

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38346
Docket No. MW-38987
07-3-05-3-431

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Trackmen (Flagmen) R. Blocker and P. Kruk a tour of duty with rest days of Friday and Saturday by Advertisement No. 009-CHI-0204 dated February 25, 2004 and effective March 11, 2004 (System File BMWWE-508-NRP).
- (2) The Carrier violated the Agreement when it assigned Trackmen (Flagmen) A. Clarence and M. Ortiz a tour of duty with rest days of Friday and Saturday by Advertisement No. 017-CHI-0404 dated April 7, 2004 and effective April 19, 2004 (System File BMWWE-509).
- (3) As a consequence of the violation referred to in Part (1) above, Ms. R. Blocker and Mr. P. Kruk shall now each be allowed pay at their respective overtime rates of pay for each Sunday subsequent to and including March 14, 2004 and allowed eight (8) hours' pay at their respective straight time rates of pay for each Friday the Carrier denied and denies them the right to work and the Carrier shall advertise these positions in accordance with the provisions of the Agreement.

- (4) As a consequence of the violation referred to in Part (2) above, Mr. A. Clarence and Mr. M. Ortiz shall now each be allowed pay at their respective overtime rates of pay for each Sunday subsequent to and including April 25, 2004 and allowed eight (8) hours' pay at their respective straight time rates of pay for each Friday the Carrier denied and denies them the right to work and the Carrier shall advertise these positions in accordance with the provisions of the Agreement."

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.

According to the record, on February 25, 2004, the Carrier advertised two Trackman/Flagman positions to provide protection for a contractor working for the U.S. Postal Service in the vicinity of the Carrier's property. The positions were awarded to Claimants Blocker and Kruk effective March 11, 2004. On April 7, 2004, the Carrier advertised similar positions, which, according to the parties and the record, were awarded to Claimants Clarence and Ortiz effective April 18, 2004. The bulletins for the positions listed tours of duty of 8:00 P.M. - 4:30 A.M. and rest days of Friday and Saturday.

Claims were filed on behalf of Claimants Blocker and Kruk on May 3, 2004 and Claimants Clarence and Ortiz on June 28, 2004 asserting violations of the Agreement by the Carrier for having positions with improper tours of duty as well as improper rest days of Friday and Saturday in violation of the Agreement. See

Rule 9 (“... [o]n positions the duties of which can reasonably be met in five (5) days, the rest days will be Saturday and Sunday”) and Rule 10 (“... [e]mployees working single shifts regularly assigned exclusively to day service will start work between 6:00 a.m. and 8:00 a.m.”).

We are unable to reach the merits of the consolidated claims. The claims are untimely.

Rule 14 -GRIEVANCES provides:

- “1. All claims or grievances other than those involving Discipline must be presented in writing by, or on behalf, of the employee(s) involved, to the supervisor within sixty (60) days from the date of the occurrence on which the claim or grievance is based. . . .”

The dispute in these claims is over the establishment of positions with rest days and tours of duty allegedly in violation of Rules 9 and 10. The bulletin for the positions eventually awarded to Claimants Blocker and Kruk was posted on February 25 and the claim was filed on May 3, 2004 which, under Rule 14 was more than “. . . sixty (60) days from the date of the occurrence on which the claim or grievance is based.” The bulletin for the positions eventually awarded to Claimants Clarence and Ortiz was posted on April 7 and the claim was filed on June 28, 2004 - again, more than “. . . sixty (60) days from the date of the occurrence on which the claim or grievance is based.” The claims were therefore untimely.

The Organization’s argument that “[w]e are not asking the Carrier to pay the claim beginning the date of the Bulletin because on the date of the Bulletin cited by the Carrier the claimants were not working, or if they were we were not aware of it and would have put the claim in earlier” is not persuasive. The record shows that on the dates the bulletins were posted, the Carrier sent copies of the bulletins to the District Chairman. Thus, the Organization was on notice of any alleged improprieties with the bulletins at the time they were posted. Similarly, the Claimants were aware of the conditions of the positions at the time the bulletins were posted and the Claimants submitted their bids for those positions.

Nor is this a continuing claim. A continuing claim is one where the act complained of may be said to be repeated from day to day, such as failing to pay a negotiated pay rate - a violation which occurs each time the Carrier issues a pay check - as opposed to a distinct act. While the liability here was a continuing one had a timely claim been filed, there was a distinct act which triggered the running of the time period for filing claims - and that was the posting of the bulletins advertising the positions with the alleged improper rest days and tours of duty. To find otherwise would allow the Organization to wait years to file a claim over a bulletined position. The Organization and the Claimants had 60 days to file the instant claims from the time of the posting of the bulletins. That was not done. We also find that the Carrier raised the timeliness issue in a timely manner on the property. The claims were thus untimely under Rule 14.

The parties' negotiated time limits for handling claims must mean what they say. In Third Division Award 38347, the Board partially sustained a claim because the Carrier did not notify the Organization of the declination of the claim within the time limit provided (language which is identical to that found in Rule 14(1) - "... [i]f not so notified, the claim or grievance shall be allowed as presented"). If the Carrier is going to be held to the negotiated time limits for handling claims by the Board, we must do the same for the Organization.

The claims are untimely and shall be dismissed.

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 5th day of September 2007.