Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD FIRST DIVISION

Award No. 24134
Docket No. 43777
92-1-91-1-B-1878

The First Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Burlington Northern Railroad Company
(
(United Transportation Company

STATEMENT OF CLAIM:

"Claim of the Burlington Northern Railroad Company that the Organization's claim, on behalf '...of the Employee or Employees at Tacoma, WA working single position Utility Yardmen Assignments at Tacoma on February 19, 1990 and for the 60-day period immediately preceding February 19, 1990, per Local Chairman's letter claim No. 556-90-C54 dated February 19, 1990, claiming 100 miles (basic day) at appropriate rate for each date account required to perform service outside the scope of their Utility Yardman's Assignment,' is procedurally defective and without merit."

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

On April 10, 1983, the Local Chairman at Tacoma communicated with Carrier's Terminal Manager and stated, inter alia:

> "I'm also not sure if the manner in which you are using the utility man to couple air hoses and inspect inbound cars and outbound trains is proper. I have instructions from our General Chairman to timeslip this practice."

On May 4, 1983, the Local Chairman and the Terminal Manager held a meeting on the matter of utility men coupling air hoses. At this meeting the Manager contended that the tasks complained of were within the scope of the duties of utility men. On January 1, 1984, a bulletin was issued requiring that when utility men coupled air hoses in any track blue flag protection must be utilized.

Six and a half years later the Claim under review here was filed. It contended that Tacoma Yard Jobs 171U, 271U and 371U were required to:

> "...post blue flags, couple air hoses, and remove blue flags from tracks within the Tacoma terminal. These coupling assignments are not to assist any particular regular assignment...."

Carrier denied the Claim on the basis that it was untimely as well as on its merits. The parties' Time Limit Rule requires that:

> "All claims or grievances must be presented in writing by or on behalf of the employee or employees involved to the officer of the Company authorized to receive same, within sixty (60) days from the date of occurrence on which the claim or grievance is based."

It is obvious that this Claim was not filed within 60 days of the date of occurrence on which the claim is based. The language of the Time Limit Rule is clear.

A W A R D

The position of Carrier is affirmed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest:
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of March 1992.

LABOR MEMBERS' DISSENT
TO
AWARD NO. 24134 - DOCKET NO. 43777

The findings of Award No. 24134 alter longstanding, uniformly applied provisions of an agreement negotiated by the parties under procedures of the Railway labor Act and implemented on May 1, 1955. The provisions of Rule 126 have persisted for 46 years. Thousands of claims and grievances presented by the General Committee to Burlington Northern (BN) over the past 46 years, were resolved either through arbitration or agreement between the parties without the slightest contention on the part of the Carrier challenging the requirements and application of time limit provisions contained in the venerable rule.

The language ". . . All claims or grievances must be presented in writing by or on behalf of the employee or employees involved to the officer of the Company authorized to receive same, within sixty (60) days from the date of occurrence on which the claim or grievance is based. . ." was not interpreted or applied by the parties between May 1, 1955 and February 27, 1991 to prohibit the presentation of future claims or grievances in circumstances when the agreement was violated and the first known instance of the violation was not covered under a claim or grievance filed with the Carrier. Actions of the parties over 46 years provide unequivocal proof that Rule 126 was neither written, interpreted nor applied

as a vehicle to change the agreement without negotiation, nor to permit unlimited future violations of the agreement when unsanctioned occurrences at some obscure terminal are permitted to continue beyond 60 days. The facts presented by the Carrier established that the claim progressed to final conference between the highest Carrier Officer and the General Chairman on September 21, 1990. It was not until February 27, 1991, five months after final conference that the Carrier first adopted the position that Rule 126 was improperly applied for the past 46 years and advanced the novel procedural contentions erroneously affirmed by Award 24134.

Award 24134 failed to address the well documented, on property application of Rule 126, as evidence by numerous claims, first filed beyond 60 days from date of first violation or initial occurrence on which the claim was based. In each case, the claims handled through all steps to and including arbitration, were considered by both the Carrier and the Employees to be handled in full compliance with the stated provisions of Rule 126. Award 24134 completely ignores the traditional application of the agreement as well as the concurrence of the Carrier evidenced by the precedential decisions of arbitration awards on the property.

