Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41780
Docket No. SG-41937
13-3-NRAB-00003-120264

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corp.:

Claim on behalf of D. C. Brookman, for eight hours pay at the straight-time rate for every Friday he is forced to observe as a rest day, and payment at the overtime rate for all hours he is required to work on Sundays, beginning on November 25, 2010, and continuing until this dispute is resolved; and J. L. Shafer, for eight hours pay at the straight-time rate for every Monday he is forced to observe as a rest day, and payment at the overtime rate for all hours he is required to work on Saturdays, beginning on November 25, 2010, and continuing until this dispute is resolved, account Carrier violated the Agreement, particularly Rule 20, when it unilaterally and arbitrarily reassigned the Claimants' rest days to other than Saturday and Sunday. Carrier's File No. NRPC: BRS-SD-1145. General Chairman's File No. AEGC. No. 102-1101. BRS File Case No. 14684-NRPC(N)."

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 claim, which was filed on January 28, 2011, protests the Carrier's unilateral action in changing the rest days of the two Electronic Technician (ET) positions held by the Claimants from Saturday/Sunday to Friday/Saturday and Sunday/Monday, and seeks various types of compensation on their behalf for working on the weekend and having a day off during the week commencing November 25, 2010. Prior to October 1, 2008, the positions in question were five-day assignments with Saturday/Sunday rest days. The Carrier abolished those positions and, by Advertisements dated October 1, 2008, posted two ET positions with the new rest days. Copies of such advertisements, as well as their award to the Claimants effective October 13, 2008, were sent to Division General Chairmen and other Organization representatives in accordance with established procedures. The Carrier did not negotiate with the Organization's representative prior to changing the rest days on these positions. The Carrier noted that a Local Chairman was displaced as a result of the bumping process that preceded this advertisement.

On the property, the Carrier raised a procedural objection to the timeliness of the claim, because it was filed more than two years after the rest days were changed, and asserted that the operational need for such action included the fact that the equipment maintained by these ET's is a critical link in every interlocking operation as a result of the expansion and integration of its system, rather than just ten percent of the interlocking as it was previously, and that it was required to comply with new statutory mandates prescribed in the Passenger Rail Investment and Improvement Act of 2008 and the performance metrics developed thereunder to improve emergency response time so as to reduce train delays and increase customer satisfaction on its 24-hour/day, seven-day/week, 365 days/year operation. The Carrier contended that these ET positions were a seven day/week operation

properly established under Rule 20(d), not a five-day/week operation as it was previously and controlled by the provisions of Rule 20(b) and (f).

The pertinent portions of Rule 20 and Rule 56 appear below.

"RULE 20 - WORK WEEK

The established work week for all employees covered by this Agreement, subject to the exceptions contained in this rule, is forty (40) hours, and consists of five (5) days of eight (8) hours each, with two (2) consecutive days off in each seven or, four (4) days of ten (10) hours each with three (3) consecutive days off in each seven . . . . The work week may be staggered in accordance with the Company's operational requirements. So far as practicable the days off for five day assignments shall be Saturday and Sunday or Saturday, Sunday and Monday . . . . The foregoing work week is subject to the provisions which follow:

(b) On positions the duties of which can reasonably be met in five (5) days, the days off will be Saturday and Sunday.

* * *

(d) On positions which are filled seven (7) days per week, any two consecutive days may be the rest days, with the presumption in favor of Saturday and Sunday.

* * *

(f) If, in positions or work extending over a period of five (5) days per week an operational problem arises which the Company contends cannot be met under the provisions of paragraph (b) of this section and requires that some of such employees work Tuesday through Saturday instead of Monday through Friday and, if the

Chief Engineer-C&S and the General Chairman fail to agree thereon, then, if the Company nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under this agreement.

RULE 56 - CLAIMS AND GRIEVANCES

(a) All grievances or 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 occurrence on which the grievance or claim is based.

* * *

(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.

(f) For failure to comply with the time limits of this Rule shall not be considered as a precedent or waiver of the contentions of either party as to other similar grievances or claims.

(g) The time limits at any stage may be extended by written agreement between the Company and the union representative."

The Organization initially argues that this is a continuing violation properly initiated under Rule 56(e) because it first discovered this change when reviewing Work Force Accounts in mid-November 2010, and that it properly filed the claim within 60 days of November 25, 2010, the benchmark of its actual notice after discussion with the Carrier. It notes that the Carrier's failure to negotiate with the

Organization about the change of rest days as required by Rule 20(f) is a sufficient basis upon which to sustain the claim, citing Third Division Awards 7041 and 31471, and prevented it from having earlier knowledge, because receipt of an advertisement does not meet the Carrier's contractual obligation.

