PUBLIC LAW BOARD NO. 5081

BROTHERHOOD OF RAILROAD SIGNALMEN

VS.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

Award No. 8
Case No. 12

QUESTION AT ISSUE:

"Claim on behalf of M. Whalen, et al for a total of 4480 hours at the straight time rate, account of the Carrier violated the current Signalmen's Agreement, as amended, particularly the Scope Rule, when it contracted the installation of 128 data communication cables, installation of new power supply and battery backup and contracted for the installation of intercom and paging system at Thirtieth Street Station, Philadelphia, Penn. Carrier File No. NEC-BRS(S)-SD-476. GC File No. RM1992-18-90."

FINDINGS:

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement of the parties; and that this Board has jurisdiction over the dispute involved herein.

The question at issue identifies three (3) separate and distinct issues which were originally separately initiated but have become combined into one subject during the on-property handling procedures. For the Board to fully understand and reach a decision on the validity - or lack thereof - of these three (3) claims, it is necessary that we begin by an examination of the initial claim letters and proceed seriatim from that point.

By a handwritten letter dated June 7, 1990, signed by Stephen Carel, a penalty claim was submitted on behalf of the following Communications department employees:

Martin Whalen	Gary Nemick	Barry Squires
Vincent Welsh	Stephen Carel	Tony Garcia
John Apostoli	James Hill	

alleging a violation of the Scope rule when - according to the claim - an outside contractor was used "to install 128 data communication cables on the 2nd - 3rd - 4th and 5th floors in the north tower of 30th St. Station." The claim as presented alleged that the work in question was started on February 10, 1990, and was completed on June 8, 1990, and took 3,000 man hours to complete.

A second handwritten letter dated June 7, 1990, signed by Stephen Carel submitted a penalty claim on behalf of the following named Communications department employees:

Martin Whalen	Vincent Welsh
Stephen Carel	Tony Garcia
John Apostoli	

alleging a violation of the Scope rule when - according to the claim - an outside contractor was used to install "a new power supply, battery backup . . . for the new telephone switch." The claim indicated that the work in question was performed during "the first two weeks of May 1990" and took "approx. (sic) 500 man hours" to complete.

A third handwritten letter dated June 7, 1990, signed by Stephen Carel was submitted outlining a penalty claim on behalf of the following Communications department employees:

Stephen Carel	Vincent Welsh
John Apostoli	Tony Garcia

alleging a violation of the Scope rule when - according to the claim - an outside contractor was used "to install and (sic) intercom and paging system in conjunction with the new telephone switch." This claim indicated NO dates on which the work in question was allegedly performed. The claim alleged that the work amounted to "480 man hours."

These three (3) penalty claims amounted to a total of 3,980 man hours of work which was allegedly performed by outside contractors all in alleged violation of the employees' Scope rule.

At the initial level of the on-property handling, these three (3) separate claims were assigned separate claim numbers and were rejected by a single letter from Carrier dated July 13, 1990, with no procedural exceptions taken relative to any aspect of the claims.

Subsequently, by letter dated August 6, 1990, Stephen Carel appealed the initial denial to the second stage of on-property grievance handling. In the letter of appeal, the initial three (3) claims took on additional size and scope. The appeal repeated the earlier contentions relative to the installation of an intercom and paging system plus the installation of the back-up power supply and battery system in connection with the "new PBX." However, in this appeal letter - for the first time - the installation of the intercom and paging system was allegedly performed "in the first two weeks of May 1990." As indicated supra, this claim when initially presented contained no claim dates. The total of 980 man hours for these two (2) claims

remained the same as initially presented - 500 man hours for the power supply and battery backup aspect of the claims plus 480 man hours for the intercom and paging system portion of the claims.

The appeal letter went on to repeat the claim relating to the 3,000 man hours of work allegedly involved in the installation of the 128 data cables which began on February 10, 1990, and which was completed on June 8, 1990. However, the appeal letter went on to allege an additional work item which had not been mentioned in the original claim letters dealing with an alleged "installation of 150 jumpers and 38 phones on the 4th floor of 30th Street" which allegedly occurred on June 7, 8 and 9, 1990, and consumed an additional 150 man hours plus "the installation of 480 jumpers and 200 phones on the 2nd and 3rd floor of 30th Street" which allegedly occurred on June 26, 27, 28, 29, 30, 1990, and consumed an additional 350 man hours.

The initial three (3) separate claims amounting to 3,980 man hours of disputed work which were submitted on June 7, 1990, became, on appeal, four (4) claims amounting to a total of 4,480 man hours of work including claim dates which are later than the date on which the original three (3) claims were initiated.

The second level handling of these claims was denied in much the same manner as at the initial level again without any procedural exceptions being taken by the Carrier to any aspects of the claim handling or to the enlargement of the initial claim including claim dates which postdated the filing of the initial claims.

