Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32993
Docket No. MW-32369
98-3-95-3-216

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Louisiana Division B&B Gang 1812 to perform bridge work (replacing bridge ties) on Bridge 346.9 on the Hot Springs Lead, Arkansas Division beginning November 30, 1993 and continuing (Carrier's File 940226 MPR).

(2) As a consequence of the above-stated violation, Arkansas Division B&B employes B. L. Davis, B. R. Crutcher, J. W. Wallace, G. R. Jameson, C. J. Beasley and T. N. Young shall each be allowed pay at their respective time and one-half rates for the total number of man-hours expended by Louisiana Division B&B Gang 1812 in the performance of said work beginning November 30, 1993 and continuing until the violation ceases."

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 operative facts are not in dispute. Carrier assigned Louisiana Division B&B Gang 1812 across seniority district boundaries to perform bridge work on the Arkansas Division. The work began on November 12, 1993 and continued until February 10, 1994. On January 26, 1994, the Organization filed a continuing claim retroactive to November 30, 1993.

The threshold issue is procedural. Carrier maintains the claim is not a continuing claim situation. As a result, it is untimely filed and must be rejected. The Organization, on the other hand, contends it is a situation entitled to continuing claim treatment under Rule12(d). Both parties cited prior Awards on the property in support of their respective positions on this point. In addition, the Organization contended that Carrier waived any timeliness objections by not raising the defense in its initial response on the property. Review of its March 21, 1994 response shows that Carrier did not mention any timeliness objection. The Organization cited Third Division Awards 27339 and 10644, as well as Awards referenced therein, in support of its waiver contention.

The Awards cited by the Carrier have distinct factual differences. Third Division Award 30267 did not involve the crossing of seniority district lines. It challenged the Carrier's use of an outside contractor to perform work without proper notice. In Third Division Award 30517, Claimants were members of a tie gang holding KO&G seniority. They were assigned across the district boundary to work in MKT territory. They claimed pay for overtime worked back in their home territory by junior employees. The Board held that a ". . . separate and definitive action . . ." was the operative event that occurred more than 60 days prior to the filing of the claim. Accordingly, continuing claim treatment was denied and the claim was dismissed.

Unfortunately, Award 30517 does not provide any factual details about the "separate and definitive action" to guide others in the future application of its holding. As such, we would have to indulge in an unacceptable degree of speculation to conclude that this one Award should serve as precedent for the facts at hand.

The Awards cited by the Organization dovetail well with the instant facts. In Third Division Award 28524, a dispute involving CSX, the assignment of a Pile Driver Operator across seniority lines was found to be a continuing claim situation. In Award 32331, involving the instant parties, Union Pacific employees were assigned to work in Missouri Pacific territory beginning October 26, 1992. An amendment to the claim, dated December 28, 1992, was found to be proper under the continuing claim theory, but retroactivity was denied beyond 60 days. See also Third Division Award 32394.

The instant claim involved the Carrier's assignment of its employees across seniority lines for many days. There is no evidence that the assignment was pursuant to a "... separate and definitive action ..." occurring on or before November 12, 1993. Given the Carrier's inherent right to make and modify daily assignments, there is no basis for concluding the foreign gang was not working pursuant to a series of daily assignments. As such, each day's assignment constituted a new claim for pay for that day. No claim for the next day could be advanced until after the foreign employees worked it. This is the classic type of violation for which the continuing claim theory has been recognized. Our finding on the procedural issue, therefore, must be that the instant claim is a proper continuing claim valid for the period beginning November 30, 1998.

Turning to the merits, we note that much of the argument contained in Carrier's Submission was not raised on the property. We have, as we must, declined to consider such new material.

The remaining issues have been well settled on this property for some time. Monetary Awards have been consistently awarded notwithstanding full employment of the claimants. Moreover, on the instant facts, had the Claimants been used to perform the work, they would have had to do so in addition to their regular hours and scheduled days. On this record, therefore, Claimants clearly lost overtime work opportunities. Compensation pursuant to Part (2) of the claim is warranted. See, for example, Third Division Awards 24576, 28852, 30408, 30409, 31228, 31570, 32500 and 32504.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of December 1998.