Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9059
SECOND DIVISION Docket No. 9116-I
2-CR-I-'82

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: (Thomas O'Hare
(Consolidated Rail Corporation

Dispute: Claim of Employes:

1. The complainant, Thomas O'Hare of Sibley Avenue, West Springfield, Hampden County, Massachusetts is a carman employee of the respondant, Consolidated Rail Corporation. (hereinafter referred to as Conrail).

2. The Consolidated Rail Corporation formed in 1974 is the legal successor in interest to the Penn Central Railroad Company. The Penn Central Railroad Company formed in 1969 was the legal successor to the New York Central Railroad.

3. Mr. O'Hare for purposes of this complaint originally began employment in the year 1953 as a carman for the New York Central Railroad. Mr. O'Hare was continuously so employed until the year 1963; at which latter time, Mr. O'Hare was furloughed.

4. Mr. O'Hare asserts that he received notice by telephone from Penn Central Railroad in the year 1973 to return to work as a carman. Mr. O'Hare accepted and returned to work as provided by said notice.

5. Between 1963 to 1973, while furloughed from the railroad, Mr. O'Hare was continuously employed by Savage Arms in Westfield, Massachusetts. Mr. O'Hare left his employment at Savage Arms when he was recalled by the railroad.

6. Mr. O'Hare has been continuously employed as a carman from his recall in 1973 to the present.

7. From 1953 to 1963, Mr. O'Hare was a member of the Carmen of America Union. Sometime during the period when Mr. O'Hare was furloughed, Mr. O'Hare's local union changed its union representation to the Transport Workers Union of America (AFL-CIO). From 1973 to the present, Mr. O'Hare is a member of the said Transport Workers Union of America (T.W.U.) Local # 2054.

8. After returning to work for the railroad in 1973, Mr. O'Hare learned that in the year 1968, two coach cleaners with less seniority than Mr. O'Hare were recalled and set-up as carmen and a third man was hired as a carman having no previous seniority. Mr. O'Hare also asserts he learned in 1973, that in the year 1963, subsequent to his own furlough, that another new employee was hired to work as a carman by Mr. O'Hare's former railroad employer, New York Central.

9. Subsequent to Mr. O'Hare's knowledge of the facts as set forth in paragraph no. 8, Mr. O'Hare complained to his union representatives regarding his position on the applicable carmen seniority roster. Although there is an extensive history of meetings and correspondence among Mr. O'Hare, officials of the T.W.U. and his employer Conrail; nevertheless, the end result was that Conrail denied responsibility and refused to make an adjustment in Mr. O'Hare's seniority position. In addition, by various letters in 1979 and 1980 from the T.W.U. to Mr. O'Hare or to his counsel, the T.W.U. has finally refused to represent Mr. O'Hare in his said seniority dispute.

10. As its defense, Conrail asserts that Mr. O'Hare was notified on May 9, 1966 for recall but that Mr. O'Hare had refused such recall. Mr. O'Hare's personnel records do indicate an unsigned notation as follows: "5-9-66, Refused call for steady employment USO Insp." Two other documents in Mr. O'Hare's personnel records for the year 1966 make reference to said May 9, 1966 notation.

11. Mr. O'Hare asserts and swears by affidavit that he never received any notice, by any means whatsoever in the year 1966 from the then New York Central to return to work. Mr. O'Hare further asserts and swears that in the years between 1963 up to his recall in 1973, that he never received any notice whatsoever for recall except for said notice in 1973.

Findings:

The Second 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 employe 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.

Claimant, a Carman, is employed by the Carrier at Springfield, Massachusetts. Claimant contends the Carrier has arbitrarily refused to adjust his seniority date to reflect twenty-seven years of service.

Claimant first entered service as an employe of the former New York Central Railroad on January 21, 1953. Claimant was furloughed in 1963. Claimant asserts that he was not recalled to service until 1973 when he accepted employment as a Car Inspector. Carrier records indicate that Claimant refused a call for permanent employment as a Car Inspector in 1966. As a consequence of Claimant's alleged

refusal, his name was dropped from the seniority roster. Claimant has specifically denied that he received any oral or written offer to return to work in 1966. In 1973, the Carrier rehired Claimant (as a new employe) and the seniority rosters since 1973 have shown Claimant's seniority date as July 9, 1973. Claimant characterizes his return to service in 1973 as a recall instead of new employment. In addition, Claimant asserts that the Carrier recalled employes with post 1953 seniority dates during the period from 1963 to 1973 before giving Claimant an opportunity to return to work. Claimant now asks this Board to adjust his seniority date to 1953, to award him an unspecified amount of back pay for the ten year period he was out of service and to provide him with retroactive benefits.

The Carrier contends that this claim is without merit and argues that company records conclusively demonstrate that Claimant refused a recall to employment in 1966. As a threshold issue, the Carrier asserts this Board lacks jurisdiction to adjudicate the claim on its merits because the claim is untimely and because the claim was not handled in accord with Section Three, First (i) of the Railway Labor Act, 45 U.S.C. § 153, First (i).

Claimant knew, in 1973, that he had been given a new seniority date. Yet, inexplicably, he failed to tender the Carrier any written protest until 1978. The Railway Labor Act requires that grievances "... shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes ..." 45 U.S.C. § 153, First (i). The usual manner is established by the parties and incorporated into the controlling collective bargaining agreement. The applicable agreements sets forth precise time limits for filing a written grievance. (Regulation 7-A-2 of the September 1, 1977 Agreement specifies a twenty day time limit for presenting a written grievance.) In this case, Claimant did not file a grievance until 1978 which was five years after the Carrier purportedly violated the agreement. Further, even after presenting his grievance, Claimant did not follow the appropriate appeal process on the property. A literal application of the Railway Labor Act precludes us from addressing this claim on its merits. See Second Division Awards No. 7156 (Marx) and No. 7799 (Roukis).

Claimant though has conceded that the claim was not prosecuted in strict adherence to Section Three, First (i) of the Railway Labor Act and the labor agreement, but, nonetheless urges this Board to assume jurisdiction because any deviations from the required procedure were mere technicalities. According to Claimant, the merits of his claim should be heard to further the policy of substantial justice and fair play in labor relations. We disagree. It would be patently unfair to subject the Carrier to potential liability on a claim which is brought five years too late. Allowing Claimant to resurrect a stale claim would undermine the equally important policy of promoting stability and predictability in the labor-management relationship. In Second Division Award No. 7453 (Eischen), we rejected the argument that this Board could assume jurisdiction based on general equitable principles when the record contains clear procedural defects. In Award No. 7453, we said:

"We cannot ignore these basic defects which render this claim defective. Nor can we treat them as 'mere technicalities' as urged by the Claimant and go to the merits of the case to 'right a wrong' or to 'do basic justice as a matter of equity and good conscience'. We are not the Chancery Court, but rather a statutorily established Board of Adjustment. We take our mandate and our authority from the Act and from Agreements which bind us just as they do the parties, which come before us. Where, as here, a claim is void ab initio, we simply have no jurisdiction to reach the merits, whatever we might think of the equities involved. In the face of a clear failure to comply with the time limits, we have no alternative but to dismiss the claim as barred from consideration."

Thus, we must dismiss this claim for lack of jurisdiction and we do so without reaching or expressing any view on the merits of the claim.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of April, 1982.