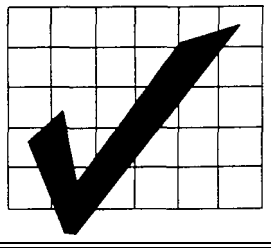

Editor's Note: One feature of The Winning Edge *will be in-depth analyses of grievance issues that face Local and District Chairpersons. This first publication will address one area of dispute commonly encountered under the time limits rule: when claims must be filed to resolve continuing violations. In subsequent issues we will address other time limit issues, as well as such topics as duty of fair representation, defense strategies at investigations, and many others.*

TIME LIMITS

Continuing Claims...Continuing Liability... Continuing Headaches

Almost all the agreements we enforce are governed by time limits for filing grievances. This was not always the case. Most of our time limit rules were established by the August 21, 1954 National Agreement. Before then, unless a particular System Board or Joint Protective Board had negotiated a time limit rule, there was no rule to govern when grievances had to be filed or appealed.

In their counter proposal to the rail unions' 1953 Section 6 notices, the carriers proposed to "Establish a [national] rule or amend existing rules so as to provide time limits for presenting claims and grievances. "

When national negotiations broke down, President Eisenhower appointed Presidential Emergency Board 106. At the PEB 106 hearings, carrier representatives argued for a national time limits rule, citing cases where claims had been successfully filed five years after the triggering event.

The unions responded that stringent time limitations on filing claims would burden the employes and permit carriers to escape liability if they could successfully hide agreement violations. Then. as now, local union representatives were pressed for time and had to juggle work, personal lives, and their union responsibilities. A time limits rule was seen as yet another impediment to enforcing the collective bargaining agreement.

On the other hand, without a time limits rule requiring a carrier to respond to grievances. the carrier was free to delay as long as it liked before responding to employe claims.

After considering each side's arguments, PEB 106 drafted a time limit rule which the parties adopted with minor changes. That rule became Article V of the August 21, 1954 National Agreement. and is the basis for almost all time limit rules now found in railroad collective bargaining agreements.

Whether or not the time limits rule is viewed as favoring one side or the other, it is a reality we must live with and do our best to ensure that our grievances do not fail because time limits have expired.

In most cases, the time limit for filing a claim is clear and obvious. But what if the violation is longstanding or occurs over and over again'? Over the years. arbitrators have developed a doctrine that has severely restricted the union's ability to file claims over continuing violations. This article examines that doctrine.

Continuing vs. Non-Continuing Violations

The following language in the 1954 National Agreement refers to filing grievances for continuing violations:

> *"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 or grievance 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 60 days prior to the filing thereof."*

In most cases, the time limit for filing a claim is clear and obvious. But what if the violation is longstanding or occurs over and over again?

At first glance, the language would seem to indicate that a claim could be filed at any time to correct a rule violation, but that the monetary remedy could only go back 60 days.

However, arbitrators have addressed this language over the years and have carved out a distinction between what they consider continuing violations and non-continuing violations. The result of this arbitral doctrine is that if the violation is deemed "non-continuing," a claim must be filed within 60 days of the initial occurrence for it to be considered timely.

Third Division Award 14450 from the 1960's is often quoted by arbitrators as defining the difference between a continuing and a non-continuing violation, as follows:

> *"... the essential distinction between a continuing claim and a non-continuing claim is whether the alleged violation in dispute is repeated on more than one occasion or is a separate and definitive action which occurs on a particular date."*

An example which illustrates the arbitral concept of "a separate and definitive action" is when the carrier abolishes a job and gives the remaining work to someone not covered by the agreement. It would seem obvious under these circumstances that every day the work is performed by the non-agreement employe the agreement is being

violated. Thus, it would appear to be a continuing violation for which a claim could be filed at any time, so long as the monetary remedy does not extend back beyond 60 days.

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However, arbitrators view the abolishment and concurrent removal of work as a one-time event which begins on the day the job is abolished. Because the violation could be traced to a **single, specific event,** the violation is held to be non-continuing.

