Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7732
Docket No. 6989-I
2-PCT-I-'78

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (John W. Kowalczyk
(Penn Central Transportation Company

Dispute: Claim of Employes:

1. Violation of Rule 33 and 34 for which I was not given a Hearing, and am now Unemployed for over a Year.

2. Violation of Rule 29 and 84 for which I have over 134, Time Claims totaling around 90,000.

3. Discrimination, Harrasment, and Job Suspension for refusing to do another Crafts Work, in Violation of the Blacksmiths Work Rule 84.

4. Violation of Rule 16 on Bulletin Notices.

5. Violation of Rule 23 Pay and Vacations.

6. Violation of Mr. Moores, 20 Percent System Wide Reduction of Forces of which No Altoona Blacksmiths were Let Go.

7. Violation of the Merger Agreement which States that No Protected Employe can ask for or be given his Severance Pay Unless His JOB is and Has been Abolished. Yet my Helper John Giasullo was Forced to take his Severance Pay by Mr. Higgins when I the Local Chairman was not there, and was told to either Sign or Do Not come in the following Monday as you will not get Payed. The section that States if an Employees Job was Posted as Abolished at one Point and he was Transferred to another Point, and his Job was again Posted as Abolished He would then be sent back to his Last Place of Employment, of which I did report to Mr. Lydon and had him call Mr. Higgins, and was told to go Home.

8. Violation of the Washington Agreement which--Call for 60 Percent of your Pay with Full Retirement and Hospitalization Insurance Credits for 5 Years of which neither My Helper or I were asked as we were the last of the New Haven Blacksmiths, and Helpers and therefore entitled to the Washington Agreement.

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.

This matter again comes before the Board pursuant to remand of the United States District Court, (KOWALCZYK vs WALSH, District Court of Massachusetts, CA 77-3426 T, August 16, 1978, Tauro, J.) wherein the Board was directed, in accordance with the procedures specified in 45 USC 153 (q) to hear the matter and further to specifically determine whether Claimant failed to process his claim in a procedurally correct manner and whether any or all of the claims are barred by the statutory limitations set out in Rule 34-A of the schedule agreement.

A careful examination of the employee's pro se submission lists numerous grievances of this employee during his employment with the former Pennsylvania R.R. Company. Each item as listed above represents a claim that must be dismissed or denied.

In addition to the claims listed above, the employee made the following claims in his submission to the Board dated November 3, 1975:

1. Between 1968 and 1973 at the Dover Street and also the "B" Street yards (Boston Division), there were violations of the Black Smith's work rules 29 and 84 for 134 time claims for myself and helper, John Giasullo.

2. Violation of Rule 23, making ME pick-up my vacation check weekly after giving them advance 30 day notice, summer, 1973.

3. Violation of Rule 16 for not posting job and sending me to another point 8 minutes of 4 p.m. check-out time. I was transferred to the maintenance shop in 1970 or 1971 at the B. Street yard without proper posting.

4. Rules 32-33-34 state that an employee has the right to remain on the payroll as long as he has a grievance pending. This was not the case with my helper and I. I was local Chairman and should have been at all hearings concerning our jobs.

5. Violation of merger agreement on job abolishment which states if my job was once abolished at the Dover Street Mechanic Department, passenger repair yards and the second time it was abolished at the "B" Street Maintenance yards, I should have been sent back to my last place of employment, which was the Dover Street yards in Boston and not Altoona Pennsylvania, as was instructed. Since Dover was permanently closed I should have been given my full weeks pay for five (5) years with all retirement and hospital benefits.

6. When the freight work at the "B" Street Yards was moved over to the Beacon Park Yard all the carmen were sent with the work, but not the Blacksmith or his helper who were also doing their work because of the merger agreement saving two jobs, one in the Mechanics Department and one in the Maintenance Department, thereby having my helper and I do all work in the Passenger and Freight Mechanical Department, plus all the work in the Bridge and Building and Track Maintenance Departments from as far as New London, Conn., Worcester, Mass., and Springfield, Massachusetts, for which I was supposed to receive a permanent blacksmith's welder's rate as agreed. I never received it. The foreman had to fill out a special form every week.

7. John Giasullos, my helper, was given severance pay although his job was never formally abolished. John was advised not to come to work anymore or else he wouldn't receive any pay. Mr. Higgins tole him this. This is in violation of our agreement and I would like to have it investigated.

8. Violation of the 20% reduction in forces because no one was laid off at Altoona, in fact 5 more people were hired. In Boston, the reduction took place.

9. Violation of all crafts rules by forcing one craft to do another crafts work for which it was given a 30 days suspention and only paid for 15 days. (Blacksmith doing Maintenance Laborer's job).

10. Violation of Rule 26 and the merger agreement, for as a protected furloughed employee, neither I nor the Railroad Unemployment Office were notified as the Penn Central hire new off the street when the Government Grant stated that all protected furlough workers be called back first. (Dover Shop Amtrack, 1973, 4, 5.)

11. Violation of Rule 90 by not giving me a competent Blacksmith helper and not providing me with a Hammer Operator when needed. (1968, 69, 70.)

12. Safety Rule violating by putting up a wall within 12" of operating hammer making it dangerous to operate - Dover Street, Boston, 1970.

