

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31239
Docket No. SG-31696
95-3-93-3-729

The Third Division consisted of regular members and in addition Referee Jacob Seidenberg when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Consolidated Rail Corporation)

STATEMENT OF CLAIM:

"Claim on behalf of General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (Conrail):

Claim on behalf of P.R. Danaher for payment of 134 hours at the time and one half rate and 136 hours at the straight time rate, account carrier violated the current Signalmen's Agreement, particularly Rule 5-A-1, when it changed the Claimant's established work week and required him to work four ten-hour days each week from May 4 through August 30, 1992."

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.

The parties to the dispute waived right of appearance at the hearing thereon.

The relevant contract provisions state in part:

"RULE 4 - Time Allowance

4-K-1(e). A claim may be filed at any time for an alleged continuing violation of any agreement and all the rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim 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 sixty (60) calendar days prior to the filing thereof."

"RULE 5 - Handling of Employees

5-A-1. The established work week for all employees covered by this Agreement subject to the exceptions contained in this rule, is forty (40) hours, and consists of five (5) days of eight (8) hours each, with two consecutive days off in each week."

"APPENDIX 'M'

Agreement entered into this 17th day of October 1978 between the Consolidated Rail Corporation and its employees represented by the Brotherhood of SIGNALMEN providing for the establishment of a work week consisting of four ten hour days.

1. Employees holding permanent positions in a signal gang may be required to work a four (4) day workweek consisting of ten hours per day, Monday through Thursday, when their job assignment does not allow such employee to return to their permanent headquarters for five (5) or more working days that are consecutive. Other positions may be assigned to such four (4) day workweek with the concurrence of the General Chairman."

The operative facts are that the Carrier advertised, and the Claimant was awarded, a job as a Signal Maintainer that had an assigned work week of five eight hour days. The advertised bulletin noted that the job might be subject to four ten hour days.

The job was posted on April 15, 1992 and the Claimant started to work thereunder on May 4, 1992. From May 4 to August 30, 1992 the Carrier required the Claimant to work a week of four ten hour days.

On August 30, 1992 the Claimant filed a claim for 134 hours at the time and a half rate for the days he had worked the additional two hours. He also claimed 136 hours at straight rate for the Friday he was not allowed to work under his scheduled work week.

The Carrier states at the outset the claim was barred because it was not filed within the prescribed time of 60 days from May 4, 1992. The Organization responded that it was a continuing claim, but amended the claim to run from July 9 to August 30, 1992 because Rule 4-K-1(a) does not allow any monetary claim retroactive for more than 60 days prior to the filing thereof.

On the merits the Organization states Rule 5-A-1 provides for a work week of five eight hour days. The Carrier arbitrarily breached the Agreement by deviating from this scheduled work week by its 10 hour 4 day work week. The Organization stated the only exception to Rule 5-A-1 was Appendix M for signal gangs or with the permission of the General Chairman which was not given in this case.

The Organization states there is no merit to the Carrier defense that the Claimant is not entitled to the relief he is requesting because he has been fully compensated during the period of time in question. The Organization adds this Carrier argument has been consistently rejected by this Division. These Awards have held parties do not negotiate contracts to practice semantics. They execute contracts to establish certain rights and when a contract is violated - damages accrue to the injured party. The Organization asserts that the requested remedy is appropriate in light of the Carrier's contract breach.

The Organization reiterates that the claim was timely filed as a continuing violation under Rule 4-K-1(e) and regardless of when the violation commenced, the claim was clearly valid for the 60 days preceding the claim. The Organization notes that the claim was amended to comply with the requisite Rule. On the basis of the total record the Organization requests the Board to sustain the claim.

The Carrier requests the Board to deny the claim in its entirety because it violated Rule 4-K-1 since it was submitted beyond the 60 day time limit specified in the Rule. The Carrier avers that the Claimant contended he commenced work on May 4 and filed his claim on August 30, 1992. This shows that the claim was not presented within 60 days as required by Rule 5-A-1. The Rule required the claim to be presented within 60 calendar days of its occurrence. The day of occurrence was May 4, 1992, the day the Claimant was awarded the position. Sixty days later was July 3, 1992. A claim dated August 30, 1995 is clearly beyond the permissible 60 days. There is no evidence of the Claimant asking for an extension of time. The Carrier cites Awards which have upheld the position it has adopted in this case.

The Carrier states that the claim should also be denied for lack of merit. It contends that the Organization has produced no proof to show a violation of Rule 5-A-1. The Organization has not offered a shred of evidence to support its allegations and consequently has not met its burden of proof. It states allegations are not proof.

The Carrier noted that the Claimant voluntarily bid on a posted vacancy that stated the position might be subject to four ten hour work days. The Carrier added the Claimant cannot be considered as aggrieved when he was assigned a work schedule for a job on which he voluntarily bid. The Carrier further added that he suffered no loss of compensation as he worked 40 hours a week and was paid for 40 hours a week.

The Board finds that the claim is barred under the terms of Rule 4-K-1(a) since it was not presented within 60 calendar days from the date of the occurrence on which the claim is based. On May 4, 1992 the putative violation took place when the Carrier initiated the work week of ten hours, 4 days a week. If the Organization concluded that this work week breached the terms of the April 15, 1992 Bulletin (Carrier Exhibit 1) it had the contractual obligation to file a claim of that date, and certainly earlier than August 30, 1992.

The Board finds that the violation was a single articulated act and not a continuous violation. The violation occurred on May 4 and while there may have been continuous liability, this did not convert the Carrier's violation, if it was a violation, of May 4 into a continuous violation.

Since the Board finds the claim is barred under the time limit provision of Rule 4-K-1, it denies the claim, and does not find it necessary to reach the other issues in this case.

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AWARD

Claim denied.

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 1st day of November 1995.