With respect to the merits of the claim, the Organization contends that (1) all 75 ET's have Saturday/Sunday rest days with the exception of eight ET's located in the Communication Call Centers, (2) it has always been considered a five-day operation, and (3) it is the Carrier's responsibility to establish that there are operational problems necessitating the change of rest days - a fact not proven by the record and never discussed with the Organization prior to the Carrier making the disputed change. It asserts that the Carrier relied upon a single incident where a delay was caused by the time it took to call in an employee to perform the required maintenance, and that its mere statements that it has had difficulties with call-ins on weekends is insufficient to establish the requisite need. The Organization argues that the Carrier failed to meet its burden of showing that it is not practicable to have Saturday/Sunday rest days on these two ET positions, citing Third Division Award 22242; Second Division Awards 7041 and 12015, as well as Public Law Board No. 5565, Award 8.

The Carrier first contends that the claim was untimely filed in January 2011, more than two years after the Organization received notice of the change of rest days and the Claimants were awarded their positions effective October 13, 2008. It contends that what is being protested is the act of changing the rest days, which occurred only once on October 1, 2008, and is not a continuing violation under Rule 56(e), citing Third Division Awards 14450 and 23953, even though the result of such change is ongoing. The Carrier asserts that the Organization received notice of the change in the same manner that it receives notice of all actions concerning positions – by receipt of copies of abolishments, advertisements and bid awards – and points out that the Claimants have been working on these positions with different rest days for more than two years without complaint. In fact, a Local Chairman was impacted by the change prior to the posting in October 2008.

With respect to the merits of the claim, the Carrier argues that it has the right to determine the best manner of improving efficiency of its operation (including reduction in delays and response times to unplanned system failures)

which was mandated by Passenger Rail Investment and Improvement Act and metrics developed for compliance. The Carrier notes that it had difficulty obtaining timely help on weekends through the call list, resulting in delays in service when there were unplanned system failures, and that the duties of the position could not be reasonably met in a five-day period because the subsystem maintained by the ET's is in use 24/7, 365 days a year and is critical to on time movement. It points out that in the past, when it was a five-day position, the equipment maintained was linked to less than 10% of its interlocking, but now it is a critical link in 100% of its interlocking. The Carrier contends that it has shown that operational requirements support its decision to change the rest days for these two seven-day ET positions, that it is permitted to do so under Rule 20(d) without conference and that the Organization has not proven that the job duties and responsibilities were not needed over seven days, noting the difference between duties of the position and individual frequency of performance, citing Third Division Awards 5556, 31295 and 35564.

A careful review of the record convinces the Board that the procedural objection raised by the Carrier has merit. As noted in Third Division Award 23953, the distinction between a continuing and non-continuing violation is whether the alleged violation is a separate and distinct action occurring on a particular date, or is repeated on more than one occasion. In this case, the action complained of by the Organization is the Carrier's changing of the rest days of the two ET positions held by the Claimants. The record makes clear that this change occurred on October 1, 2008, as noted in the Advertisements posted for these two positions, and became effective with the award of the positions to the Claimants on October 13, 2008. The fact that the Claimants have repeatedly worked the same schedule since that date, having other than Saturday and Sunday rest days, does not convert this to a continuing claim. There is a clear difference between continuing liability and a continuing claim. In this case, the distinct action giving rise to the claim is the change of rest days, which occurred effective October 13, 2008.

Rule 56(a) requires a claim to be presented within 60 days from the date of the occurrence upon which it is based, absent written agreement to extend the time limits. There was no such agreement in this case and January 28, 2011 falls far outside the required 60day time limit. The Board is unable to accept the Organization's contention that it first learned of the change of rest days in mid-November 2010 and officially on November 25, 2010, making that the benchmark

for determining timeliness under Rule 56. The record supports the finding that two General Chairmen and seven other representatives were sent copies of the advertisements in question on October 8, 2008, as was the accepted practice, and received notice of the eventual awards to the Claimants. It is interesting to note that, in all of the cited cases dealing with the issue of change of rest days, the claims were initiated within the requisite time period commencing on the date of the advertisements, which were found to constitute appropriate notice. See, Third Division Awards 22242 and 31471; Second Division Awards 7041 and 12015, as well as Public Law Board No. 5565, Award 8.

Because the claim was not timely filed in accordance with Rule 56, it is dismissed without reaching the merits and without prejudice to the parties' respective positions on the issue under Rule 56(f).

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 25th day of November 2013.