

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 12988  
Docket No. 12868-I  
96-2-94-2-6

The Second Division consisted of the regular members and in addition Referee Robert E. Peterson when award was rendered.

(James G. O'Rourke  
PARTIES TO DISPUTE: (  
(Southern Pacific Transportation Company  
( (Western Lines)

STATEMENT OF CLAIM:

"1(a) That Carrier did violate the Collective Bargaining Agreement, Rules 19, 25, 29, 32, 38, 39, 46 and Claimant's Seniority Rights, and unjustly treated, disciplined and dismissed Claimant and unjustly discriminated against Claimant;

(b) That Carrier did violate the Collective Bargaining Agreement, Rules 19, 22, 23 and Claimant's Seniority Rights, the Implementing Agreement dated May 21, 1991, the New York Dock Agreement (New York Dock Railway -- Control -- Brooklyn Eastern District; 360 I.C.C. 60, 1979), the Roseville Transfer Agreement dated October 23, 1991, the Washington Job Protection Agreement of May, 1936, the Mediation Agreement (Case No. A-7030) signed at Washington, D.C. on September 25, 1964 and the Interstate Commerce Act, Title 45, United States Code, Section 11347, and the Interstate Commerce Commission's Employee Protective Order (Finance Docket 32000) pertaining to the Denver & Rio Grande Western Railroad Company's purchase of the Carrier (SPTC);

2(a) That Claimant is contractually entitled to have his name restored to the current Sheetmetal Workers' Seniority Roster, entitled to reinstatement with seniority rights unimpaired, and entitled to compensation for all time lost, including overtime, with compensation for all vacation rights, pay and time accrued for vacation purposes, contractual back pay and lump sum payments, holiday and sick pay, medical and dental insurance premium payments, railroad retirement tax credits, and any other contractual right, privilege, or benefit provided in the Collective Bargaining Agreement between the Union and Carrier with interest thereon at a rate of 10% per annum retroactive to July 6, 1990.

(b) That Claimant is contractual entitled to all rights, privileges, and benefits provided in the Collective Bargaining Agreement, any employee protection agreement, implementing agreement, or transfer agreement between the Union and Carrier and entitled to all rights, privileges, and benefits provided in any Interstate Commerce Commission employee protective order, ruling, or directive pertaining to the Denver & Rio Grande Western Railroad Company's purchase of Carrier (SPTC)."

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.

This is the third dispute filed by the Claimant involving essentially the same or like circumstances, namely, a claim that the Carrier is wrongfully denying him a recall to service and a transfer to a stated work location.

In Second Division Award 11624 this Board dismissed a somewhat like claim filed by the Claimant on the grounds that it was untimely, that it failed to establish a Rule violation, and that no conference had been held on the property as required by the Railway Labor Act.

In Second Division Award 12198 this Board dismissed another like claim, stating in part the following:

"The Board must here conclude that the Claimant's September 28, 1988 Claim is in violation of Rule 38 of the Agreement since this Claim was not progressed in a timely manner subsequent to the Claimant's alleged injuries in May 1982, and August of 1984, nor was it progressed properly after the alleged incident of discrimination which also took place in 1984. The Claimant was a member of the Sheet Metal Workers' Association and was governed by that craft's Agreement.

In accordance with Rule 38 of that Agreement, Claims must be filed within sixty (60) days of the date of their occurrence. In fact, the Claimant waited for periods of from four to six years prior to filing Claim. On this point alone the instant Claim before the Board must be dismissed.

The instant case shows additional procedural and legal improprieties. It was not handled in the proper manner as required by the Railway Labor Act, nor does this Board have jurisdiction to rule on state or federal law and/or on Constitutional matters."

The only circumstance that appears to be different in the instant case is that the Claimant, upon learning that the Carrier had recalled some furloughed Sheetmetal Workers at Sacramento, California, filed a claim on September 10, 1990 (received by the Carrier the following day) that he had been wrongfully denied a right of recall to service for such positions.

In denying the claim the Carrier correctly noted, as this Board finds in study of the record, that although the Claimant had more seniority than some of the individuals recalled on July 5, 1990, the fact remains that the Claimant was not entitled to recall because he was not medically cleared to return to duty. The Claimant has been restricted from service for medical reasons since 1987. It was determined at that time in a psychological assessment that the Claimant was "... not capable of returning to work, as his impairments and defects would place himself and others at risk."

The record also shows that the instant claim was not filed in a timely manner. The claim was received 67 days after the date of the recall of the Sheetmetal Workers, July 5, 1990. This was beyond the time limit prescribed in the controlling Agreement for the filing of a claim, namely, 60 days from the date of the occurrence on which the claim or grievance is based.

As concerns that part of the claim whereby the Claimant asserts that he is "... contractually entitled to have his name restored to the current Sheetmetal Workers' Seniority Roster," it is clear that such portion of the claim is now moot. In its Ex Parte Submission to this Board the Carrier has stated that the Claimant's name was erroneously removed from the July 1, 1989, and 1990 seniority rosters, and that this error has since been corrected, with the Claimant's name being restored to the Sacramento Locomotive Works seniority roster with the notation that he is on medical leave.

The Board's findings as expressed in the two prior Awards involving this Claimant (Second Division Awards 11624 and 12198) apply with equal force and effect to this dispute, and for those same reasons as stated therein, as well as those reasons which we have stated above, the instant claim will be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Dated at Chicago, Illinois, this 2nd day of February 1996.