Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28560
Docket No. MW-28606
90-3-88-3-425

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company (Western Lines)

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

(1) The Carrier violated the Agreement and continued to do so on a daily basis beginning on January 29, 1987 when it failed to recall furloughed Water Service Mechanic A. M. Belfortti in recognition of his seniority, but instead assigned three (3) new employes to perform water service mechanic work on a daily basis (Carrier's File MofW 147-101).

(2) The claim as presented by General Chairman D. E. McMahon on June 11, 1987 to Superintendent G. R. Fetty shall be allowed as presented because said claim was not disallowed by Superintendent Fetty in accordance with Rule 44(a).

(3) As a consequence of either or both Parts (1) and/or (2) above, Mr. A. M. Belfortti shall:

> '... be paid eight (8) hours per day at the respective current pro-rata rate of his assignment on June 1981 commencing January 29, 1987, that he be paid any and all overtime hours worked by the three (3) new employes named herein at the applicable time and one-half rate, and that he continue to receive such compensation until such time the violation here outlined is corrected or Claimant Belfortti is returned to active service.'"

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

On January 29 and February 4, 1987, the Carrier hired new employees as Water Service Mechanics, despite the fact the Claimant was furloughed and held seniority in this job classification. The Organization contends the Claimant was entitled under the Agreement to be recalled to service prior to the hiring of new employees. At no time during the handling of this dispute on the property has the Carrier refuted this contention. The Claimant was eventually recalled on August 31, 1987.

The Claim is before this Board solely on time limit issues. The Organization first filed its Claim on June 11, 1987. The Carrier's letter of denial was dated August 13, 1987, but was not postmarked until August 18, 1987. The Organization asserts the Claim must be sustained because the Carrier failed to deny it within sixty (60) days as prescribed by Rule 44-1(a), which reads as follows:

> "All claims or grievances must be presented in writing by or on behalf of the employe 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 employe 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."

The Carrier has not taken exception to the fact that its denial of the Claim was more than sixty (60) days after it was presented. It argues, however, that no denial was necessary as the Organization's Claim was barred because it was not filed within sixty (60) days "from the date of the occurrence on which the claim or grievance is based." The Carrier relies upon Second Division Award 8924 which, in turn, cited Third Division Awards 9684, 10532, 15631, and 16164, all holding the Organization's failure to submit a timely claim requires the claim be dismissed, notwithstanding the Carrier's failure to make a timely denial.

The Organization has responded by asserting the violation is of a continuing nature and, therefore, subject to Rule 44-2, which 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 60 days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient."

Whether or not this is a continuing violation depends upon 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. To make this determination, we must look to the nature of the violation. The Carrier's position is that either the failure to recall the Claimant or the hiring of new employees was a definitive action which occurred on a particular date. The Organization, however, argues that each day a junior employee worked while the Claimant was furloughed was a violation of the Agreement. The Rules cited by the Organization, though, refer to the filling of vacancies, being called back to service, and bringing new employees into the service to fill new positions or vacancies. These are events which occurred once; more than sixty (60) days prior to the filing of the Claim herein. The cited Rules do not specifically prohibit a junior employee from working while a senior employee is on furlough status. If the Agreement was violated, it would have been on January 29 and/or February 4, 1987. These dates, therefore, would commence the sixty (60) day time limit.

This Board has rendered numerous decisions in which it has held that the abolishment of a job does not create a continuing violation, even though another employee performs the work of the abolished job on a continuing basis. See, for example, Third Division Awards 10532 and 16164. The only real distinction between a case involving a job abolishment and one involving the failure to recall an employee is that in the former case, the affected employee unquestionably has notice that the event giving rise to the Claim has occurred. Knowledge of a violation of the Agreement, however, is not a condition precedent to the commencement of the time limit under Rule 44. We are certain it is not unusual for a violation of the Agreement to go unchallenged simply because it is not discovered within the applicable time limit.

Having found the violation is not of a continuing nature, we must agree with the Awards cited by the Carrier that there was no obligation to deny the Claim on a timely basis. The Claim is barred and must be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1990.