

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

(Brotherhood Railway Carmen of the United States
(and Canada
PARTIES TO DISPUTE: (
(Norfolk and Western Railway Company

STATEMENT OF CLAIM:

1. That the Norfolk & Western Railway Company violated Rule 27 1/2 of the controlling current Agreement (formerly Virginian) when around August 15, 1985 Carrier filled a vacancy at Weller Yard, part of the Bluefield Territory, with a junior apprentice carman.

2. That because of such violation, the Norfolk & Western Railway Company be ordered to compensate Apprentice Carman A. W. McKinney for all time worked by Junior Apprentice Carman R. A. Halsey beginning sixty (60) days prior to the date claim was filed on October 3, 1985.

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 employes 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 a claim from a furloughed Apprentice Carman at Elmore, West Virginia (a point on the former Virginian Railroad) alleging that he should have been used to perform extra and/or relief work at Weller, Virginia (a point on the original N&W Railway) instead of a junior apprentice carman from Weller.

There are several conflicting and contradictory statements in the record of this case relative to who talked to whom, when and about what. This Board, of course, has no way of resolving such conflicting and contradictory testimony and will not attempt to do so here. See Second Division Award 9450 and Third Division Award No. 21423.

From the facts of record that are not in dispute, it is apparent that on or about April 15, 1985, a vacancy existed at Weller, VA, and that furloughed Apprentice Carman R. A. Halsey, who was located at Weller and who had indicated a desire to perform extra and/or relief work was used to fill the vacancy in accordance with the provisions of Article IV of the August 21, 1954 National Agreement. It is also a fact that Claimant A. W. McKinney who was a furloughed Apprentice Carman at Elmore, W VA had more total seniority than did Apprentice Carman Halsey.

By letter dated October 3, 1985, a claim on behalf of Mr. McKinney was presented alleging a violation of Rule No. 27 1/2 of the Virginian Rules Agreement and requested payment to Mr. McKinney for "...all time, hours, days or shifts worked by Mr. Halsey in the past sixty (60) days (retroactive from date receiving claim) ... and such computation of time and pay be continued to be made and allowed Mr. McKinney hereafter for so long as this violation continues to exist,"

From the outset of the handling of this case on the property and continuing through the handling before this Division, Carrier has argued that a procedural violation has existed which must be addressed before the merits - or lack thereof - may be examined. The procedural violation, Carrier argues, is that this claim was not initiated within the required sixty (60) days from the date of occurrence.

Article V, Section 1(a) of the August 21, 1954 National Agreement provides in pertinent part as follows:

"1(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...."

From our review of the record of this case and after hearing the presentations of the parties, we agree that the Carrier's presentation is persuasive. This claim may indeed involve one which may have a potential continuing liability, but it is one which has as its basis an alleged violation which occurred on a date certain - that is the date on which the junior employee was first used on the vacancy at Weller, VA.

The Divisions of this Board which have been charged with the responsibility of interpreting Article V of the August 21, 1954 National Agreement have consistently held that:

"...the essential distinction between a continuing 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 occurs on a particular date...." (Third Division Award No. 14450)

Here the "separate and definitive action" occurred when the junior employee was assigned to the vacancy at Weller, VA. The record shows that this action occurred on or about April 15, 1985. The claim which was presented on October 3, 1985, was well beyond the sixty (60) day time limit permitted by Article V of the August 21, 1954 National Agreement. In this regard, see also Second Division Awards 3777, 6854 and 7571.

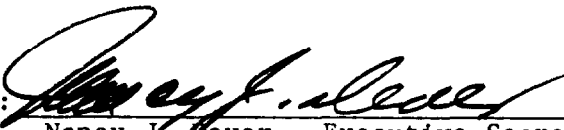
Therefore, without addressing the merits arguments which were advanced in this case, we must deny the claim because of the time limit violation.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1988.