Second Division Award 6987 addressed the abolishment of a machinist's position and the assignment of the welding work the machinist formerly performed to a boilermaker:

> *"This Board has long held that a claim is not a continuous one where it is based on a specific act which occurred on a specific date. While a continuing liability may result, it is settled beyond question that this does not create a continuing claim."*

In another dispute, the carrier abolished a yardmaster position but claims were not filed until more than a year later. Fourth Division Award 3182 held that it was the abolishment of the position which triggered the time limits provisions of the agreement:

> *"In sum, we do not find the alleged violation to be a continuing one since it involved the abolishment of a position and the subsequent transfer of the work to another employe; the Board has consistently held that such a violation is not of the continuing type."*

What, then, are examples of what arbitrators consider to be continuing violations, for which claims may be filed at any time?

Third Division Award 21782 held that improperly bulletined positions, that is, those not conforming with the applicable bulletining rules, are continuing violations because the improper scheduling of the positions occurs repeatedly week-in and week-out; therefore, each occurrence constitutes a separate violation.

Another example involved a situation where the carrier had three consecutive shifts assigned to work eight hours each, including a 20 minute meal period, in accordance with the agreement. The carrier rebulletined the jobs as nine hour assignments, including a one hour meal period. Nine months after the rebulletining, the union began filing claims for one hour overtime for each day. In Award 6 of Public Law Board 3569, the referee held that:

> *'Allegations of repetitive errors in computing compensation are precisely the type of dispute which is covered by the 'continuing violation' conditional exception to the sixty-day filing requirement."*

Another continuing violation was addressed in Award 15 of Public Law Board 4482. That award involved a dispute where it was found that the carrier was not paying the correct rate on a position. The referee held that:

> *"The event giving rise to the claim was not the abolishment of Claimant's CTC position on July I I, 1986, but rather the payment of compensation less than his protected rate for working the position of Secretary to the General Storekeeper. "*

Second Division Award 8673 also found that the payment of an improper wage rate was an example of a continuing violation.

> *"Since the claim had to do with wages allegedly owed over an extended period of time, this type of dispute may be properly classified as a continuing claim, but any remedy must be limited to a period commencing within 60 days prior to such claim. "*

Continuing Claims vs. Continuing liability

Another area of confusion is the difference between continuing claims and claims for continuing liability. Simply put, a claim for continuing liability is a claim for compensation for future recurrences of an ongoing violation. Its most common form is to request that the specified remedy be for the dates cited, "and for every day until the violation ends. "

A claim for continuing liability is a claim for compensation for future recurrences of an on-going violation.

Claims for continuing liability are clearly appropriate for violations which arbitrators hold to be "continuing," such as the job bulletining and payroll disputes described above. But they may also be appropriate for "non-continuing" violations where the original violation necessarily results in repeated, ongoing violations until corrected, sueh as the removal of work following an abolishment dispute described above.

For example, take a "non-continuing" violation like the assignment of work to non-agreement personnel after a job is abolished. Although the initial claim would have to be filed within sixty days of the abolishment, only one such claim has to be filed, provided it contains the language "and for every day until the claimant is restored to the position and the work returned to agreement coverage."

One trap that local representatives sometimes fall into is to choose not to file a single claim for continuing liability on a non-continuing violation. Instead, the local representative decides to file a series of day-to-day claims in an effort to flood the carrier with claims. Unfortunately, if the violation is found to be a non-continuing

The best advice we can give is to consider every violation to be non-continuing, and try to therefore file the c/aim within the time limits in your agreement.

one, that is, initiated by a one-time occurrence. only those claims filed within sixty days of the initial occurrence will be timely. The only way to properly file a claim in those cases is to file within sixty days of the occurrence. asking for compensation for as long as the violation lasts.

To make matters even more complicated. however. not every claim can be properly filed for continuing liability. For example, take the situation where a worker from one craft is improperly assigned your craft's work on a one-time basis. A claim could not properly be filed demanding "one day's pay for each time the violation may occur in the future." A claim for continuing liability cannot be hypothetical. The original violation must *cause* the ensuing liability. Another example would be a runaround claim. Your member is bypassed for overtime. You cannot properly claim "every day the claimant might be runaround in the future. "

The best advice we can give to every Local and District Chairperson is to consider every violation to be non-continuing. and to try to therefore file the claim within the time limits in your agreement. If the carrier's action has resulted in ongoing harm, such as a continued loss of work opportunity, the claim should contain a request for appropriate compensation until the violation ceases.

If the violation is not discovered until sixty days after the initial occurrence, we then have no choice but to try to frame the claim as a continuing violation. We suggest in such cases that you check with your General Chairman to discuss whether the claim has any chance of success,