Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44652
Docket No. SG-46022
22-3-NRAB-00003-200661

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: **(BROTHERHOOD OF RAILWAY 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 Corporation (Amtrak).

Claim on behalf of all BRS Northern Seniority District Employees, for the re-establishment of a regular work week of Monday through Friday with consecutive rest days of Saturday and Sunday with defined meal periods, account Carrier violated the current Signalmen's Agreement, particularly Rule 20 and 22 when it arbitrarily changed the regular work week and meal periods without substantiating an operational problem that could not be met with the traditional five day work week with rest days of Saturday and Sunday. Carrier's File No. BRS-154836-TC. General Chairman's File No. 20193. BRS File Case No. 16244-NRPC(N). NMB Code No. 32.""

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 Organization filed this claim on November 27, 2018, following a job posting by the Carrier for a newly-created Signal Maintainer Relief position based in New Haven. The position was posted with work days Friday through Sunday and Monday and Tuesday, with Monday and Tuesday rest days. The Organization alleges that the Carrier violated Rule 20, Work Week, and Rule 22, Start Time, of the current Agreement when it posted the position with rest days other than Saturday and Sunday and without specifying a meal period. The Carrier did not respond to the Claim, and by letter dated March 5, 2019, the Organization filed an appeal demanding that the claim be allowed as presented because the Carrier had not responded to it within the time limits set forth in Rule 56 of the parties' Agreement.

The Carrier responded by letter dated May 6, 2019, denying that it had violated the Agreement. Specifically, the Carrier indicated that the claim was untimely filed, so that it had no obligation to respond to it. According to the Carrier, the job at issue had originally been posted in February 2018. The Claim was not submitted until November 27, 2018, well after the time limits set in the Agreement for filing a grievance. "sixty (60) calendar days from the date of the occurrence on which the grievance or claim is based." In addition, the Carrier argued, the Claim was procedurally defective because there was no named Grievant and filing a claim on behalf of the entire workforce, who are not affected, is improper. The Carrier also argued that Rule 20 of the Agreement allows for staggered work weeks, and the position at issue was posted accordingly.

In its submission, the Organization contends that the Claim must be allowed because of the Carrier's procedural violation in failing to respond to the Claim within sixty days, as required by Rule 56. Moreover, Rule 20 clearly establishes a five-day work week with rest days on Saturday and Sunday. In order to deviate from that standard, the Carrier has the burden of establishing an operational necessity for the change, which it has not done in this case. The evidence in the record is not sufficient to support the Carrier's claimed scheduling needs.

In its submission, the Carrier reiterated the arguments it made on the property.

Rule 56 sets forth a time limit of sixty (60) days for both filing and responding to claims. The record establishes that the job at issue was originally posted on February 22, 2018. However, the position had to be posted several times before it was ultimately filled in December 2018. The Claim here was filed November 27, 2018. The Organization contends that the filing was timely because the violation was continuing. But the posting was for a new position, and no employee was adversely affected by the schedule of the posted job. Without a specific employee being adversely affected, it is not appropriate to characterize the posting as a continuing violation. The Organization clearly thought that the November 2018 posting constituted a violation of the Agreement, or it would not have filed a Claim. But there is no difference between the original February 2018 Posting and the November 2018 posting that motivated the Organization to file a claim. If the November posting was a violation, so too was the February 2018 posting, and the Organization should have filed a claim at that time. Rule 56 requires that claims be filed "within sixty (60) days of the date of the occurrence." The occurrence date here is when the position was originally posted, or February 22, 2018. The Claim was not filed until November 2018, well after the sixty-day filing deadline. The Board accordingly finds that the Claim was not timely filed, and the Carrier did not violate the Agreement when it failed to respond to an untimely claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2021.

LABOR MEMBER'S DISSENTING OPINION TO NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION AWARD NO. 44652

(REFEREE Andria S. Knapp)

The Majority's findings contain several points for which dissent is necessary. Primarily, it was undisputed that Carrier failed to respond to the initial claim filed on the property; therefore, enacting the default language of Rule 56 which require the claim be allowed as presented. The Majority in an attempt to justify its failure to enforce the agreement as written, authored its findings on premise that the Organization's claim was untimely. Although unsatisfactory, that finding could be chalked up to flawed logic if not for the fact that foundation for that finding was based on a new argument and evidence included in Carrier's submission.

The Majority's findings that this improperly advertised job at issue was originally posted on February 22, 2018, was not within the on-property handling, instead was argued for the first time by Carrier in its submission and new evidence attached as their Exhibit 4. The Organization properly raised the procedural objection to new evidence and argument presented to the Board, which the Majority without explanation disregarded. The fundamental principle that Section 3 tribunals are limited to the record developed on property is not novel and has been consistently upheld by a long line of arbitral precedent. A common statement of this principle can be found in **Fourth Division Award No. 4136** wherein the Board stated:

> "As a preliminary point it must be underlined that it is well established that the National Railroad Adjustment Board will not consider material that was not submitted during the handling of a case on property. This firmly entrenched doctrine, which is codified by Circular No. 1, has been articulated in many Awards....The Board will ignore, therefore, information found in either ex parte submission which was not exchanged between the parties on property…"

For the sake of brevity, we will not belabor this point with further citations of this inherent principle recognized universally under the National Railroad Adjustment Board.

Notwithstanding the Majority going rogue in its consideration of new argument, that argument was still not governing as each job posting is a new occurrence and the agreement language in Rule 20 is clear and unambiguous in presumption of the Saturday and Sunday rest days. Arbitration has long recognized that when interpreting agreements, no alleged past practice nor alleged acquiescence can overcome clear agreement language. This well recognized principle was succinctly noted early on in **Third Division Award No. 2806**, which held:

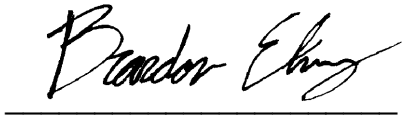
> "The Carrier seeks to justify its action by evidence of long continued practice similar to that indulged in here and refers to numerous other instances where like procedure was followed and accepted without complaint. We are not impressed. Long continued violation of a rule does not preclude its application when wrongful action is properly challenged."

Similarly in **Third Division Award No. 11031** the Board stated:

> "It has, frequently, been held by this Board that the repeated violation of an Agreement does not change it; knowledge of a rule violation is not sufficient to operate as an estoppel as the responsibility for policing the Agreement is primarily that of the Carrier and either party may at any time require the practice to be stopped and the rule applied in accordance with the terms of the Agreement."

To continue in our effort to make this discourse brief, no further citations of this axiomatic principle will be referenced. The Majority's findings in this case demonstrated a failure to enforce the agreement as written and serve to allow a violation of its terms to continue. The Majority failed in its obligation to resolve the dispute, instead passing that responsibility to another in the future.

In conclusion, the Organization respectfully dissents to the Majority's finding in this case. For all the foregoing reasons, this award and its arbitrary findings are devoid of precedential value for use by any arbitration board created under the Railway Labor Act.



Brandon Elvey

Labor Member