

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23534
Docket Number CL-22683

Dana E. Eischen, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8710) that:

1. The Company violated the Rules Agreement effective June 1, 1965, particularly Rules 1, 7, 8, 29, 38 and other Rules of the Agreement when Mr. H. L. Caudillo, Truck Driver, North Platte, Nebraska, Seniority District No. 7, seniority date November 25, 1945, was forced to vacate position of Truck Driver to a lower rated position with different rest days.

(2) The Company shall compensate Mr. H. L. Caudillo for the difference in compensation each and every work day effective January 25, 1978, between Truck Driver and Laborer. The rate of Mr. Caudillo's position as Truck Driver was \$6.9016 per hour, and for the position he was forced to occupy as Laborer, is \$6.5450 per hour. In addition, claim is for the penalty rate of time and one-half for each Saturday and Sunday that Claimant works beginning with claim date based upon the rate of Truck Driver.

(3). The Company shall include any wage increases placed in effect, whether general or cost of living.

OPINION OF BOARD: Claimant is employed as a Truck Driver for Carrier at North Platte, Nebraska. On January 24, 1978 he was notified, in writing that due to insurance problems with Kemper Insurance Company he was disqualified for truck driving and should exercise displacement rights to another job. Claimant did as instructed and bumped onto a lower rated Laborer's job with different assigned days which he worked until May 26, 1978 when he was returned to truck driving after the Carrier had switched to another insurance company which did not question Claimant's insurability.

In the meantime, however, the Local Chairman on behalf of Claimant filed a "formal claim" that Carrier had acted arbitrarily and capriciously by removing Claimant from the position of Truck Driver. In handling on the proper Carrier repeatedly asserted the lack of timeliness of this claim under Rule 38(f3); and the Organization countered that the Carrier had improperly disciplined Claimant without a hearing.

We have reviewed the record in detail and are persuaded that Carrier's threshold objection is well founded. This is not a discipline or suspension case, nor was Claimant demoted on the basis of alleged misconduct or incompetence. If his treatment at Carrier's level was unjust in his judgment, then he had recourse under the Agreement to Rule 38(f) which reads as follows:

"An employee who considers himself unjustly treated shall have the same right of investigation and appeal if written request is made to his supervisor within fifteen (15) days of the cause of complaint or date of supervisor's decision on matters brought to his attention in writing."

Under the foregoing time limitations of Rule 38(f), the written claim of February 13, 1978 was filed too late since the gravamen occurred on January 24, 1978. The Carrier preserved its timeliness objectives throughout the handling of this claim and the time defect must be deemed fatal to the claim. Because of the procedural defect we do not reach and express no opinion upon the merits of the Claim.

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 ate 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 under Rule 38(f).

A W A R D

Claim dismissed without reaching the merits.

NATIONAL RAILROAD ADJUSTMENT BOARD
By order of Third Division

ATTEST:

A. W. Paulsen

Executive Secretary




Dated at Chicago, Illinois, this 26th day of February 1982.

LABOR **MEMBER'S** DISSENT
TO
AWARD 23534, **DOCKET** CL-22683
(Referee Eischen)

Award 23534, to quote Referee Eischen from a different case, is ". ..in our judgement. just plain wrong." Claimant was removed from his job in violation of Rules **7**, 8, 29 and 38 of the Agreement. At the time of Claimant's removal a timely and legitimate claim was filed on his behalf. This claim was acknowledged by the Carrier timely and after conference, approximately a month later, denied. The letter of denial did not mention or deal with the Unjust Treatment Rule. It was not until the final level of appeal, some time later, that Carrier took the position that Claimant should have, some time back and several steps earlier, requested an unjust treatment hearing. Then **of** course, it was too late (beyond 15 days) to make a timely request.

We don't agree that the Carrier can discipline an employee, in this case remove him from his position, without notice and investigation. To hold that when this happens the employee must request an unjust treatment hearing is a tragic injustice, to say nothing of being not supported by the agreement and in violation of **the** discipline rules. To write that "the Carrier preserved its timeliness objectives (sic) throughout the handling of this claim and the time defect must be deemed fatal to the claim" simply is not supported by the facts.

'Award 23534 is "just plain wrong."


J. C. Fletcher, Labor Member

D a t e : 3-16-82