13. Failure to credit my retirement fund with earnings in 1938 and 1939.

14. I would request the following gentlemen to be present at my hearing:

    A. All shop craft General Chairman.

    B. Judge Fullman, Government appointee for Penn Central reorganization.

    C. General Foreman at Boston, Mr. Lydon and Mr. Fox, Mr. Higgins, Mechanic, Mr. Cross, Supervisor.

    D. Mr. Barton, Mr. Eudihe (Labor Relations) Mr. Robbins (Job Efficiency) at Philadelphia.

    E. Mr. Masher, Vice President of Labor Relations.

    F. Mr. Moore Late President, Penn C.

15. Violation for discrimination and harrasment against the undersigned by General Foreman, Mr. Lydon, Dover Street Shop - 1969-70."

The claims as present to the Board have never been brought to the attention of the Carrier in the manner required by the Railway Labor Act, 45 U.S.C. 153 et, seq., and the schedule agreement between the parties hereto, and therefore must be dismissed.

The applicable agreement provides, in pertinent part:

> "(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 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 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee 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.
>
> (b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision,

"the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional Board of Adjustment that has been agreed to by the parties hereto as provided in Section 3, Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to."

None of the alleged violations attributed to the Carrier by the Claimant in this dispute was ever handled to a conclusion on the property; that is to say, they were not progressed along the designated line of appeal up to and including the Director-Labor Relations.

If the claimed violations were related to the application of the Merger Protective Agreement they should have been handled with the Director-Labor Relations, but they were not so handled. The violations alleged by the Claimant in this dispute were never handled with the Director-Labor Relations as required by Section 29 (a) of the Implementing Agreement.

If the claimed violations were not related to the application of the Merger Protective Agreement, they should have been handled on the property in accordance with the terms of the Schedule Agreement, i.e., in accordance with the procedure set forth in the above quoted paragraphs (a), (b) and (c) of Rule 34-A. It is a matter of record, however, that the alleged violations in this dispute were never handled on the property in accordance with the schedule agreement.

Indeed, instead of following either procedure, i.e., the one for claims related to the application of the Merger Protective Agreement and the procedure for other claims set forth under the Schedule Agreement, the Claimant chose to address his claim directly to the President of the Carrier.

It is a well established principle that a claim or grievance which has not been progressed on the property in accordance with the applicable agreement

up to and including the highest official of the Carrier designated to handle such matters cannot properly be decided by the Adjustment Board. Section 3, First (i) of the Railway Labor Act provides, in part, as follows:

> "The dispute between an employe ... and a carrier ... growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, ... shall be handled in the usual manner up to and including the chief operating officer of the Carrier designated to handle such disputes; but failing to reach an adjustment in this matter, the appropriate division of the Adjustment Board..." (Emphasis added)

The above requirements of the Railway Labor Act are explicit and unambiguous as is evidenced by numerous awards by all Divisions of the Adjustment Board. It has been consistently held that the petitioner must progress the dispute "in the usual manner up to and including the chief operating officer" on the property of the Carrier and failing to do so, the Board lacks the authority to take jurisdiction. This principle has been consistently adhered to by the Second Division of the National Railroad Adjustment Board as the below quoted award excerpts attest:

AWARD 6555 (REFEREE LIEBERMAN)

> "It is apparent from the record that the claim in this case was not handled on the property of the Carrier in accordance with the provisions of the applicable Agreement and as required by Section 3, First (i) of the Railway Labor Act and Circular No. 1 of the National Railroad Adjustment Board. The Claim is therefore barred from consideration by this Division and will be dismissed."

AWARD 6520 (REFEREE FRANDEN)

> "We have held many times that we do not have jurisdiction to adjudicate claims that have not been presented in accordance with the procedures established by the parties. Under the Railway Labor Act, Section 3 (i) and the Rules and Procedures of this Board, Circular No. 1, this Board has no jurisdiction over a claim which has not been handled on the property in the usual manner."

AWARD 6172 (REFEREE DUGAN)

> "It is clear from the record that the claim the Petitioner is attempting to assert before this Board was not handled on the property of the Carrier in accordance with the provisions of the applicable collective bargaining Agreement and as required by Section 3, First (i) of the Railway Labor Act and Circular No.

"1 of the National Railroad Adjustment Board. Therefore, the claim is barred from consideration by the Division and will be dismissed."

The alleged violations contained in Claimant's letter of October 18, 1974, which letter was accepted by the Board as notice of his intent to file Ex-Parte Submission, were not handled on the property in accordance with the applicable agreement, up to and including the Director-Labor Relations, as required by Section 3, First (i) of the Railway Labor Act and Circular No. 1 of the National Railroad Adjustment Board. Therefore, these violations, which together constitute the subject of this dispute, are not properly before the Board and must be dismissed. This is applicable to the eight claims initially presented by the employee in his letter to the Board of October 18, 1974 and the 15 claims in his submission to the Board dated November 3, 1975. The employee has made no denial as to the untimeliness and faulty procedure in his claims.

A W A R D

The Board reaffirms its dismissal of claims made by the employe through his letter of October 18, 1974 and his submission to the Board dated November 3, 1975.

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 8th day of November, 1978.