

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13870
Docket No. 13749
05-2-04-2-28

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

(Brotherhood Railway Carmen Transportation
(Communications International Union

PARTIES TO DISPUTE: (

(The Western Fruit Express Company (WFE)

STATEMENT OF CLAIM:

- “1. That; the Western Fruit Express Company has violated Rules 1, 3 and 4 of the controlling agreement between the Western Fruit Express and the Brotherhood of Railway Carmen on behalf of Supervisory Forces in the Mechanical Department dated May 23, 1946 (revised October 2, 1972).
2. That the Carrier violated Rules 15 and 24 of the January 1, 1997 Agreement between Western Fruit Express and the Brotherhood Railway Carmen, when they improperly demoted Claimant and denied him the right to exercise his seniority as a supervisor on April 28, 1999.
3. That; accordingly, the Western Fruit Express Company be ordered to compensate Foreman G. W. Klein eight hours pay at the foreman’s pro rata rate of pay for each workday commencing September 3, 2002 and continuing until he is restored to the position of Foreman in accordance with his seniority on the 1-1-2001 Western Fruit Express Foreman’s Roster.”

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 were given due notice of hearing thereon.

On February 1, 2002, one of the two exempt employees at Spokane, Washington retired. On September 3, 2002, the Carrier moved Mr. Chad Peterson into the exempt position of Refrigerator Car Supervisor. The Organization initiated a request for information by letters of September 21, 2002 and October 14, 2002 to determine the status of the position so that the Claimant could apply. The record indicates that in the second week of December, the Organization was informed that the Carrier would respond. A claim was filed January 22, 2003.

The Carrier has argued that the claim is untimely under Rule 8 1/2. It maintains that this Board cannot reach the merits of the case, due to the fact that the occurrence was September 3, 2002 and the claim was filed January 22, 2003. The Rule states:

“All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based”

The Organization contends that the Carrier engaged in a pattern to deliberately and intentionally mislead the Organization in its requests for information and then argue time constraints. Such action does not undermine the claim, and further, this claim is not procedurally improper as Rule 8 1/2 further states:

“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”

Accordingly, the Organization argues that the claim is procedurally proper and the merits must be considered.

The Board has carefully read all of the on-property correspondence and the Awards cited by the parties. The central issue at bar is whether this instant claim is a continuing claim. If it is, we may turn to merits. If it is not, then we can not.

In this case, the movement of Mr. Peterson into the Foreman’s position occurred on September 3, 2002. This is clearly a set date for the occurrence. While it may or may not have been wrong, it did not occur again and again and again, and therefore it is not a continuing violation. As stated in Second Division Award No. 13641 which is very similar to this instant case,

“If the alleged violation is a discrete act, the fact that the act continues to have consequences for a lengthy period of time does not make it a continuing violation. On the other hand, if the alleged violation is repeated multiple times over a lengthy period, a continuing violation exists.”

As such, the negotiated Agreement provides that a claim which is not a continuing claim must be filed “within 60 days from the date of occurrence” and failing that must be considered untimely. The Board however, notes that the record shows the Claimant during the course of the claim has never initially or ever filed an application for the disputed position. If the claimant had filed a proper application the issue of a time limit violation may not have become an issue. This Board has no alternative under these facts, but to dismiss the claim on procedural grounds.

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AWARD

Claim dismissed.

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 12th day of October 2005.