

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25538
Docket Number MW-25111

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Ann Arbor Railroad System (Michigan Interstate
(Railway Company - Operator)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when outside forces were used to perform rail laying work between Alma and Mt. Pleasant, Michigan September 21, 1981 through December 15, 1981.

(2) As a consequence of the aforesaid violation, the following named employees shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces, beginning November 11, 1981 and extending through December 15, 1981.

C. R. Scarbrough	A. E. Hajdu
Sebastian Ramon	S. P. Schall
R. E. McCrindle	S. W. Spaulding
C. R. Gaskill, Sr.	V. L. Vore
Andrew Abraham, Sr.	D. G. Runyan
L. C. Wallace	E. L. Lowry
J. E. Webber, Jr.	Sam Scarbrough
Rafael Ruiz	M. L. Parker
R. D. Shaw, Jr.	D. F. Griffus
E. B. Trowbridge	E. M. Johnston
R. T. Elliott	T. C. Loomis
B. D. Cassady	C. C. Guck
R. E. Fulks	C. I. Watters, Jr.
L. R. Johnson	S. E. Glass
R.R. Redman	J. L. Vore
C. R. Gaskill, Jr.	B. K. Tufford
G. D. Vore	W. A. Eldridge
D. P. Hyatt	C. K. Elliott
J. A. Roberson	D. M. Krajcovic
A. J. Przepiora	R. D. Stone
J. C. Keehl	J. L. Bunting
Laurence O'Dea	William Cooper
R. J. Proudfoot	M. S. Russell
R. A. Spaleny	D. L. Gaskill
R. S. Crawfis	K. R. Walter
D. K. Willis	L. G. Holbrook
M. D. Sparks	F. W. Enos
L. W. Stiffler	D. K. Frolka
D. L. Kastel	B. R. Rohac
J. W. Lee	Larry Noras
T. D. Beck	Kent Cruson
A. R. Micham	Ray Boussouw
K. S. Kerns	Jerry Whitaker

OPINION OF BOARD: The Michigan Interstate Railway Company (MIRA) was formed in September, 1977 as an operating Company under contract with the Michigan Department of Transportation. It operates the Ann Arbor Railroad System. By letter, dated January 7, 1982, the Organization filed a grievance claim wherein it asserted that Carrier violated the May 1, 1979, Schedule Agreement when the Longwell-Scott Construction Company was permitted to lay ribbon rail between Alma, Michigan and Mt. Pleasant, Michigan from September 21, 1981, through December 15, 1981. It averred that Carrier failed and refused the Claimants named in the petition the opportunity to perform the work in direct violation of Rules 1, 43(b) and the applicable protective seniority rules.

By letter, dated February 23, 1982, Carrier declined the claim on the grounds that it was procedurally untimely and the correlative substantive rationale that the work was an integral aspect of the State of Michigan's Rail Rehabilitation Program and not subject to the Schedule Agreement. It further argued that even assuming arguendo the work was covered by the Schedule Agreement, it did not have the forces and requisite equipment to perform the work, and thus, these preclusive limitations were permitted Rule 43(b) exceptions.

In its response letter of April 20, 1983, the Organization maintained that its claim began on November 11, 1981, when it first became aware that outside forces were actually laying ribbon rail, albeit the start of work began on September 21, 1981. Under these conditions, it argued the asserted violation was a continuing claim.

Carrier continued its defense in its response letter of June 15, 1982; and the Organization reiterated its essential arguments in its response letter of September 21, 1982. It argued that it was not aware the outside contractor was on the property until six (6) weeks after the work commenced; and averred that as the Agent of the Michigan Interstate Railway Company, the Ann Arbor Railroad was bound by the requirements of the Railway Labor Act.

In considering this case, the Board agrees with Carrier's position that the January 7, 1982 claim was untimely filed. While the Organization argued that it was first made aware of the ribbon rail laying work on November 11, 1981, we have no supportive indisputable evidence that this was so. Moreover, judging from the record the Organization was aware that the Chief Engineer was trying to have the work performed by Carrier Forces, and also mindful that the State of Michigan was contemplating the use of an outside Contractor. It would be hard to conclude that the work when it was performed by outside Forces, was a completely unanticipated surprise. In its submission to the Division, the Organization argued that Rule 24(d) clearly provided that a claim may be filed at any time for a continuing violation and asserted that Third Division Award No. 12012 was on point with its interpretative position. Carrier argued that Third Division Award No. 23953, which logically and analytically was predicated upon the claim type distinctions enunciated in Third Division Award No. 14450, was more pertinent and directly on point with the fact specifics herein. In the latter Award, the Board held in part:

"In the case at bar, it is apparent that the action complained of, the lack of notice of intent to contract and the actual contracting of the work, took place in August of 1979 while the claim was not filed until December, long past the sixty days provided in Rule 29(a). Clearly, the claim is not a continuing claim under the well reasoned definition cited above, and followed by many other awards, and it must be barred."

The other Award referred to was Third Division Award No. 14450.

The instant claim is based on an act that occurred on September 21, 1981, and consistent with the solid body of case law on this point it is not continuing, although a continuing liability may flow from the specific pivotal act. (See also Third Division Award Nos. 20631, 20655, 21376, 11167, 12984 et.al. and Second Division Award No. 6987.) The claim was filed on January 7, 1982, well beyond the sixty (60) days time limit set forth in Rule 24(d); and it is untimely. This decision foursquarely comports with the explicit language of Rule 24(d) and our judicial holding on similar issues of contention. The claim, therefore, is dismissed.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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

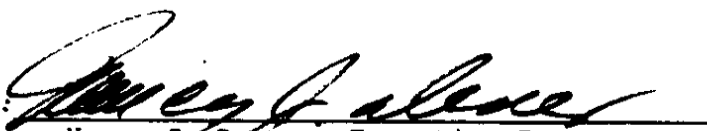
That the claim is barred.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 28th day of June 1985.