

The Second Division consisted of the regular members and in addition Referee Clarence H. Herrington when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company did unjustly fail to recall to service in line with his seniority Carman Painter James Cegielski and did hire in his place a new employee.
2. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to compensate Carman Painter James Cegielski at the straight time rate of pay for 110 days plus any additional days from date of Local Chairman Laack's letter of claim dated November 10, 1978 until he is restored to service.
3. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to pay Carman Painter James Cegielski interest at the rate per annum for any monies he may receive as result of this claim.

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 record in this dispute reveals that the Claimant holds seniority as a painter in the Passenger Car Shop at the Carrier's facilities in Milwaukee, Wisconsin with a date of May 25, 1972. The Claimant was laid off due to a reduction of force in March, 1975. On June 12, 1978, the Carrier was in need of a painter in the Locomotive Department at its facilities in Milwaukee, and employed a new man in lieu of recalling the Claimant under the provisions of Rule 27(d) reading:

"In the restoration of forces, employees will be restored to service in accordance with their seniority and shall be returned to their former position if possible. Employees failing to return to service within fifteen (15) days after date of notice to their last known address, unless an extension has been granted by the supervisor in charge and the local committee, will forfeit all seniority rights. The local committee will be furnished with a list of employees to be restored to service."

On September 15, 1978, the Organization became aware that a new painter had been employed. On October 14, 1978, the General Chairman discussed the matter with supervision, who agreed to call the Claimant and did so on October 16, 1978. The Organization filed the dispute now before this Board on November 10, 1978.

At the outset the Carrier contends that the claim is barred by the time limit as set out in Article V, 1(a) of the August 21, 1954 Agreement, and Section 3, First (i), of the Railway Labor Act and/or Circular No. 1 of the Board. The Organization's reply is that the dispute before the Board is a continuing claim.

Numerous awards of this Board have consistently held that the distinction between a continuing claim and a non-continuing claim is whether the alleged violation in dispute is repeated on more than one occasion or is a separate and definitive action which occurred on a certain date. This Board has also settled, beyond question, that while a continuing liability may result that this does not create a continuing claim. The record in this claim establishes that the occurrence on which the claim is based is the employment of a new painter on June 12, 1978. The record also establishes that no claim was presented to the Carrier until November 10, 1978, well beyond the 60 day time limit.

This Board prefers to dispose of disputes such as that herein on their merits rather than on procedural grounds. Since the claim, however, was not presented within the time limit the Board has no authority to consider the merits and the claim must be dismissed.

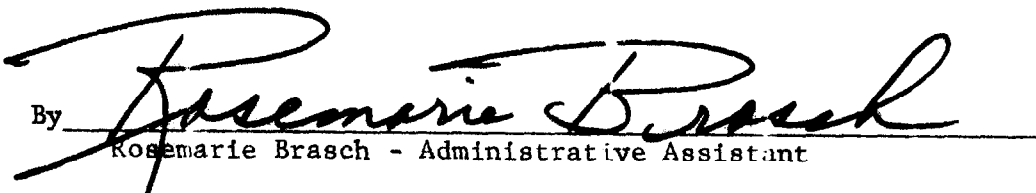
A W A R D

Claim 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 27th day of January, 1982.