

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19972  
Docket Number CL-19906

C. Robert Roadley, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station Employees  
PARTIES TO DISPUTE: (  
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7173)  
that:

1. Carrier violated Rules 4, 7, 18 and related rules of the **Clerks'** Rules Agreement when it arbitrarily and **capriciously** disqualified and refused to assign Mr. J. T. McMullan to position of Chief Timechecker, in the office of the General Manager, Little Rock, Arkansas, effective May 3, 1971.

2. Carrier shall now be required to compensate Mr. J. T. McMullan for the difference in rate of pay, \$3.31 per day, beginning May 3, 1971, and continuing for each subsequent work day, Monday through Friday, until the violation is **corrected**.

OPINION OF BOARD: This claim is based upon the fact that Claimant, with a seniority date of May 17, 1929, was not assigned to the position of Timechecker even though he was the senior bidder. The position was assigned to a junior employee on the grounds that **the** Claimant **was not** qualified to satisfactorily perform the duties of that position. The claim is for the difference in the rate of pay between the position of Chief Timechecker and the position held by Claimant, \$3.31 per day, effective May 3, 1971. The position of Chief Timechecker is a five day a week position, Monday through Friday, with **Saturday** and Sunday the assigned rest days.

The instant claim was received by the Carrier on June 30, 1971, filed by the Division Chairman in behalf of Claimant. The **record** shows that the position in question was occupied by the former incumbent until the close of business on April 30, 1971, the date of his retirement. Since May 1, and 2, 1971 were the assigned rest days of the position, the position was not occupied by the present incumbent until Monday, May 3, 1971.

In addition to the Carrier's position that the claim is without merit, the Carrier also avers that the claim was not timely filed **and is** therefore barred pursuant to Rule 43, of the Agreement, because it was not received by Carrier within 60 days of the date of the occurrence.

We will consider the matter of whether the claim was timely filed before proceeding with our consideration of the merits of **the** claim.

Carrier has stated that the date of occurrence upon which the claim is based was the issuance of Carrier bulletin under date of April 27, 1971 assigning a junior employee to the position in question, 64 days prior to the date claim was received by Carrier. Petitioner, on the other hand, avers that the date of occurrence is the date the junior employee occupied the position, May 3, 1971, in view of the fact that May 1 and 2 were the assigned rest days of the position and therefore the position could not have been occupied on either of those dates.

In **the** light of the foregoing the question is whether the date the bulletin was issued or the date the junior employee began work on the position is the date of occurrence.

Petitioner, in his rebuttal to the Carrier's Ex Parte submission stated:

"Due to the fact that junior employee Gill did not physically occupy the position until May 3, 1971, that date is the date of the occurrence on which the instant claim was filed or based."

"In other words, there was no way Claimant McMullan himself could know that his seniority rights had been violated until the junior employee was physically placed on the position on May 3, 1971." (emphasis added)

The record also shows that on April 27, 1971 (the date the bulletin involved was issued) the Claimant wrote to the Carrier as follows:

"I request reason in writing for not assigning me to position of Chief Timechecker advertised in accordance with Rule 8 of the Clerks' Agreement on your bulletin No. 25, dated April 12, 1971."

It is readily apparent from the foregoing that the Claimant knew that a junior employee had been assigned to the position of Chief Timechecker on the same date that the assignment bulletin was issued and that with the issuance of said assignment bulletin his seniority rights had allegedly been violated. It is the assignment of a junior employee that was the basis of the claim that Claimant's seniority rights had been violated and that assignment date was the date of occurrence. The very language of the claim, in part 1, states, in part:

"...when it (Carrier) arbitrarily and capriciously disqualified and refused to assign Mr. J. T. McMullan..." (emphasis added)

In Award No. 15662 we stated, in part:

"A claim arises or 'comes into being' when an employee has been adversely effected, and the sixty day period **commences** from that moment and not before."

In this case, the adverse effect took place when an employee junior to Claimant was assigned the position in question.

A dismissal of a claim on procedural grounds often poses a hardship and may ~~seem~~ inequitable but procedural rules have a purpose. They impose upon both parties an obligation to expedite the processing of claims so that they can be more expeditiously adjudicated.

Based upon a careful review of the record we are obliged to hold that the instant claim was not timely filed and we will therefore dismiss the claim, without consideration as to the merits.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claim was not timely filed with the Carrier.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Paulos  
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1973.

LABOR MEMBER'S DISSENT TO AWARD 19972 (DOCKET CL-19906)  
(Referee Roadley)

Deciding that the claim in this dispute was not timely filed with the Carrier and, consequently, dismissing the claim, is untenable, ill-advised, and against prior awards of this Division.

Claimant questioned the assignment bulletin inasmuch as he was senior to the employee who was to be assigned to the position, effective May 3, 1971. On many occasions, when a Carrier is questioned about or a complaint is registered pertaining to a bulletin that was issued, a Carrier has cancelled it and reissued a corrected bulletin. In other words, a bulletin is not necessarily final until its effective date. Thus, the date a bulletin carries when it is issued is not controlling; what controls is the date of the action for which the bulletin was issued. The date of the action in this dispute (permitting the junior employee to physically place on the position) was the first date on which Claimant was adversely affected by a loss in his daily rate of pay amounting to \$3.31 and continuing each work day thereafter on which he was not permitted to work the position.

As stated, Claimant was not adversely affected by the issuance of the bulletin; he was affected upon the consummation of the stated reason for the issuance of the bulletin. Until that date, May 3, he had no positive knowledge that he would not be awarded the position and, when the assignment bulletin

was posted on April 27, 1971, he had yet to suffer a diminution of earnings.


The "date of occurrence upon/<sup>which</sup>the claim is based" could only have been when the assignment of the junior employe was perfected, i.e., when he occupied the position on May 3, 1971; on that date the Claimant was adversely affected for the first time. Claim was timely filed within 60 days of that date - the "date of occurrence".

Award 15662 is cited in support of the decision to dismiss this claim. The quote therefrom is fine, as far as it went, But, what Referee Zumas otherwise held should have been equally considered by the Referee in this dispute. Referee Zumas stated:

"We cannot assume that the claims \* \* \* arose when the Agreement was signed \* \* \*."

The Agreement to which he referred was effective on a date subsequent to its having been signed by the participants, In this dispute, the effective date likewise Should have been the controlling date, and not the date the bulletin was signed and posted. Many awards uphold this contention: Awards 19422 and 15141 were cited to the Referee in full support of the issue of "date of occurrence."

The decision in Award 19972 failed to follow prior well-reasoned decisions and is totally erroneous. I dissent.

  
M. E. Fletcher  
Labor Member  
10-5-73