The preponderance of awards of the NRAB - First Division support the organization's position in the following instances:

1) Award 24134 has changed the meaning and application of the agreement without negotiation which this Division has

consistently held to be outside the purview of its jurisdiction.

2) The NRAB has no authority to change existing conditions under the guise of interpreting an old rule.

3) This Division has also issued numerous awards holding that the custom and practices relied upon by the parties for the purpose of determining the application of their rules should control in the disposition of disputes requiring interpretation of a rule.

4) This Division has previously held that time limit rules do not prohibit the submission of future claims when a situation has been permitted to persist beyond 60 days after the date when the violation first occurred.

5) The bulk of available precedent has similarly held that a default on time limits either on the part of the Carrier or the Employees shall not be considered as a precedent or waiver of the contentions of the parties as to other similar claims or grievances.

6) Previous awards of this Division have consistently held that the Employees would not be time barred from progressing future claims in circumstances when the initial claim was not filed within years from the first instance when the agreement was violated. All that has been considered necessary is to place the Carrier on notice that continued non-compliance with the agreement will not be tolerated.

This palpably erroneous award is based on tortured conclusions

which contravene and oppose the accepted, consistent, practical application of a rule which was uncontested for 46 years. It files in the face of overwhelming precedent. A new contract has been given effect by this Division which has no authority in the law governing Board action to change or modify the established application of existing rules under the guise of issuing an interpretation. The Board has exceeded its statutory jurisdiction.

L. W. SWERT
Labor Member

W. E. BIEDENHARN, JR.
Labor Member

R. K. RADEK
Labor Member

G. R. DEBOLT
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBERS' DISSENT
TO
AWARD 24134, DOCKET 43777
(Referee Fletcher)

The time limit rule is written in very simple unambiguous language that has been in the industry since at least 1954 (and perhaps even longer on some properties). The language has been analyzed; the analyzers have been analyzed; and the analyzers who have analyzed the analyzers have been analyzed. What's difficult to understand about a rule that reads:

> "All claims or grievances must be presented...to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based."

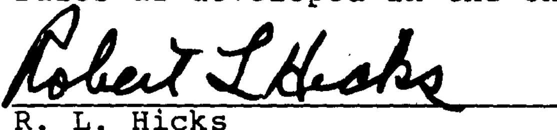
If the claim was not presented within sixty days of the date of occurrence upon which the claim or grievance is based, there is no claim. Anyone who can read and decipher a calendar and can count to sixty can readily determine if the claim or grievance is filed timely.

The claims concerned here alleged a violation occurred when the utility men at Tacoma, commencing April 10, 1983, were obligated to connect air hoses on various cuts of cars, and on January 1, 1984, when they were required to handle the Blue Flag for the cut of cars on which they were required to couple air. This did not occur at an obscure point such as Bellingham, but at Tacoma where several hundred employees are assigned to work; and the Organization was fully aware of these events at the time each occurred.

Claims for coupling air should have been filed within 60 days of April 10, 1983, and within 60 days of January 1, 1984, when the utility man was informed by bulletin of his Blue Flag obligations. Interestingly enough, no claims were filed until December 18, 1989. Even the mail cannot be blamed. Six years of sitting on their hands is an indication of six years of tacitly agreeing with Carrier's position. If any violation of a past practice occurred, it was the Organization who did so when it filed the instant claim protesting a practice of six years running.

Past practice is irrelevant when the rule is clear and unambiguous. This precedent has been established by the Board. See First Division Award 20916; Third Division Award 28034.

The Award is on point and based entirely upon the facts and rules as developed in the on-property handling.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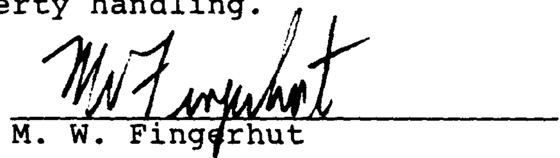
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