

The Second Division consisted of the regular members and in addition Referee Abraham Weiss when award was rendered.

Parties to Dispute: { System Federation No. 114, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Electrical Workers)
 { Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That under the current Agreement, Motive Power and Car Department Electrician Helper D. A. Bilton was unjustly treated when on September 2, 1977, after having been terminated from the Locomotive Firemen's Training Program at Los Angeles, California, she was prevented from returning to her prior position as Electrician Helper at the Los Angeles Locomotive Maintenance Plant until October 12, 1977.
2. That accordingly, the Carrier be ordered to:
 - (a) Compensate the aforesaid employee at the straight time pro rata for the period September 2, 1977 through October 11, 1977.
 - (b) Pay employees' group medical insurance contributions, including group medical disability, dental, dependent's hospital, surgical and medical, and death benefit premiums for all time that the aforesaid employee was held out of service.
 - (c) Reinstate all vacation rights to the aforesaid employee.

Findings:

The Second 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 waived right of appearance at hearing thereon.

The basis of the claim is that a Carrier Personnel Supervisor on September 2, 1977 denied Claimant reinstatement as an Electrician Helper after she was terminated from the locomotive fireman training program that same day because she did not present a release form from her instructor or from the Operations Department.

Claimant states that she "later" went back to ask for her release forms so as to return to work, but that neither the instructor nor the Road Foreman of

Engines would see her. Early in October, the Personnel Supervisor called her to return to work, notwithstanding he had not obtained a release form, and she was reinstated October 12, 1977.

Claimant wrote to her General Chairman on October 31, 1977, and again on November 5, 1977 stating her grievance. A claim was filed with the Carrier by the Local Chairman on November 17, 1977.

Petitioner charges Carrier's action in preventing her return to her prior position as Electrician Helper was in violation of Rules 19(d), ("Bulletins -- New Jobs and Vacancies"), 29(d,e) ("Reduction and Restoration of Forces"), 38 ("Grievances"), and 39 ("Discipline--Suspension--Dismissal"). Petitioner also alleges that the Personnel Supervisor's instructions were inconsistent in that he told Claimant on September 2 that she could not return to work until she had the release forms, but that he called her early in October to return to work, release forms or not.

In response to the claim, Carrier's Plant Manager replied that he told Claimant "to see our Personnel Records Clerk about getting paperwork completed preparatory to her return to her former assignment. Apparently, she did not understand instructions, as no one told her to go home, and stay there without taking any further action".

The highest Carrier officer designated to handle disputes rejected the claim on the following grounds:

1. The claim was untimely in that it was submitted in excess of 60 days from date of occurrence giving rise to the claim.
2. At the time Claimant was terminated, she was advised by the Training Officer and the Road Foreman of Engines to report back to her prior job as an Electrician Helper and the procedure to follow in so doing. Claimant reported to the Plant Manager who informed her to complete the necessary paperwork and report to her former assignment, which she did not do. Claimant's loss of work time was caused by her failure to follow through on the steps necessary to return to work and hence she is not entitled to compensation as requested in the claim.

The Carrier officer also noted in his reply that Claimant had applied for and received unemployment benefits for the period September 3 - October 11, 1977.

Petitioner denies that the claim was abandoned, contrary to Carrier's argument that the claim was untimely submitted and concludes that since the Plant Manager's denial letter made no reference to violation of the time limit rule, Carrier in effect waived any objection to handling the claim per Rule 38, Grievances. Petitioner cites Third Division Award 11044 and Second Division Award 3931 in support of its position that Carrier waived the Time Limit Rule.

Petitioner adds that Carrier violated Rule 38(b) by failing to specify the reason for disallowing the claim within 60 days of its filing, inasmuch as the claim was filed November 17 and Carrier's objection to its handling because of alleged time limit violation was not made until January 30, 1978.

Carrier counters Petitioner's time limit arguments by asserting that it raised the time limit issue during the handling on the property and cites the following cases as indicating that the issue of non-compliance with procedural requirements can be raised at any time during the handling of the claim on the property: Third Division Awards 14355, 14608, 21542.

This case involves a procedural question which must be considered before the substantive issue can be reached. That issue involves consideration of Rule 38(b) which provides:

"A claim or grievance may be presented in writing by the duly authorized committee to the master mechanic (to Shop Superintendent in General Shops), provided said written claim or grievance is presented within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative), in writing, of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances. Any claim or grievance not presented within sixty (60) days of the occurrence on which based will be deemed to have been abandoned."

We have reviewed the Awards cited by the parties as well as others bearing on this issue, and they go both ways on the question of whether the raising of a time limit violation at a later step in the handling of the case on the property constitutes a waiver of such violation.

Was there a waiver under the facts of this case? The record discloses that Carrier's highest officer designated to handle disputes raised the time limit objection during the handling of the dispute on the property. On this basis we cannot say Carrier waived its right to object. The sanctity to be accorded the language agreed upon by the parties dictates that any finding that the time limitations which the parties have prescribed for themselves have been waived must be substantially based. As the Board held in Third Division Award 21542 (Wallace):

"Clearly, it would have been preferable if the question had been raised at an earlier stage in the adjustment process. It was not; nevertheless, we do not believe we are permitted to depart from well-established principles of this Board and the agreement of the parties in order to achieve what may appear to be an equitable result."

The issue of non-compliance with procedural requirements can be raised at any time during the handling of the claim on the property. This principle has been enunciated in many decisions of this Board. The Carrier raised on the property the matter of non-compliance with Rule 38(b) and it was not, therefore, barred.

Form 1
Page 4

Award No. 8399
Docket No. 8133
2-SPT-EW-'80

Based upon the record, we conclude that the claim before us was untimely filed and is therefore barred.

We express no view concerning the merits of the claim.

A W A R D

The claim is dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of July, 1980.