When the dispute was advanced to the highest on-property appeal level, the case numbers as assigned to the initial three (3) claims were used to identify the subject being progressed. At the highest appeals level, the Carrier accepted, without exception, the expanded 4,480 man hours as the total amount of the claims being progressed. Carrier did, however, for the first time raise two procedural arguments, namely:

1. An alleged violation of Rule 47(a) because Stephen Carel was not an accredited union representative and therefore had no standing to initiate claims on behalf of anyone other than himself; and
2. An alleged violation of Rule 47(a) because the claim which covered the period beginning February 10, 1990, had not been timely presented.

Rule 47(a) of the schedule agreement reads as follows:

"RULE 47

CLAIMS AND GRIEVANCES

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

Before the Board can begin to give consideration to the merits of these disputes, we must first address the procedural contentions which have been advanced. In the first situation, there is no apparent argument relative to the status of Stephen Carel. He is not a union representative. Therefore, he has no status to initiate or progress claims on behalf of anyone other

than himself. The reply of the Organization to this issue after it was raised by the Carrier is far from being persuasive or convincing. The insinuation that somehow Carrier had a responsibility in this regard because Carrier had dismissed the local chairman is specious. The designation of accredited union representatives is the sole responsibility of the Union. Since the General Chairman was aware that his local chairman had been dismissed, it was his responsibility to promptly notify the Carrier relative to who the "union representative" would be for grievance handling as referenced in Rule 47(a). His September 26, 1991, indication to the Carrier that it was his position that "Mr. Whalen was acting as the duly authorized representative and acted appropriately on behalf of the organization (underscore ours)" does not come close to answering Carrier's contention relative to Stephen Carel's status as the initiator and progressor of the claims involved in this dispute.

It is the determination of this Board that the only proper claimant with whom we are concerned in this dispute is Stephen Carel. The claims on behalf of the other named individuals in the three claims are not properly before this Board and they are dismissed.

As to the second contention raised by the Carrier relative to the timeliness of the claim which allegedly began on February 10, 1990, we need only look to the clear and unambiguous language of Rule 47(a) which requires that claims must be presented "within sixty (60) calendar days from the date of the occurrence on which the grievance or claim is based." The only exception to

this rule requirement is found in paragraph (e) of Rule 47 which 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. With respect to claims involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient."

The Organization's only response on the property to this contention relative to the timeliness of this claim was that somewhat cavalier statement to "Lets (sic) not muddy the water . . . ." At the hearing before the Board, the Organization representative valiantly attempted to answer this issue by arguing that Carrier's failure to take exception to this time limits situation at the first two levels of on-property handling constituted "laying behind the log." Therefore, the Organization urged that Carrier's contention in this regard should be rejected by the Board.

Boards such as this have had numerous opportunities to examine arguments relative to implied waiver of time limit defenses by failure to assert them at the first opportunity and have regularly and consistently held that there was no waiver if the issue was raised at any time before the claim was appealed to a Board of Adjustment. For Example, Decision No. 5 of the National Disputes Committee created to interpret the August 21,

1954 National Agreement, specifically Article V thereof which deals with time limits for claims handling, reads as follows:

> "If the issue of non-compliance with the requirements of Article V is raised by either party with the other at any time before the filing of a notice of intent to submit the dispute to the Third Division, it is held to have been raised during handling on the property."

And again, in Third Division Award No. 14355, Referee Ives held as follows:

> "Carrier did not waive its right to invoke the time limit provision by reason of its agent's initially passing on the merits of the dispute without raising the timeliness of the claim as contended by Employees. The issue of non-compliance with the requirements of Article V was raised by Carrier on the property before the filing of a notice of intent to submit the dispute to this Board."

Therefore, it is the determination of this Board that the claim which was initiated on June 7, 1990, covering the claim period beginning February 10, 1990, was not presented in a timely manner. The language of Rule 47(e) specifically limits claims of this nature to not "more than sixty (60) calendar days prior to the filing thereof." In this instance, Carrier's reference to June 18, 1990, as the filing date and April 18, 1990, as the cut-off date has no verifiable support in the case record. The unchallenged filing date of the 3,000 man hour claim was June 7, 1990, and is a proper claim retroactively for sixty (60) calendar days prior thereto. That claim will therefore be considered beginning April 8, 1990. The claim dates from February 10th to and including April 7th are dismissed as being untimely filed.

The merits arguments which relate to these disputes had their origins in 1988 when Carrier announced plans for a major rehabilitation of the entire 30th Street Station complex. After many meetings, exchanges of correspondence and much discussion between the parties, an agreement was reached in settlement of the issues involved which agreement was set forth in a letter dated May 3, 1990, which stipulated as follows:

