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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35583
Docket No. SG-35588
01-3-99-3-505

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

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern Railroad (KCS):

Claim on behalf of T. L. Ray for differential between the MidSouth Signal Maintainer’s rate and the Signal Maintainer’s rate he is receiving at Tupelo, Mississippi, on the SouthRail, account Carrier violated the current Signalmen’s Agreement, particularly the Memorandum of Agreement dated September 1, 1994, Section III(d), when it failed to compensate the Claimant at the MidSouth rate. Carrier File No. M0698-5055, General Chairman’s File No. 9749MCR. BRS File Case No. 11034-KCS.”

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.

In a Memorandum of Agreement effective September 1, 1994, the parties agreed that "... all existing signalman's seniority rosters on the Kansas City Southern Railway Company (KCS) Eastern Division [Formerly MidSouth Rail Corporation (hereinafter 'MRC') and SouthRail Corporation (hereinafter 'SR')] will be combined to create a new consolidated seniority district encompassing both of the aforementioned seniority districts." Section III of the Agreement defines "non-prior right employees" and reads, in pertinent part, as follows:

"SECTION III

Employees establishing seniority in the signalman's craft after the effective date of this Agreement will not have prior rights on any seniority district that existed prior to the effective date of this Agreement and they will be known as non-prior right employees.

* * *

"(d) Non-prior right employees are required to protect all assignments, regardless of their location in the consolidated seniority district, and may not elect to take furlough in lieu of protecting any assignment (it is understood that a non-prior right employee who first performs compensated service on an MRC position will not have his rate of pay reduced if force assigned to a SR Job). A non-prior right employee who refuses or fails to protect a temporary or permanent vacancy, to which he has been assigned, forfeits his seniority on the first day he fails to protect the assignment." (Emphasis added.)

The Claimant established seniority in the Signalman's craft in the consolidated seniority district on or about October 1, 1994, and thus, in accordance with the above-quoted Agreement, became a non-prior right employee. He was assigned at that time to Signal Maintainer Job 819, headquartered at Columbus, Mississippi, a former SouthRail location. However, according to the Organization, during the first two weeks of his employment on that job, he worked at Meridian, Mississippi, a former MidSouth Rail location, and was paid the MidSouth Rail rate of pay. The Carrier disagrees, asserting that his first compensation was not at the MidSouth Rail rate because its payroll records show his first compensated service was on SouthRail Job 819 at Columbus.

After the Claimant's first two weeks on Signal Maintainer Job 819, there appears to be no dispute he remained on that job, worked at Columbus and received the SouthRail rate of pay until January 6, 1997, when he bid in Signal Maintainer Job 817 at Gibsland, Louisiana, a former MidSouth Rail location. While he held the Gibsland job, he was paid at the MidSouth Rail rate of pay.

On October 14, 1997, the Claimant was displaced from Signal Maintainer Job 817 at Gibsland by a senior employee. The Claimant, in turn, exercised his seniority and displaced a junior employee on Signal Maintainer Job 833 at Tupelo, Mississippi, a former SouthRail location, where he was paid the SouthRail rate.

Because the SouthRail rate of pay for the Signal Maintainer's job at Tupelo was lower than the MidSouth Rail Signal Maintainer's rate, the Organization, in a letter addressed to the Carrier's Signal Supervisor on November 25, 1997, submitted a claim on the Claimant's behalf for the difference. The Organization contended the Claimant was entitled to the higher MidSouth Rail rate under Article III(d) of the parties' September 1, 1994 Memorandum of Agreement, supra, because he had been force assigned to the Tupelo job and his first two weeks of service in the consolidated seniority district in 1994, at Meridian, Mississippi, had been paid for at the MidSouth Rail rate.

The Signal Supervisor responded to the Organization's letter on January 12, 1998, stating he was not the Carrier Officer authorized to initially receive claims submitted on behalf of Signal Department employees. He advised the Organization to contact the Labor Relations Department in regard to the matter.

