in dispute.

However, the award which dealt with work transferred from dispatchers to telegraphers states, "In the case at bar there is no single event which can be classified as the 'date of the occurrence on which the claim or grievance is based.' The practice in question is clearly a continuing one ... and not barred by the 60 day limitation."

In this case at bar there is a clearly distinguishable series of dates and therefore Third Division Award No. 18539 provides no clear precedent supporting the Employees' claim.

Moreover the Carrier refers the Board to Public Law Board No. 2971, Award No. 1, a case involving the same parties and the same issue of a time bar to a claim wherein the Employees also cited Award No. 18539. In upholding the Carrier's position that the assignment of work at the intermodal facility of the Carrier was not a continuing violation the Board held.

> "... the circumstances herein in dispute do not constitute a continuing violation but rather a single act - that of contracting out certain work at the intermodal facility of Carrier. It is apparent that the Organization slept on its rights for almost ten years from the time the work was first initiated. There is no question but that the claim is barred under the terms of Rule C-3 1(a) and must be dismissed." PLB 2971, Award No. 1, BRAC vs. SOU

Based upon the undisputed dates of initiating the CRT operation at the intermodal facilities and the clear precedents of prior Awards with which this Board concurs, the Board must conclude that the claim is time barred by the provision of Rule C-3 1(a). Thus the claim that the Carrier did not violate the agreement and the four senior idle employees, extra in preference are not entitled to the compensation claimed on their behalf, is sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes' within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim of the Carrier is upheld.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of June, 1985

LABOR MEMBER'S DISSENT TO
AWARD NO. 25498, DOCKET NO. CL-24808
(REFEREE GEORGE V. BOYLE)

The Majority has erred in this instance as the Award is contrary to the established precedence set forth on the property in Third Division Award No. 18539 and is based upon inadmissible evidence. Nor can its quotation of a portion of that same Award taken out of context, sustain its lack of logic. That quotation of such, on Pages 2 and 3, ignores the fact that in Award No. 18539, Referee O'Brien was refuting the Carrier's reliance upon several Awards which dealt with a single event, specifically the abolishment of an employe's position. The similarity of Award 18539 and the case at bar is that both involved a continuing violation of the Agreement. Examination of all the correspondence on the property reveals that the Employes clearly stated that their claim began when the Carrier installed CRT Machines in the various intermodal locations for the purpose of transmitting data to the computer and not when the Carrier initiated its various intermodal operations. Thus the Statement Of Claim set forth in this Award is reflective of the initial claims. (Employes Exhibits 14-17; Carrier's Exhibits A1-A4), as being the following:

H. A. Poore	Greenville, TN	August 22, 1981
L. R. Trent	Morristown, TN	August 8, 1981
W. C. Raby	Cleveland, TN	July 28, 1981
J. H. Carter	Knoxville, TN	July 28, 1981

the property. See Third Division Awards Nos. 1010, 4079, 8324, 12326, 14994, 16092, 20163, 20166, 20235, 21073, to name just a few.

The Majority based their conclusion upon unproven assertions and inadmissible evidence and thus failed to resolve the question at issue and merely helped to perpetuate a continuing grievance. Avoidance of issues through unproven technicalities as has been done in Award No.25498 , is in error.

The case law authority on this issue on the property required a sustaining award. The Majority erred in not so finding. We must, therefore, strenuously Dissent to Award No.25498 , and emphasize that Awards out of the norm have no precedential value.

William R. Miller

William R. Miller, Labor Member

Date June 18, 1985

CORRECTED

LABOR MEMBER'S DISSENT TO
AWARD NO. 25498, DOCKET NO. CL-24808
(REFEREE GEORGE V. BOYLE)

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On the property, the Carrier contended without ever refuting the Employes question at issue, that their Intermodal Operations hadn't changed since being started and it was not until their Rebuttal on Page 2 that they offer alleged dates as to when the CRT Machines were installed. The Majority Opinion seized upon such as being fact rather than merely being a self-serving statement and states the following:

> "...But the uncontested dates when the CRT machines were installed were as follows:
>
> Greenville 11/20/80
> Morristown 11/20/80
> Cleveland 12/3/80
> Knoxville 4/1/81
>
> "All of these dates are well beyond the sixty (60) day limit when the claim was filed on September 16, 1981."

By accepting such as being fact rather than an unproven assertion, the Majority is then able to conclude that the claims should have been initiated within sixty (60) days of those dates and not having been done, the Employes have slept on their rights and Award No. 1 of P.L.B. 2971, between the same Parties, is controlling.

That conclusion is based upon evidence which was inadmissible at this level as it was not set forth on the property. The Board has consistently held that provisions of the Railway Labor Act and Rules of Procedure of the Board (Circular No.1), do not permit either party, on appeal to the Board, to present issues that have not been raised during the handling of the dispute on

the property. See Third Division Awards Nos. 1010, 4079, 8324, 12326, 14994, 16092, 20163, 20166, 20235, 21073, to name just a few.

The Majority based their conclusion upon unproven assertions and inadmissible evidence and thus failed to resolve the question at issue and merely helped to perpetuate a continuing grievance. Avoidance of issues through unproven technicalities as has been done in Award No.25498 , is in error.

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