

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 41697  
Docket No. MW-41004  
13-3-NRAB-00003-090340

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

PARTIES TO DISPUTE: ( (Brotherhood of Maintenance of Way Employes Division -  
( IBT Rail Conference  
(  
(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to increase the Hankinson section foreman rate of pay, pursuant to the provisions of the Memorandum of Agreement dated January 25, 1990, after the September 10, 2000 abolishment of the Rosholt Section Crew, which resulted in additional territory being assigned to the adjacent Hankinson Section Crew (System File C-05-010-007/8-00479).
- (2) The claim referenced in Part (1) above as presented by General Chairman G. A. Bell on March 18, 2005 to Manager M. S. Hanson shall be allowed as presented because said claim was not disallowed by Manager M. S. Hanson in accordance with Rule 21-1(a).
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Hankinson section foreman, Claimant D. Swartz  
‘\*\*\* Foremen’s pay shall be adjusted using the bracketed formula as prescribed in Memorandum No. 4, beginning September 13, 2000 and continuing until corrected, and other

rights restored which were lost to him as a result of the above violation.”

**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 following facts are not in dispute:

1. At all times relevant pertaining to the instant claim, the Claimant had established and held seniority as a Section Foreman in the Track Sub-department. At the time the event occurred that eventually resulted in the filing of the instant claim, the Claimant was the Section Foreman of the Hankinson Section Crew.
2. The territory assigned to the Hankinson Section Crew was adjacent to the territory assigned to the Rosholt Section Crew.
3. The Carrier and the Organization entered into a Memorandum of Agreement known to the Parties as Memorandum No. 4, effective January 25, 1990, which provided for a full and final settlement of the issue involving the expansion of duties and responsibilities of Section Foremen as a result of section crew abolishments and the extension of section territories. Said Memorandum set forth a formula based on three criteria, to wit: 1) Traffic Density (Tons, Millions); Mainline Miles; and Yard Engine Starts Per Month to determine whether the pay rate for a Section Foreman was

commensurate with the duties and responsibilities under the circumstance wherein the Carrier abolishes a section crew that resulted in additional territory being assigned to an adjacent section crew. Upon the effective date of Memorandum No. 4, the Claimant's monthly pay rate of \$2,278.14 was adjusted to \$2,350.00 which fell within the lowest of three basic pay rates established by the Memorandum in accordance with the three-prong pay formula predicated on a \$2,000.00 base rate.

4. On September 10, 2000, the Carrier abolished the Rosholt Section, which resulted in the addition of territory assigned to the adjacent Hankinson Section. Under the self-implementing provisions of Memorandum No. 4, the Organization contended, Claimant Swartz was entitled to an increase of \$100.00 in his monthly pay rate. However, the Carrier did not adjust the Claimant's monthly pay rate in accordance with the Organization's position. This dispute as to the Claimant's commensurate pay rate vis-à-vis the expansion of the Hankinson territory due to the abolishment of the Rosholt section resulted in numerous discussions between the Parties over a number of years without success in reaching a resolution of the impasse.
5. The subject claim herein was filed on March 18, 2005, four and one-half years after the Carrier abolished the Rosholt Section, which resulted in the addition of territory to the Hankinson Section. Said claim filed by certified mail, was directed to M. S. Hanson, the officer designated by the Carrier to receive claims.
6. By letter dated July 15, 2005, the then incumbent General Chairman of the Organization advised the Carrier that it had not received a response to the subject March 18, 2005 claim and asserted that as a result of the Carrier's failure to comply with the stipulated time limits of Rule 21-1(a) as set forth in the Agreement effective December 31, 2001, the claim should be paid as presented.

Based on the opposing positions of the Parties presented to the Board, we hold that the Carrier was under no obligation to respond to the stale claim filed by the Organization nearly five years after the Carrier abolished the Rosholt Section, thereby increasing the adjacent Hankinson territory. The Organization's contention that it

did not file an initial claim asserting the Carrier's failure to adhere to the self-implementing provisions of Memorandum No. 4 to grant the Claimant an increase in his monthly rate of pay because the Carrier "stonewalled" and "delayed" discussions regarding the matter of pay in question, is found by the Board to be totally unpersuasive. While admirable on its part to attempt to resolve the matter through discussions as opposed to filing a claim, the fact is that the Organization was in a position to assess the situation within the time limit of 60 days of the abolishment of the Rosholt Section to file a claim that the Carrier was simply unwilling to effect a resolution of the pay issue pertaining to the Claimant by its alleged stonewalling.

The Organization's position that the issue of the Claimant's pay nearly five years after the Carrier abolished the Rosholt Section is valid because it constitutes a continuing contractual violation in that every monthly pay period subsequent to the subject abolishment represents an incorrect amount of pay, is roundly rejected by the Board on grounds that it does not meet the definition of a continuing violation. Contrary to the well-established definition of a continuing violation, the Board finds that the Claimant's monthly pay was set by the single, definite and discrete event of the Carrier's having abolished the Rosholt Section and the fact that the Organization failed to file a timely claim asserting that the Claimant's pay had not been properly adjusted pursuant to the applicable provisions of Memorandum No. 4. In this regard we conclude that the Organization slept on its rights by failing to timely file its claim.

The circumstances would have been totally different had the Organization filed its initial claim within 60 days of the abolishment of the Rosholt Section alleging the Carrier's failure to adhere to the self-implementation of the applicable provisions of Memorandum No. 4 by failing to properly adjust the Claimant's monthly pay. Had the Organization done so, any "stonewalling" on the part of the Carrier to participate in the established procedure of handling claims could have resulted in a valid assertion by the Organization that the Claimant's monthly pay had not been properly adjusted per Memorandum No. 4 and, therefore, the Claimant's monthly pay going forward constituted a continuing claim and, as a result subject to consideration on the merits. Given our conclusion that the instant claim does not constitute a "continuing" claim, the Board is precluded from considering it on its merits.

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**AWARD**

Claim denied.

**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 September 2013.