Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41214
Docket No. SG-41032
12-3-NRAB-00003-090408

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Northeast Illinois Regional Commuter Railroad
(Corporation (Metra)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Northeast Illinois Regional Commuter Rail Corp.:

Claim on behalf of T. H. Stone and J. E. Sobieszczyk, for 25 hours and 40 minutes each at the overtime rate of pay account Carrier violated the current Signalmen's Agreement, particularly Rules 15 and Side Letter 10 (dated May 16, 1999), when it used junior employees instead of the Claimants for overtime service on January 19, 20, and 26, 2008, and denied the Claimants the opportunity to perform this work. Carrier's File No. 11-21-670. General Chairman's File No. 4-MW-08. BRS File Case No. 14269-NIRC."

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.

On March 14, 2008, the Organization filed a claim alleging violations of Rule 15 and Side Letter No. 10 "a) . . . on January 19, 2008, January 20, 2008 and January 26, 2008." Further down in the claim letter, the Organization then specified the dates of violation as "b) . . . January 12, 2008 . . . January 13, 2008 . . . [and] January 26, 2008. . . ."

By letter dated March 26, 2008, the Organization advised the Carrier that its March 14, 2008 ". . . letter contained typographical errors . . . the dates . . . should have been January 19 and January 20 and January 26, 2008." The Organization then submitted a corrected copy of its March 14, 2008 letter with the dates of January 19, 20 and 26, 2008 consistently alleged for the dates of violation throughout the letter.

Rule 56(a) provides, in pertinent part, that "[a]ll claims or grievances must be presented in writing on or on behalf of the employee involved . . . within 60 days from the date of the occurrence on which the claim or grievance is based." Relying upon the 60-day filing requirement found in Rule 56(a) the Carrier argues that the Organization's March 26, 2008 letter correcting the claim dates from January 12, 13 and 26 to January 19, 20 and 26, 2008 constitutes a new claim making the January 19 and 20, 2008 claim dates untimely. According to the Carrier, the January 19 and 20, 2008 dates alleged in the Organization's March 26, 2008 letter are, for all purposes, new claims and beyond the 60-day filing requirement prescribed in Rule 56(a).

There is no dispute that, at least with respect to the alleged violation on January 26, 2008, the Organization's claim was timely filed. With respect to the alleged violation on January 26, 2008, both the March 14 and March 26, 2008 letters consistently identified January 26, 2008 as a date for an alleged violation. Further, March 26, 2008 – the date of the Organization's second letter – is 60 days from January 26, 2008. The Board can therefore consider the merits of the allegations arising on January 26, 2008.

With respect to the January 19 and 20, 2008 alleged violation dates, the Carrier effectively argues that alleged violations for those dates are not arbitrable because they were untimely brought under the 60-day filing requirements prescribed in Rule 56(a).

Grievances under collective bargaining agreements are presumptively arbitrable and should not be considered inarbitrable unless it can be said with "positive assurance" that the grievance and arbitration provisions of the collective bargaining agreement do not cover the dispute. Further, doubts are to be resolved in favor of arbitrability. See Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960):

> ". . . [T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration . . . [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

See also, Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 377 (1974) ("In the Steelworkers trilogy, this Court enunciated the now well-known presumption of arbitrability of labor disputes"); Wright v. Universal Maritime Service Corp., et al., 525 U.S. 70, 77 (1998) (referring to "the presumption of arbitrability this Court has found. . . .") and (id. at 78):

> "In collective bargaining agreements, we have said, 'there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."' AT&T Technologies Inc. v. Communications Workers, 475 U. S. 643, 650 (1986) (quoting Warrior & Gulf, supra [363 U. S. 574 (1960)] at 582-583)."

With respect to the first two dates in the instant claim (January 19 and 20, 2008) if the entire claim as set forth in the Organization's original March 14, 2008 letter only referred to January 12 and January 13, 2008 and did not mention January 19 and 20, 2008 as dates of alleged violations, the Carrier would be correct that the March 26, 2008 letter constituted a new claim for January 19 and 20, 2008 and not merely the correction of a typographical error. In that situation, there would be no "doubts" that the Organization was filing a new claim for those dates

which was untimely under Rule 56(a) as being filed beyond the 60-day filing requirement found in that Rule.

But that is not the case. In paragraph "a)" of the Organization's original March 14, 2008 letter, the Organization identified violations ". . . on January 19 . . . [and] January 20, 2008. . . ." However, in paragraph "b)" of the Organization's original March 14, 2008 letter, reference is then made to "January 12, 2008 . . . [and] January 13, 2008 . . ." with no mention of January 19 or 20, 2008. By its letter of March 26, 2008, the Organization then submitted a new letter dated March 14, 2008 making paragraphs "a)" and "b)" consistent – i.e., both paragraphs identified January 19 and 20, 2008 as dates of the alleged violations.

At best, there may be "doubts" concerning the different dates alleged in paragraphs "a)" and "b)" of the two claim letters submitted by the Organization. The "doubts" are whether by its March 26, 2008 letter the Organization was submitting a new claim for January 19 and 20, 2008 as opposed to January 12 and 13, 2008. However, because the Organization specifically alleged violations on January 19 and 20, 2008 in paragraph "a)" of the original March 14, 2008 letter, those "doubts" must be resolved in favor of the Organization's position that through its March 26, 2008 letter, it was merely correcting a typographical error in paragraph "b)" of the original claim letter. Because, doubts are to be resolved in favor of arbitrability, the Board must consider the Organization's allegations of violations on January 19 and 20, 2008 as timely filed and we must therefore address the merits of those alleged violations.

With respect to the merits, the Claimants were Signal Testmen on the Milwaukee District and also held prior rights on that district. During the period January 9 through January 27, 2008, the Carrier employed a contractor to operate a specialized tree trimmer/cutter for clearing branches along the right-of-way. To assist the contractor, the Carrier assigned Maintenance of Way and Signal forces to work with the contractor. The contractor's forces worked a five day workweek with Monday and Friday rest days. According to the Carrier's August 28, 2008 letter, various combinations of Signal employees worked overtime on the weekend days of January 19, 20 and 26, 2008 performing tree service. It is undisputed that the Claimants were not only senior to the Signal employees who performed the overtime work, but also available on days the overtime work was performed. Nor is there a contention that the Claimants were not qualified to perform the overtime work. During their scheduled workweek, the Claimants were not involved working with

the contractor performing tree service. There is some question as to whether and to what extent during their regular workweek, the junior employees who received the overtime worked with the contractor performing tree service.

As in Third Division Award 41188, Side Letter No. 10 dated May 16, 1999 ("Prior rights, and the seniority that goes with it, shall be applied as being superior to an individual's relative position on the system seniority roster when an employee is stationed on their prior rights district . . . [and p]rior rights takes priority in the exercise of seniority, overtime allocation, and preference for receiving vacation or other paid for time not worked") and Public Law Board No. 5565, Award 34 govern this dispute and require a sustaining award.

In terms of a remedy, the Claimants shall be made whole for any lost overtime opportunities on the dates set forth in the claim. However, if the Claimants earned overtime on the dates set forth in the claim, those amounts shall be offset against the Carrier's liability.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of February 2012.