

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29894
Docket No. SG-29186
93-3-90-3-68

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(CSX Transportation, Inc. (former Louisville
(& Nashville Railroad Company)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Seaboard System Railroad (L&N):

On behalf of G. Taylor, for payment of eight (8) hours pay at his punitive rate of pay, account of Carrier violated the current Signalmen's Agreement, as amended, particularly, Rule 15, when it assigned him to work his rest day (Sunday) beginning January 8, 1989 and continuing until this dispute is settled." Carrier file 15-15 (89-29). BRS Case No. 7839 SSR (L&N).

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 employe 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.

This dispute first arose in October 1988, when the Carrier reissued bulletins advertising several new positions on Seniority District #9, including two new positions with staggered workdays to provide seven-day coverage on signal maintenance work at Cartersville, Georgia - one with Monday through Friday workdays and one with Saturday through Wednesday workdays.

Claimant was placed on a position on January 2, 1989, with Saturday through Wednesday workdays, and consequently was required to work on Sunday, his rest days being Thursday and Friday.

On October 27, 1988, the Organization filed a letter protesting several new positions, including the position at issue here, AS-105. The Organization stated in its letter that it would be filing claims. This letter was appealed and handled on the property and allowed to expire and not appealed to the Board.

On February 27, 1989 the Organization filed this claim. The claim alleged that the Carrier violated the Agreement when Claimant was assigned to work on Sunday, January 8, 1989, which should not have been an assigned work day. The claim was filed on a continuous basis.

The Organization contends that the Carrier violated the Agreement when it did not attempt to obtain the Organization's agreement prior to making changes in rest days for the Signal Maintainer's position. The Organization also argues that the Carrier violated the Agreement when it required seven day coverage of the Signal Maintainer's position without showing that such coverage was necessary or that there were any operational problems which necessitated such coverage.

The Organization also argues that the claim should be allowed because the Carrier failed to respond to the claim, in violation of Rule 54. The Carrier contends that it had no obligation to respond because the Organization's claim is time barred and, therefore, void and not properly before this Board. The date of the occurrence is October 6, 1988, when the position was established, not January 8, 1989, when the Claimant first worked on a Sunday. It is this procedural issue which the Board must deal with initially.

Rule 54 (a) provides:

"All claims and grievances must be presented in writing by or on behalf of the employee involved to the officer of the carrier authorized to receive same, within sixty (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 sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee 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 Organization asserts that it did not untimely file its claim because the claim is a continuing one which may be filed at any time under Rule 54(d):

"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."

The Carrier contends that the claim is not a "continuing" claim under 54(d) which can be filed at any time. The basis of the claim is really the establishment of Signal Maintainer position AS-105 with Sunday as a workday. The position was established on October 6, 1988. If there was a violation, it was this specific event, which occurred on October 6, 1988, not January 8, 1989, when the Claimant first worked on a Sunday.

Numerous Awards support the Carrier's position that a claim based on a specific action or inaction of the Carrier which occurs on a specific date such as establishing or abolishing a position, for instance, is not a "continuous claim" even though there may be continuing liability.

In Public Law Board No. 2742, Award 1, the claim alleged that a Blacksmith position was abolished, after which the Carrier assigned other crafts to perform this work on a daily basis. The Carrier contended the claim was barred because it was not filed within 60 days of the abolishment of the position, while the Organization argued that it was a continuing claim. The Board found:

"We find the Carrier's position in this respect to be correct. The claim was based upon the abolishment of the Blacksmith position on February 9, 1979, and was not presented within sixty days from that date . . . The abolishment of the position and the re-assignment of

work, if there was any, did not constitute a continuing violation of the Agreement . . . We find that the exception to the claim was taken by the Carrier while the dispute was in the process of appeal on the property, and, therefore, was timely raised."

In Third Division Award 27327, the Board held:

"There are a host of Awards, of this and other Divisions, which conclude that such claims, disputing prospective work assignments, while exhibiting characteristics similar to a continuing Claim with regard to not being required to file a new Claim every day thereafter, are not continuing Claims that may be filed at any time. To be timely they must be filed within sixty days of the date of occurrence giving rise to the incident, i.e., the abolishment. Typical of these is Third Division Award 14450, holding:

'Recent Awards of this Board consistently have held that 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. (Award Nos. 12045 and 10532). Here, the action complained of was the abolishment of the section gang, including the position of the Section Foreman, with headquarters in Boonville, Missouri. It is undisputed that the abolishment and transfer of territory by Carrier occurred on or about July 21, 1958. Therefore, we find the Time Limit Rule is applicable as the claim was not filed within sixty days after the date of the occurrence upon which it is based. (Award Nos. 14131 and 12984).'

When the original claim filed by the Organization (quoted above), is examined alongside the holdings of Award 14450, it can be seen that

the two fit like hand and glove. The very first sentence of the Claim, initially filed in this matter, states that the Agreement was violated "when Carrier elected to establish a Yard gang...without a trackman." This is the action the Organization complained about. This action occurred when the trackman's assignment was abolished on December 10, 1984. The abolishment and the restructuring of the gang, so that thereafter track work was being performed without a trackman assigned, occurred only on one occasion and was a separate and definitive action. It was the initial triggering event to the prospective changes in work assignments and the Organization had sixty days from that date to file a Claim. This was not done. (See Third Division Award 23953)."

Second Division Award 7581 held:

"Numerous awards have held that a claim based on a singular occurrence is not converted into a continuing violation merely because liability continues to accrue. This claim was filed more than sixty (60) days after the occurrence on which it is based. This Board therefore must deny the claim."

Third Division Award 28560 held that a failure to recall a furloughed employee and instead hiring new employees was not a continuing claim:

"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."

Although the language of the claim alleges that the Agreement was violated when the Claimant was assigned to work his rest day, the gravamen of the complaint is really the establishment of Position AS-105 with a Saturday to Wednesday workweek. Under the new position, the Claimant was required to work Sunday. He did not have Sunday as a rest day. Under this position, working on Sunday was consistent with the job description.

The Organization cannot avoid the 60 day requirement by couching the claim in language which would contemplate a continuous claim when the essence of the complaint is really a specific occurrence with a specific date, the creation of the position which included a Sunday workday. To allow the Organization to do so would completely undermine the 60 day Rule and Board precedent defining a "continuing" claim.

The Organization argues that even if the claim is not a continuing one, this does not excuse the Carrier's failure to respond to the claim. The Carrier argues that since the claim is time barred and void the Carrier's default by not responding to the claim does not render it payable.

Third Division Awards 10532 and 27692 as well as Second Division Award 8924 are instructive on this issue. These Awards all held that where a claim was not filed within the time required, there is no valid claim, and the Board cannot consider the Carrier's later procedural error in failing to respond to the claim.

In particular, the Board in Third Division Award 26549 held:

"Since the Claim was not properly filed in the first instance we do not reach the question as to whether Carrier's response was timely nor do we reach the merits of this dispute. Numerous Awards have held that where, as here, no valid Claim existed ab initio, the Board

may not consider Carrier's later procedural error or the merits of the Claim. See Third Division Awards 9684, 10532, and 16164. Accordingly we must rule to dismiss this Claim."

Accordingly, we must dismiss the claim.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.