

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30517  
Docket No. MW-30169  
94-3-91-3-613

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

(Brotherhood of Maintenance of Way Employees  
(  
PARTIES TO DISPUTE: (Union Pacific Railroad Company (former  
(Missouri Pacific Railroad Company)

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

- (1) The Agreement was violated when the Carrier assigned junior employees instead of calling and assigning the senior KO&G Seniority District employees to perform overtime work on the KO&G Seniority District beginning June 9, 1990 and continuing (Carrier's File 900673 MPR).
- (2) As a consequence of the aforesaid violation, Claimants J.P. Mericle, K.W. Lynch, J.L. Marks and L.C. Arnold shall each be compensated at their respective time and one-half rates of pay for an equal proportionate share of the total number of man-hours expended by the junior KO&G Seniority District employees in the performance of the overtime work."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Before considering the merits of this matter we must first deal with the contention of the Carrier that the claim before the

Board is barred by the time limit provisions of Rule 12.2.(a) of the Agreement.

Rule 12.2.(a) reads as follows:

"All claims or 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 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 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 alleges that on October 31, 1989, the Roadmaster unilaterally moved KO&G district Tie Gang #4254 across the seniority boundary that separates the KO&G seniority district from the Missouri-Kansas-Texas Railroad ("KATY").

On August 8, 1990, the Organization filed a Claim on behalf of the Claimants for all overtime worked by junior KO&G employees working KO&G territory, beginning June 9, 1990 and continuing. It alleges that the claimants have been required to work off their own territory since October 1989, thus depriving them of overtime opportunities.

The Carrier denied the Claim on the merits, and on the grounds that the claims were untimely under Rule 12.2.(a) of the Agreement.

The basic principles to be applied in resolving this issue were enunciated by the Board in Third Division Award 27327:

"On the matter of the Claim's timeliness, Carrier argues that the changes, that were made in restructuring track gang personnel at Port Covington, occurred with the abolishment, effective December 10, 1984, of a trackman position. It wasn't until March 28, 1985, that the Organization filed a Claim alleging that the Agreement was violated by having a track gang perform track work without a trackman assigned. March 28, 1985, was well beyond the sixty day period within which the Organization could timely file a Claim on the incident.

The Organization contends that the situation involves a continuing violation and under its Time Limit Rule, claims may be filed any time for such violations.

Continuing claims are a device created to avoid a multiplicity of claims thereby eliminating a need for filing a new Claim every day for that day's violation. (Second Division Award 3298). And the language of the Agreement permits the filing of a continuing claim "at any time", however, retroactivity of more than sixty days on monetary Claims is not allowed. At issue here, though, is whether or not claims disputing work assignments resulting from a single occurrence, such as the abolishment of a position, are considered continuing Claims which may be filed beyond sixty days after the occurrence of the abolishment.

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).'

Since the operative event in the instant matter occurred in October 1989, and constituted a separate and definitive action, the

Organization had sixty days from that date to file a claim. Since it failed to do so, we must dismiss the matter and are unable to consider the claim on its merits.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 9th day of November 1994.

LABOR MEMBER'S DISSENT  
TO  
AWARD 30517, DOCKET MW-30169  
(Referee Duffy)

This award is palpably erroneous and a dissent is required. The Majority first determined that this was a claim for a seniority district violation and that such a violation is not continuing in nature. As will be shown below, such a decision is contrary to precedent awards of this Board. Following its erroneous determination that a seniority district violation is not a continuing violation, it found that since the first day of the seniority district violation was more than sixty days prior to the claim being filed, the claim was untimely and it dismissed the claim.

Without reference to any of the fact-bound issues arising in this case, one egregious error stands out in the Majority's reasoning: The precedent awards of this Board have found that seniority district claims are continuing claims as contemplated within Rule 12 and similar time limit rules and the Majority was wrong to hold otherwise. To hold that a seniority district violation is not such a continuing violation is to nullify the rule's provision for the filing of continuing claims. As the Board held in Third Division Award 28744:

"The Parties clearly carved out an exception to the basic 60-day Time Limit Rule for 'alleged continuing violation(s)'. They may be filed at anytime. While the nature of a continuing violation is sometimes difficult to define and while it depends on the facts and circumstances of each case, the Board is compelled to find that

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"this was a continuing violation. If this is not a continuing violation, then Rule B Section (2) would be a nullity. All the provisions of the Agreement must be observed and given meaning and effect. \*\*\*"

In Third Division Awards 23046 and 28524, the Board clearly held that seniority district violations were continuing violations pursuant to rules allowing for the filing of continuing claims. Award 23046, in pertinent part, reads:

"In our review of this case, we concur with Carrier that the claim is procedurally defective with respect to the claimed dates of July 25, 26 and 27. We find that each date was a separate occurrence that must be separately tolled within the time limits of Rule 44(a). Carrier challenged the timeliness of the three dates which were not refuted by the Organization during the handling on the property. We do find that the other claimed dates beginning with July 28 are valid and properly before this Board."

This Board has recognized in innumerable awards the value of well-reasoned precedent, not only in settling the immediate cases brought before it, but also to fulfill the purposes of the Railway Labor Act to effect the prompt and orderly settlement of disputes by settling issues with some degree of finality. In this connection, attention is invited to Awards 14489 and 14508 of this Division:

AWARD 14489:

"The principle of stare decisis is a most commendable one. It puts an end to controversy where a provision of an Agreement permits more than one interpretation and ends the parade of disputes seeking to upset the established view. In following stare decisis we do not say that we would necessarily have held the same way if we were presented the issue as a matter of first impression. We merely hold that unless the precedent view is palpably wrong we must not upset it. Award 12240."

AWARD 14508:

"\*\*\* Although we retain the authority to reverse prior awards of this Board. We find no justification for doing so in this case. Our reasoning is the same as that expressed by Referee (sic) Dorsey in Award No. 11788:

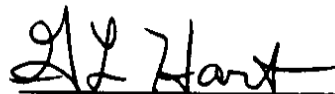
'We have no hesitation or compunction in reversing prior Awards when we are convinced they are palpably wrong. But, we cannot and do not lightly regard precedent Awards; for, if we did so, it would not engender the prompt and orderly settlement of disputes on the property within the contemplation of Section 2 (4) and (5) of The Railway Labor Act, herein called the Act \* \* \* Only if in law and in fact a prior Award finds no support should we reverse it. Certainly, where a provision of an Agreement permits more than one interpretation, we must presume that the Division, in its deliberations, considered all of them before making its selective determination. We should not at a later date, with a different referee participating, substitute our judgment for that in a precedent Award unless we are unequivocally convinced and can find that the prior judgment is without support. To apply any other test would be to foster uncertainty in the Employee-Carrier relationships in derogation of the objectives of the Act.'

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In this case, rather than refer to the precedent awards dealing with seniority district violations, the Majority improperly relied on Third Division Award 27327 for its enunciation of "The basic principles to be applied in resolving this issue \*\*\*". While no exception is taken here to the principles enunciated within that award, per se, it should simply be noted that Award 27327 did not deal with a seniority district violation and does not serve as precedent in a seniority district case.

Inasmuch as the precedent awards have decided that seniority district violations are continuing violations and inasmuch as the Majority here did not find those precedent awards to be palpably erroneous, the Majority was simply wrong to find otherwise. Hence, this award is, itself, palpably erroneous and of no precedential value.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "G. L. Hart", written over a horizontal line.

G. L. Hart  
Labor Member