

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 29260  
Docket No. MW-28208  
92-3-87-3-792

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(CSX Transportation, Inc. (former Seaboard System Railroad)

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

(1) The Carrier violated the Agreement when it allowed junior furloughed employe M. Moss instead of Mr. J. Patrick to return to service on Rail Gang 5X11 beginning during February 1986 (System File JP-86-24/12-8(86-241) Q.

(2) Mr. J. Patrick shall be compensated for all wage loss suffered as a consequence of the violation referred to in Part (1) above beginning sixty (60) days retroactive from May 5, 1986 and continuing until such time as the violation was corrected."

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 employees involved in this dispute are respectively carrier and employees 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.

Claimant holds seniority as a Trackman on the Raleigh-Rocky Mountain Division Seniority District. At the time this dispute arose, Claimant had approximately four years, four months service in the Maintenance of Way Department.

During the latter part of 1985, Claimant's position was abolished due to force reduction. Rule 13, Section 3 requires an employee affected by a force reduction to exercise his seniority rights within 30 calendar days from the date of his displacement. The Rule reads as follows:

"An employee affected by force reduction or displacement shall, within a period of thirty (30) calendar days from the date of his displacement, exercise his seniority rights. An employee failing to comply with the above will forfeit his rights to place himself in any rank in which he holds seniority; except by successfully bidding on and being assigned to a new position or vacancy, or by resuming active service through recall to duty in accordance with the provisions of Section 6 of this Rule."

Claimant elected to protect his seniority in accordance with Rule 13, Section 6(a), which reads in pertinent part:

"(a) When employees are furloughed by reason of force reduction and desire to retain their seniority rights, they must file their name and address in writing not later than thirty (30) calendar days from date cut off."

Beginning the latter half of February 1986, a temporary vacancy on a Trackman position occurred on System Rail Gang 5X11. The claim by the Organization is that Carrier recalled and assigned a furloughed junior Trackman to fill the temporary vacancy. According to the Organization, Rule 13, Section 5 and Rule 8, Section 3 are controlling. They state:

"RULE 13  
FORCE REDUCTION

\* \* \*

Section 5

Employees temporarily out of the service, or serving in lower ranks, will be given opportunity to return to the service, or to such higher rank in the service in which they have established seniority, in the order of their seniority to fill temporary vacancies or positions, as provided in Rule 8."

"RULE 8  
BULLETINING VACANCIES AND NEW POSITIONS

\* \* \*

Section 3

All temporary vacancies of more than seven (7) calendar days' and less than thirty-one (31) calendar days' duration will be filled as follows:

First, by using the senior employee of the rank and group on the district who has seniority in the rank in which the vacancy occurs, who may be out of work or working in a lower rank account reduction of forces.

Second, if no such employee is available, the vacancy will be filled through the general promotion rules."

There is a dispute in fact as to whether the temporary Trackman vacancy in question on System Rail Gang 5X11 was more than seven calendar days in duration, thereby triggering the foregoing provisions of Rule 8, Section 3. The Organization contends that Carrier assigned a junior Trackman to a temporary Trackman vacancy on a continuous basis over a period of several months beginning the latter half of February 1986. Carrier, on the other hand, asserts that the junior Trackman made himself available at Rail Gang 5X11, a crew that works throughout the Southern States region, and that he was utilized only where vacancies of less than seven calendar days arose; i.e., where there were regularly assigned employees off due to illness, personal reasons, etc. Carrier's position is that it is not required by any Agreement provision to fill these short term vacancies with furloughed employees, and that had the Claimant made himself available in the same manner as the junior employee, he would have been given preference in the filling of said vacancies.

Even if the Board could resolve the factual dispute concerning the question of whether there was a "temporary vacancy" as set forth in Rule 8, Section 3, there is a threshold issue which is determinative of the matter now before us. As we view the record, it is clear that the claim is untimely, and therefore not subject to adjudication on the merits. Claim was filed by letter dated May 5, 1986, and is based on an occurrence which the Organization acknowledges took place sometime during the second half of February 1986. It is therefore outside the 60-day time frame set forth by Rule 40 of the Agreement. Although the Organization has attempted to characterize this dispute as a continuing violation, it does not meet the definitional standard established in longstanding Board precedent such as Third Division Award 14450 which held:

"... the essential distinction between a continuing claim and a non-continuing claim is 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...."

Here, the "separate and definitive action" occurred when the junior employee was assigned to return to service on Rail Gang 5X11 in February 1986. We concur with Carrier's contention that while the claim as stated may have had potential continuing liability, it is one which has as its basis an alleged violation which occurred on a particular date, that is, the date on which the junior employee was first used on Rail Gang 5X11.

Moreover, we reject as unpersuasive the Organization's assertion that the Carrier waived its timeliness objection. The record discloses that Carrier's Director of Labor Relations raised the time limit objection in his letter dated January 19, 1987, declining the Organization's appeal of the claim. Obviously, while it would have been preferable if the question had been raised during an earlier stage in the process, we decline to find that such action is tantamount to a waiver. Board precedent teaches that the issue of non-compliance with procedural requirements can be raised at any time during the handling of the claim on the property. (Second Division Award 8399). Having raised the issue on the property, we concur with Carrier that the claim is untimely and is therefore barred.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of June 1992.