

The Third Division consisted of the regular members and in addition Referee George S. Roukis 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 Carrier violated the Agreement when it failed to properly advertise and assign the Extra Gang Foreman's position on Gang 5902 located at Cima, California beginning February 23, 1987 and on a continuing daily basis thereafter (System File M-638/871050).

(2) As a consequence of the aforesaid violation, Mr. G. S. Mang shall be allowed the difference in what he was paid at the Assistant Foreman's rate and what he should have been paid at the Extra Gang Foreman's rate for all time beginning sixty (60) days retroactive from May 15, 1987. In addition, Mr. Mang shall be allowed twenty-six (26) hours of pay at the Extra Gang Foreman's time and one-half overtime rate."

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.

The chronology of this Claim is set forth as follows: By letter dated May 15, 1987, the Organization charged Carrier with violating the controlling Agreement, particularly Rules 1, 9, 19, 20, 20(a), 26 and 35 when on or about February 23, 1987, Carrier failed to assign Claimant the position of Extra Gang Foreman on Gang 5902. Instead, the Organization contended Carrier improperly assigned a Welder Helper to fill the Foreman's position. By letter dated September 1, 1987, Carrier notified the Organization that the May 15, 1987, Claim was denied, but also noted that an attempt was made via conference on July 3, 1987, to resolve the matter. The Organization was not satisfied

with this response and the Claim was appealed on September 5, 1987. By letter dated October 27, 1987, the General Chairman confirmed the October 27, 1987, telephone conversation whereby both sides agreed to a thirty (30) day extension of the Claim's time limits for any possible appeal. By letter dated November 25, 1987, the Organization appealed Carrier's September 1, 1987, denial and set forth in detail its reasons for sustaining the Claim. It pointed out and within the context of rule application, that the Welder Helper had worked the disputed Foreman's position some three (3) months before Claimant was actually assigned the position via Bulletin CA-SCF-07-A dated April 30, 1987. Claimant assumed the Foreman's position on May 11, 1987. By letter dated January 15, 1988, Carrier denied the Claim, but this time predicated its denial upon procedural grounds. It asserted that since the date of the charged violation occurred on or about February 23, 1987, and the first Claim letter was dated May 15, 1987, the Organization belatedly filed the Claim. In other words, the Claim was filed some eighty-two (82) days after the occurrence of the purported violation. Several Board Awards dealing with time limit issues were submitted as supportive authority for this position. Another Carrier letter dated August 25, 1988, reviewed the parties July 28, 1988, on situs conference and a letter by the Organization dated September 7, 1988, confirmed the parties agreement to extend the time limits by ninety (90) days for any submission which may be filed with the Board. By letter dated September 21, 1988, the Organization disputed Carrier's interpretation of Rule 49 (Time Limits), arguing instead that the instant Claim was a continuing Claim. It argued that Carrier violated the Agreement each day Claimant "was off the Foreman's assignment".

The Organization asserts that since Claimant possessed greater seniority, Carrier violated Rule 20(c) when it assigned a junior employee to fill the position of Extra Gang Foreman. It also contended that Claimant was available to fill the position, notwithstanding Carrier's contention that Claimant did not want the position because he wanted to finish his college education in Los Angeles. It submitted statements by Claimant indicating availability. As to Carrier's timeliness contention, the Organization argued that the Claim reflected a continuing violation, since each day Carrier allowed the junior employee to remain in the Extra Gang Foreman's position, it violated the Agreement. More pointedly each day was a separate violation. It cited several Board Awards as controlling authority.

In response, Carrier reiterated its position that the Claim was untimely filed and also asserted that the Statement of Claim before the Board differed from that handled on the property. It further argued the Organization failed to establish the bona fides of the Claim, since the time roll records showed that the junior employee worked as a Track Welder Helper on Gangs 4906 and 5912 in the last half of February, and the entire month of March, 1987.

In considering this dispute, specifically the timeliness issue, the Board concurs with Carrier's position, that the Claim is not continuing. To be sure, there are many variations and factual distinctions that arguably blur the dividing line between continuing and noncontinuing claims, but the Claim herein is not continuing. The alleged assignment of the Welder Helper to the Extra Gang Foreman's position on or about February 23, 1987, was a separate and definitive action which occurred on a certain date but it was not an action repeated on more than one occasion. In Third Division Award 25538, where outside forces were used to perform rail laying work for several months, the Board held that the actual violation occurred on the first day that outside forces were used. It stated in pertinent part,

"The instant claim is based on an act that occurred on September 21, 1981, and consistent with solid body of case law on this point is not continuing, although a continuing liability may flow from the specific pivotal act."

In the case herein, the specific pivotal act occurred on or about February 23, 1987, and any continuing liability flowed from this date's specific occurrence. Accordingly, we find the Claim untimely and it is dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1991.