> "Mr. R. E. McKenzie, General Chairman
> Brotherhood of Railroad Signalmen
> 230 East Orange Street
> Lancaster, Pennsylvania 17602
>
> Dear Mr. McKenzie:
>
> This has reference to our continuing discussions pertaining to the rehabilitation of Thirtieth Street Station, most recently May 1, 1990.
>
> Without prejudice to either party's respective position and not to be referred to by either party in the future, the following resolution of our dispute was agreed upon.
>
> (1) Amtrak will perform the "riser" work as outlined in Amtrak's letter of April 30, 1990, from Assistant Chief Engineer C&S/ET J.A. Early, or guarantee 2,500 man hours at pro rata to employees that would have been used to perform such work if Amtrak for some reason does not perform the "riser" work. If for some reason Amtrak performs only a portion of the "riser" work, the 2,500 man hours will be allowed on a proportionate basis to the work not performed by Amtrak.
>
> (2) Amtrak will allow three hundred (300) hours of compensation at pro rata to be divided among BRS represented employees alleged to be aggrieved. The employees names and respective hours to be allowed will be provided to Amtrak by the BRS.
>
> It is understood that the above agreement resolves any dispute with regard to installation work that may be of interest to BRS in the rehabilitation project at Thirtieth

Street. If the foregoing accurately reflects our agreement, please sign where indicated returning one copy to me for Amtrak's record.

Very truly yours,

\s\ L.C. Hriczak
Director-Labor Relations

\s\ R. E. McKenzie
General Chairman"

As for the issues involved in the claims which relate to the "new telephone switch" and the "intercom and paging system in conjunction with the new telephone switch," there was a separate series of communications and discussions between the parties. The details of these functions were set forth in a letter dated May 10, 1990, from the Carrier to the Organization which reads as follows:

"As I advised in conversation April 30, 1990, Amtrak will be purchasing nine (9) state of the art PBX switches. Six (6) of those switches will be installed at locations on the Northeast Corridor. New switches will be installed at New York, Philadelphia, Trenton, Newark, Wilmington and Baltimore.

In view of the complexity of the switches, the advanced software associated with these systems and the warranties involved, the switches will (sic) be purchased on an installed basis. Installation must be performed by installers certified to perform such work in order to protect the warranties. The first switch is scheduled to be installed at Thirtieth Street Station, Philadelphia, in the near future.

Should you have further questions or desire to meet on this matter, please contact me to arrange a mutually convenient time."

The Organization eventually replied to Carrier on this issue as follows:

"This refers to our meeting of July 19, 1990 concerning installation and Amtrak's ownership of six new PBX's on the corridor. After

discussions with Mr. Tate, it was considered a productive meeting, having reached many understandings in principle to the following:

1. After installation and expiration of a one year warranty the BRS would assume all trouble-shooting and maintenance responsibilities of each PBX.

2. Amtrak would provide the necessary training for trouble-shooting and repair of each PBX.

3. All preparation work to be performed by the BRS.

4. BRS would be willing to work out an agreement establishing a quick response team to handle severe PBX problems.

It is our desire to work together and to finalize these understandings as soon as possible. Hopefully, we can start putting some issues to rest. Looking forward to a meeting as soon as possible to finalize."

During the handling of these claims before the Board, the Organization argued that the Board need not address the applicability of the Scope rule inasmuch as both parties have recognized the applicability of the Scope by the nature and extent of the notices, discussions and agreements reached in connection with the rehabilitation work. The Board fully agrees with this position.

In our determination of the merits of these claims, we have read, re-read and studied the language which is found in the May 3, 1990, agreement and the letters of understanding reached in conjunction with the PBX claims. The Board must accept the language of the written agreement and letters of understanding as being the intent of the parties who wrote them. We must presume that the authors of the agreement and letters of

understanding were knowledgeable individuals who knew the circumstances which were involved in the discussions which led to the agreement and who by their agreement and concurrence acquiesced in the settlements reached.

The May 3, 1990, agreement contains clear, unambiguous and far reaching language. It clearly refers "to our continuing discussions pertaining to the rehabilitation of Thirtieth Street Station . . . ." It clearly provides that the agreement reached "resolves any dispute with regard to installation work that may be of interest to BRS in the rehabilitation project at Thirtieth Street." This agreement by its language goes far beyond the "riser" work which is referenced as only one of the items involved in the agreement; which "riser" work, according to uncontroverted statements by Carrier, was actually performed by Carrier's employees (Brotherhood Exhibit No. 4) thereby negating the 2,500 man hour guarantee mentioned therein. The agreement resolves any dispute which may be of interest to BRS in the rehabilitation project. These agreed upon words can be given no other meaning.

As for the "new telephone switch" and the attendant work in conjunction therewith, the May 10, 1990, and July 25, 1990, letters of notice and understanding give tacit indication of approval by the Organization to the use of the supplier's employees to make the initial installation of the equipment. The Organization acknowledged that "after installation and expiration of a one year warranty . . ." the responsibility for and control of the equipment would accrue to the Organization represented employees. This language too can be given no other meaning.

It is, therefore, the conclusion of the Board that the complained of work in these claims is covered by the provisions of the May 3, 1990, agreement and the May 10th/July 25th letters of understanding. There has been no showing by the Organization to the contrary. The claims which were properly and timely presented to the Board are denied.

AWARD:

Claim denied.

James E. Mason
Chairman and Neutral Member

W.H. Robinson, Jr.
Carrier Member

Charles A. McGraw
Employee Member

Issued at Palm Coast, Florida
May 26, 1994