

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36578
Docket No. MW-36759
03-3-01-3-247**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company (Western Lines))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed Mr. R.A. Sanchez from service on August 2, 1999 and withheld him from service until January 7, 2000 (Carrier’s File 1227829 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. A. Sanchez shall ‘...now be compensated for net wage, straight time and overtime, and benefit losses suffered by him from August 2, 1999 through January 7, 2000.***’”**

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.

The instant claim was initiated on March 3, 2000, contending that the Carrier violated Agreement Rules 1 and 32 when it removed the Claimant from service on August 2, 1999 pending a medical evaluation and did not return him to service until January 7, 2000. The claim states:

"In view of the Carrier's action of removing the Claimant from its service based upon speculation that the Claimant was experiencing health problems and the subsequent medical evaluations that proved Carrier's speculations were wrong, we respectfully request that Claimant now be compensated for [all losses] suffered by him from August 2, 1999 through January 7, 2000."

The Carrier denied the claim and the matter was appealed.

In its declination of the appeal, the Carrier asserted that the claim was untimely. According to the Carrier, the alleged violation in this case occurred on August 2, 1999, when the Claimant was removed from service, and therefore the March 3, 2000 claim was outside the 60 day time limits provided in Rule 44 of the Agreement.

The Organization responded on the property that it could not file a claim until such time that the employee was returned to service and the results of the medical evaluations were final. The Organization argued that it did not know whether back wages were due to the Claimant until the Claimant was allowed to mark up for duty, which was accomplished on January 7, 2000, after a final determination of the Claimant's physical condition was available.

Rule 44 provides in pertinent part:

"RULE 44 - CLAIMS AND GRIEVANCES

Claims or grievances shall be handled in accordance with Article V of Agreement of August 21, 1954 as follows:

1. All claims or grievances arising shall be handled 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 60 days from the date of the occurrence on which the claim or grievance is based. . . .”

After considering the language of the Agreement, the Board does not agree with the logic advanced by the Organization. Taken to its logical conclusion, the Organization would be permitted under its theory to file a claim in a disciplinary case 60 days from the date the decision is rendered after a Hearing, or, alternatively, 60 days from the date the employee is returned to service. We do not believe the Agreement contemplates such a result.

The time limits begin to run within 60 days from the date of the occurrence on which the claim is based. In this case, the Organization has not expressly alleged a continuing violation and indeed the essence of its claim does not support the idea that one exists. The gravamen of the claim was that the Carrier’s action in removing the Claimant from service on August 2, 1999 was based upon mere speculation and was unsupported by subsequent medical evaluations. There was thus a fixed date - a particular point in time - when there was an “occurrence” for purposes of triggering the contractual time limits. The Carrier’s liability may have been a continuing one from that point forward, but the alleged violation occurred on a date certain.

There have been numerous Awards on this property which have reached the same conclusion in a variety of contexts. See, Third Division Awards 28826 and 31043 (alleged failure to advertise and assign extra gang position occurred on a specific date); Third Division Award 23953 (contracting out claim not a continuing violation); Third Division Award 30517 (claim for overtime for alleged misassignment of junior employee not a continuing violation and therefore untimely). In Third Division Award 22528, where outside forces were used to perform rail laying work for several months, the Board concluded that the actual violation for purposes of calculating the time limits occurred on the first day that outside forces were used. The Board in that case stated:

“The instant claim is based on an act that occurred on September 21, 1981, and consistent with solid body of case law on this point is not continuing, although a continuing liability may flow from the specific pivotal act.”

In light of the foregoing precedent, we find that the claim should have been filed within 60 days of August 2, 1999. Although the Organization argued for the first time

before the Board that the Carrier raised its timeliness objection too late in the grievance handling process, it is firmly established that new argument cannot be considered at this level. The Board is not authorized to consider arguments which the parties themselves have not raised during the handling of the claim on the property. Accordingly, the Organization's argument is itself untimely and must be deemed waived.

Inasmuch as the March 3, 2000 claim was filed more than 60 days past August 2, 1999, we must dismiss the claim.

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 16th day of June 2003.