On January, 20, 1998, after consulting with the Labor Relations Department, the Organization forwarded the claim to the Vice President and Chief Engineer, the Officer authorized by the Carrier in 1993 to initially receive such claims. The Vice President and Chief Engineer received the claim on January 23, 1998.

The Vice President and Chief Engineer denied the claim on two grounds. First, it was asserted the claim was time barred and thus dead under the parties' Grievance Procedure Rule because it had not been timely and initially filed with the proper Carrier Officer and, in any event, had not been timely filed within 30 days of the date the Claimant first performed service. Secondly, the Vice President and Chief Engineer contended that the Claimant's displacement from his Maintainer's job at Gibsland by a senior employee on October 14, 1997, and his subsequent exercise of seniority to the

Maintainer's job at Tupelo did not constitute a forced assignment. The Vice President and Chief Engineer denied the Organization's assertion that the Claimant's first compensated service had been at the MidSouth Rail rate.

During the subsequent appeal process on the property, the Organization argued the claim was not barred because it "has to do with [a] rate of pay and is therefore a continuing claim," which, under the parties' Grievance Procedure Rule, may be filed at any time. The Carrier continued to assert there was a time limit violation and added to its defenses the argument that the Doctrine of Laches applied.

The claim is appealed to the Board with the issues raised on the property still intact.

Paragraph (a) of the parties' Grievance Procedure Rule, which the Carrier cites in support of its contention the claim is barred from consideration on its merits, reads, in pertinent part, as follows:

"(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 30 days from the date of the occurrence on which the claim or grievance is based. . . ."

The Organization's claim is premised on the contention that the Claimant's move from the former MidSouth Rail Signal Maintainer's job at Gibsland, Louisiana, to the former SouthRail Signal Maintainer's job at Tupelo, Mississippi, was a "forced assignment" under Section III(d) of the parties' September 1, 1994 Memorandum of Agreement, supra, thereby entitling him to the higher MidSouth Rail rate of pay while on the Tupelo job because his first compensated service on the consolidated seniority district allegedly was at the MidSouth Rail rate. There is no dispute that the Claimant made the move to Tupelo on October 14, 1997. Accordingly, if the Claimant was force assigned, it was, in our judgment, a single event that occurred on that date and none other, making it the date of the occurrence on which the claim is based.

Because the claim was not presented to the Officer of the Carrier authorized to initially receive it, the Vice President and Chief Engineer, until January 23, 1998, some 101 days after October 14, 1997, the date of the occurrence on which it is based, it is barred from consideration on its merits by the 30-day time limit requirement set forth

in the above-quoted portion of paragraph (a) of the parties' Grievance Procedure Rule. Indeed, even if the Signal Supervisor to whom the claim was erroneously sent on November 25, 1997 had been the Carrier Officer authorized to initially receive same, it still would have been submitted some 11 days beyond the required 30-day time limit.

We are not persuaded by the Organization's argument that the claim involves a "continuing violation" and thus may be filed at any time under paragraph (d) of the parties' Grievance Procedure Rule, which reads, in pertinent part, as follows:

"(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 30 days prior to the filing thereof."

These provisions contain no definition of a "continuing violation." It is well established by arbitral Awards, however, that potential continuing liability, per se, does not a continuing violation make. Also, it seems clear the alleged violation cannot be one that arises out of a single occurrence, as in the instant case, or paragraph (d) would nullify paragraph (a), a construction which must be avoided. Paragraph (d) states that the filing of one claim or grievance will protect the rights of a claimant so long as the alleged continuing violation continues. Such successive new claims would not be necessary with respect to a claim based on a single event or occurrence. It is only with respect to claims involving separate recurring events that might give rise to a claimant's right to protest each successive event without filing a new claim. We do not have such a situation in the instant case.

Accordingly, the claim is dismissed without consideration of its merits.

AWARD

Claim dismissed.

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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 24th day of July, 2001.