

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41560
Docket No. SG-41888
13-3-NRAB-00003-110310**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Massachusetts Bay Commuter Railroad**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Massachusetts Bay Commuter Railroad:

Claim on behalf of Z. Angers, B. Doherty, and M. J. Ruggiero, for 4 hours pay each for performing service on their regular assigned rest days and 8 hours pay each for being deprived the right to work on their regularly assigned work days, beginning on May 14, 2010, and continuing until this dispute is settled and the Claimants are changed back to their normal rest days, account Carrier violated Rule 20 of the Agreement when it changed the Claimants’ rest days. Carrier’s File No. MBCR-BRS-03-0909. General Chairman’s File No. AEGC-120-10-05. BRS File Case No. 14486-MBCR.”

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 February 26, 2010, the Organization filed this claim asserting that the Carrier had violated Rule 20 of the Agreement in its establishment of five-day workweek positions with rest days other than Saturday and Sunday. At the time the claim was filed the Claimants' rest days were Sunday and Monday. The claim stated, "This time claim is being presented on behalf of the incumbents working the following advertised positions. The (Section 12) Section Maintainer headquartered at W. Concord [sic] MA. The (Section 5) Section Maintainer headquartered at Salem [sic] MA. The (Section 11/3) Signal Inspector headquartered at Waltham MA." The Organization attached bulletins to substantiate this assertion and referenced another claim it had filed, "MBCR-BRS-03-0909," and indicated that while advancing that claim, it first became aware of the instant violation. The Organization informed the Carrier that "The time claim as presented will be effective sixty (60) days of the occurrence or the Organization's first hand knowledge of the dispute. The benchmark for calculation will be sixty (60) days preceding the date of this time claim and will be continuous until satisfied under the provisions of the Railway Labor Act." The Organization argues that Rule 56 (e) provides that it can file a claim at any time where the violation is continuing in nature.

The Organization maintains that the Carrier failed to comply with the requirements of Rule 20 in that even if it did have operational problems that required the change of relief days, as it claimed in its reply to the claim, it failed to show any evidence that an operational problem existed. Moreover, and most importantly, asserts the Organization, the Carrier did not attempt to negotiate or conference with the General Chairman as required by the Agreement.

In a letter dated May 18, 2010, the Carrier denied the instant claim asserting that it was procedurally defective. The Carrier pointed to Rule 56, noting that it did not contain any provision requiring "knowledge" by the Organization of an alleged violation and asserted that the Rule required that the Organization file a claim on behalf of a Claimant within 60 days of the occurrence. In addition, argues the Carrier, the Organization failed to produce any probative or reliable evidence to support the merits of its claim that a violation of Rule 20 occurred.

The on-property record of the Carrier's denials of the claim and subsequent appeals by the Organization indicates that the final decision by the Carrier was on August 20, 2010. The Organization appealed that decision on October 28, 2010.

The threshold issue that must be initially addressed is the Carrier's objection that the claim was not presented within the time limits specified in Rule 56 of the Agreement. Rule 56, in the pertinent part reads:

"RULE 56 – CLAIMS AND GRIEVANCES(a) All grievances and claims other than those involving discipline must be presented, in writing, by the employee or on his behalf by a union representative to the Division Engineer within sixty (60) calendar days from the date of the occurrence on which the grievance or claim is based."

The Organization relies on Rule 56 (e) in support of its assertion that the claim is a continuing violation and that it can, therefore, be filed at any time. Rule 56 (e) in the pertinent part, reads as follows:

"(e) 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 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) calendar days prior to the filing thereof."

A review of the record reveals that the Carrier is correct in asserting that the claim is not a continuing violations but one that had to be filed within 60 days of the occurrence as required by Rule 56 (a) of the Agreement. A continuing violation is one that pertains to the type of events that occur repeatedly, violating the same Rule with subsequent occurrences and possibly opening the door to adding more claimants to the same claim until the matter is resolved. It is not, as is the basis of the claim before the Board here, an event that was initiated by a single event that created a change going forward and allegedly violates the Agreement. The posting of a bulletin changing relief days falls into the category of a single event as it pertains to the individual Claimants here. Further, whether an alleged violation by

the Carrier is a continuing violation or not, the time limits set forth in an agreement cannot be ignored unless expressly stated in the agreement. The Board finds no such exception to Rule 56 (a) in the record.

As noted by the Board in Third Division Award 10401, citing Second Division Award 3298, the “continuing violation” device is one that is used to avoid multiple claims and the need to file a new claim every day. Even more instructive regarding the proper application of the continuing violation analysis is the finding of the Board in Third Division Award 31419, which reads as follows:

“The gravamen of the claim occurred on a date specific and continued thereafter without change. It was not a cyclical or episodic occurrence, i.e., a ‘continuing violation’ such as the issuance of a biweekly paycheck at the wrong rate of pay. The fact that Carmen were openly performing the disputed work for several months before the claim was filed establishes a prima facie case of untimely filing.”

See also Third Division Award 39528.

Here, upon our review of the record, we find that the evidence submitted in support of the three specific positions allegedly affected by the change in relief days by the Carrier, was untimely and incomplete. The Organization presented three Bulletin Advertised Positions for Signal Maintainers and Signal Inspector attached to its claim of February 26, 2010. The first is dated December 3, 1986, when the railroad was run by another Carrier, and indicates that Position No. 10 in Section No. 10, in West Concord, Massachusetts had Sunday/Saturday relief days. The next bulletin is dated June 17, 2008 and is for Position No. 40 in Section 12, in West Concord also with Sunday/Saturday relief days. The last bulletin is dated February 26, 2009 and is for Position No. 40 in Section 12, in West Concord with relief days of Sunday and Monday. Clearly, all of these bulletins pertain to the position headquartered in West Concord and not the others referenced in the claim.

The record does not contain any bulletins relevant to the Signal Maintainer position in Section 5 headquartered at Salem, Massachusetts or for the Signal Inspector position in Section 11/3 for the Signal Inspector headquartered at

Waltham, Massachusetts. With regard to these Claimants the Board finds that the Organization failed to meet its burden of proof in establishing a prima facie claim.

The bulletin for the Section 12 Section Maintainer headquartered at West Concord was posted on February 26, 2009 and, therefore, the claim filed on February 26, 2010 is untimely given the requirements of Rule 56 (a). The Claimant holding this position had notice of the change one year before the claim was submitted. Further, the record shows that the Organization presented a letter, dated October 9, 2010, from David A. Cantone who asserts that the relief days for the Signal Inspector position in Waltham were changed to Sunday and Monday in 2006. The letter indicates that when it was written, Claimant B. Doherty was holding that position. Clearly the relief days were changed years before the Claimant selected the assignment.

In addition, the Organization states in its claim that it first became aware of the change while addressing another claim "MBCR-BRS-03-0909." The record indicates that claim was filed on June 26, 2009 and confirms that the Organization had notice of the changes in relief days eight months before it filed the instant claim. However, the Board notes here that nothing in Rule 56 requires that the time frame for submitting a claim begins when the Organization receives notice. The language of Rule 56 (a) is clear and unambiguous. The claim must be presented within 60 days of the occurrence by the employee or on his/her behalf by the Organization.

The record is clear that the claim is untimely. The Claimants knew for more than 60 days before the claim was filed that their positions had relief days other than Saturday/Sunday. The failure to submit the claims in accordance with Rule 56 (a) and the inability to provide support for a prima facie claim is fatal and requires dismissal without further comment on the 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 18th day of March 2013.