Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32439
Docket No. MW-31237
98-3-93-3-193

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committed of the Brotherhood that:

(1) The Carrier violated the Agreement when it selected six (6) junior employes to attend and receive special training for engine repairs, beginning August 26 through 30, 1991, without affording Repairman J. Wheeler the same opportunity to attend said classes in recognition of his superior seniority (System Docket MW-2398).

(2) As a consequence of the violation referred to in Part (1) above, the Carrier shall send the Claimant to the technical school for engine repairs or he shall be reimbursed for the total cost of attending said school for one (1) week, including motel and meal expenses."

FINDINGS:

The Third 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 were given due notice of hearing thereon.

In August 1991, Claimant, along with a number of other employees, was assigned as a maintenance Repairman in Carrier's Canton Maintenance of Way Repair Shop. Claimant, while possessing the ability to make engine repairs, was used mainly to repair engine compressors, at his request. In mid-August Carrier selected six Canton Repair Shop Repairmen to attend an engine repair training school between August 27 and August 29, inclusive. All employees scheduled for the engine training were junior to Claimant, and when he was not selected, the Organization on August 23 filed the instant claim contending that Rules 4 and 40 were violated.

The claim was denied at the initial level on the basis that Claimant primary job assignment was working on compressors and only employees actively rebuilding engines were sent to the school. At the next two steps of the appeal procedure the initial basis of denial was repeated without additional comment. On appeal to this Board, Carrier has repeated the on-the-property basis for denial, but additionally, it argues that the claim is flawed because it was filed on August 23, 1991, before the date of the alleged violation, August 26, 1991. Carrier argues that Rule 26 says that claims are to be filed within 60 days from the date of the occurrence on which the claim is based. It insists that the Rule contemplates that an alleged violation must occur before a claim can be filed.

The Organization responds with a contention that the "time limits" argument is new argument, not raised on the property, and, therefore it cannot be raised for the first time before this Board.

Looking at the time limits issue first, the Board concludes that not only do Carrier arguments on this point come too late, they also lack substance. The Board acknowledges that challenges to our jurisdiction can be raised anytime, even before the Board for the first time, but alleged violations of the time limit provisions of a specific rule, the situation here, are not jurisdiction. Time limit arguments pertain to procedure. Procedure established by the parties in their rules. We have long held that procedural arguments, to be considered, must be raised in the on-the-property handling, where the other party is afforded an opportunity to respond. If an alleged breach of time limit rules are not raised on the property, neither party is privileged to cite it in support of its position before this Board.

With respect to the substance of Carrier's time limit arguments, Claimant was allegedly injured when he was not selected to attend the engine repair classes that junior employees were chosen to attend. Two occurrences are involved. The first is the occurrence of non selection, the second is the date that junior employees actually commenced training. Claimant was privileged to file a claim within 60 days of either occurrence.

With respect to the merits of the matter, Rules 4 and 40 fairly read, indicate that Claimant, as a senior employee, was entitled to be selected to participate in the involved training. The claim has merit, it will be sustained.

This brings the Board to the remedy requested. The Organization has requested that Claimant be provided the training or be paid the equivalent of the cost of providing the training. The Board concludes that only the first aspect of the remedy is appropriate. Accordingly, we will order that within 60 days of the date of this Award that Carrier make arrangements to provide Claimant with training comparable to that he was not given an opportunity to participate in August 1991.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of January 1998.

CARRIER MEMBERS' DISSENT
TO
AWARD 32439, DOCKET MW-31237
(Referee Fletcher)

We are compelled to dissent to the substance of the holding of this Award. A clearer example of the majority's writing its "own brand of industrial justice" is not easily found. In this Award the Board holds in effect that the Carrier must select employees for training on a seniority basis even though there is no rule in the Agreement even requiring that the Carrier provide the additional training, and no rule providing for the basis of the Carrier's selection. In the instant case, the Carrier selected employees holding positions rebuilding engines to attend, at the Carrier's expense, additional training on engine repairs. Claimant held a position repairing compressors.

Rule 4 relied upon by the Employees involves the acquiring and application of seniority and makes absolutely no mention of its use in selection for training. Rule 40, entitled "Non-Discrimination" does not mention, inter alia, "selection for training." However, Rule 40 provides for the Carrier's compliance with state or federal laws "dealing with non-discrimination" toward employees. There is no such law (that we are aware of, and none cited by the Employees) requiring that training be offered on the basis of an employee's seniority.

The Majority has attempted to write into the cited rules language and requirements that they do not contain. This it may not do. We therefore DISSENT.

P V Varga
Paul V. Varga

Michael C. Lesnik
Michael C. Lesnik

Martin W. Fingerhut
Martin W. Fingerhut

02/18/98