

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 32550  
Docket No. MW-31142  
98-3-93-3-42

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

**PARTIES TO DISPUTE:** ( (Brotherhood of Maintenance of Way Employes  
(Southern Pacific Transportation Company  
( (Eastern Lines)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned or otherwise allowed Burlington Northern forces to perform track work (patrolling track, replacing bolts, switch-ties and cross-ties, replacing buck signs and removing trash from ditches) between Sherman and Denison, Texas on November 19, 1991 and continuing (System File MW-92-22/MofW 37-66 SPE).
- (2) As a consequence of the violation referred to in Part (1) above, Foreman D. Fletcher, Labor Driver D. W. Fletcher, Laborer W. L. Gentry and Machine Operator M. Cedillo shall each be allowed pay, at their respective rates, for an equal proportionate share of the total number of man-hours expended by the Burlington Northern forces in the performance of the work in question.”

**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 were given due notice of hearing thereon.

Claimants D. Fletcher, D. W. Fletcher, W. L. Gentry and M. Cedillo have established seniority as a Foreman, a Laborer Driver, a Laborer and a Machine Operator, respectively on the Dallas-Austin division. At the time this claim arose, they were regularly assigned as such and headquartered at Sherman, Texas. Pertinent to this dispute, Carrier's trackage at that location is intersected by trackage owned by the Burlington Northern Railroad Company. However, the trackage at issue here is owned, operated and maintained by the Southern Pacific Transportation Company.

On November 19, 1991, Claimants' gang was assigned to work at Dallas, Texas, and continued to work at that location until January 1, 1992 when they were cut off.

On January 17, 1992 the Assistant Chairman sent a letter to Carrier in which he asserted:

"We are presenting to you a claim on behalf of Dallas-Austin Division Foreman D. Fletcher, Labor-Driver D. W. Fletcher, Laborer W. Gentry and Machine Operator Cedillo for an equal portion of total man hours and on a continuing basis account B&N employees working on Southern Pacific tracks.

On November 19, 1991 till present date B&N employees Messrs. Lyons, Grassion, Baker, Wakefield and Welding Gang #683 member Rogers worked between Sherman and Denison, Texas.

Mr. Fletcher's gang was headquartered in Sherman, Texas, but was sent to work around the Dallas, Texas vicinity. This gang was put on expenses and cut off after January 1, 1991.

The railroad tracks between MP 377.9 and MP 324.75 have always been maintained by the headquartered gang that was in Sherman, Texas. Never by B&N employees.

It is our position that Claimants were willing, available and fully qualified to do the work that the B&N employees were doing on our tracks such as patrolling track, replacing bolts, replacing switch ties and cross ties, replacing buck signs and removing trash from ditches so water could flow easily, but were not allowed or offered this work and if time of essence they could have done the work on overtime basis.

It is our position that by allowing B&N employees to perform this MofW work, the Carrier has violated the current agreement, but not limited to, Article 1, Scope, Article 2, Seniority Rules, Article 3, Force Reductions, Article 6, Seniority Rosters, and Article 8, Promotions and Filling of Vacancies.

Due to these violations, we are now requesting that the claimants be paid as outlined in the first paragraph of this letter. This in addition to any and all other compensation they may have already received."

Carrier denied the claim, premised upon:

1. The District Chairman did not present the claim within the 60 day time limits of Article 15, Section 1(a).
2. The claim is also improper in that it alleges payment on a continuing basis without evidence or documentation that any such continuing violation occurred.
3. Investigation concerning this claim does not reveal that BN employees performed any work which belongs to Claimants,

In its denial, Carrier maintained that this claim was filed outside of the time limits set forth in Article 15 of the Agreement. Section 1 of that Article states:

"Section 1(a) 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 (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."

For its part, the Organization asserted a continuing violation premised upon the language found in Section 2 of Article 15 which provides:

"Section 2.A claim may be filed at any time for all alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this article, 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 sixty (60) days prior to the filing thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient."

In that connection, there is no evidence or documentation on this record which would lead us to conclude that the alleged violation occurred on a "continuing basis." The dates upon which this claim is based are time specific. As this Board has consistently found, "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[s]." (See Third Division Award 27327).

In any event, the claim need not rely upon the continuing violation theory for timeliness. A review of the record reveals that the violation allegedly began on November 19, 1991. The Organization filed this claim on January 17, 1992. Carrier asserts that because it did not receive the initial claim in hand until January 20, 1992, it was "presented" outside the time limits set forth in the above quoted section of Article 15. However, Article 15 clearly states that all claims and grievances must be presented in writing within 60 days from the date of the occurrence on which the claim is based. In this case, the initial claim was presented on January 17, 1992, 58 days after the occurrence of the alleged violation. This Board frequently has interpreted the language

of Rules similar to Article 15, and consistently held that the date a claim is filed/presented on the date the claim is mailed. See Awards 16370 and 24440.

Regarding the merits of this matter, the Organization has failed to provide any evidence which refutes Carrier's declaration that BN employees did not perform the work in question. In fact, the unrefuted facts in this case show only that BN inspectors rode the track to "check for defects", but made no repairs. Further, the Organization did not provide any documentation to indicate who did what, what work was performed, or how much time was involved in performing the alleged work on the dates at issue. Therefore, this claim must be denied for failure of proof.

**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 29th day of April 1998.