

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39704
Docket No. MS-39193
08-3-NRAB-00003-050684
(05-3-684)

The Third Division consisted of the regular members and in addition Referee Robert E. Peterson when award was rendered.

(Denise Gildon
PARTIES TO DISPUTE: (
(Norfolk Southern Railway Company

STATEMENT OF CLAIM:

- “1. The Carrier violated the Agreement dated May 1, 1973, as amended, in particular Rules B-10, B-14, and others, when Clerk Denise Gildon was arbitrarily disqualified, effective February 24, 2004, from CYO Clerk position T4293 in the Central Yard Operations (CYO) in Atlanta, Georgia.
2. As a result of the Carrier’s action, effective February 24, 2004, it shall now be required to compensate Clerk Gildon daily for the difference in pay of her present assignment on NW District 59 versus a WGR 10 CYO Clerk position continuing each Monday thru Sunday, in addition, pay her overtime on her present rest days and hours of assignment versus the position she formerly held in the CYO. Also, reimbursement for all expenses incurred in connection with her return to NW District 59. Claim to be continuous until she is permitted to return to her former CYO position. (Carrier File No. CL-ATLA-CYO-04-17).”

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.

The dispute at issue, in the first instance, calls for a determination as to whether the claim is void ab initio as not having been timely progressed on the property and to the Board in accordance with Rules C-2 and C-3 of the Agreement as entered into by the Carrier and the Transportation Communications International Union (TCIU). Thereafter, if not found to be procedurally defective or time-barred, the dispute calls for a decision as to whether the record supports a finding, as claimed, that the Claimant was improperly disqualified from a Central Yard Operations (CYO) clerical position in the Carrier's CYO facility in Atlanta, Georgia, effective February 24, 2004.

The Claimant filed the claim with the Board on her own initiative. She came to the Board's Hearing without any documents as handled and exchanged on the property or with copy of ex parte Submissions as exchanged following her filing of the claim with the Board. Because an accredited representative of the TCIU was present for Board Hearings, at the request of the Claimant, he assisted her in oral presentation of the claim.

The record shows that upon being held by the Carrier to be disqualified from holding the CYO clerical position at issue, the Claimant was accorded benefit of an Unjust Treatment Hearing at the request of the TCIU pursuant to Rule C-2 of the current Agreement. That Hearing was held on April 5, 2004. The Claimant was present for the Hearing and assisted in a defense against her disqualification by a duly accredited representative of the TCIU. Subsequently, the Hearing Officer notified the Claimant by letter of April 7, 2004 that sufficient reason was found to affirm the disqualification decision.

Concurrent with the filing of a request for an Unjust Treatment Hearing, the TCIU, by letter of April 6, 2004, filed a grievance on behalf of the Claimant pursuant to other Rules of Agreement, requesting reinstatement of the Claimant to her former clerical position and compensation not unlike that mentioned in the above Statement of Claim as here presented to the Board by the Claimant.

The provisions of Rule C-2 expressly prohibit the pursuit of an Unjust Treatment Hearing if it is alleged that any other Rules of the Agreement are claimed to cover the grievance. In this respect, Rule C-2 reads in part here pertinent:

“An employee who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of investigation, hearing, appeal and representation as provided in Rule C-1 if written request which sets forth the employee’s complaint is made to his immediate superior officer and/or the designated officer with whom claims are filed, within thirty (30) days of cause of complaint.”

The highest designated Officer of the Carrier for the handling of claims and grievances on appeal denied both claims as advanced by the TCIU in a letter of July 7, 2004. Subsequently, at a claims conference of August 15, 2005, the TCIU advised the Carrier that it was withdrawing the claims without prejudice. It was upon this basis of handling that the Carrier says it considered the claims or grievance resolved, and closed its file.

Sixteen months thereafter, by letter dated November 25, 2005, the Claimant served notice of her intention to file an ex parte Submission with the Board covering what was said to be “an unadjusted dispute” between her and the Carrier “involving the Disqualification due to not displaying the skills needed to perform as a Central Yard Office Clerk.” That is, the dispute here before the Board, albeit the Statement of Claim is as was contained in the grievance as initially progressed and then withdrawn on the property by the TCIU.

There is no question, as the Carrier submits, that the claim is procedurally barred inasmuch as: (1) it was filed on the property pursuant to the provisions of Rule C-3 concurrent with a grievance filed pursuant to Rule C-2; (2) it constitutes an improper pyramiding of the same grievance; (3) it was withdrawn by the TCIU on the property; and (4) it was not timely and properly progressed to the Board pursuant to the provisions of Rule C-3.

The pertinent provisions of Rule C-2 are as hereinbefore quoted. Rule C-3 in part here pertinent read, as follows, with underscoring added by the Board:

“(c) [All] claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer’s decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act.”

The Claimant had nine months from the date the claim was denied by the Carrier’s highest designated Appeals Officer, July 7, 2004, to institute proceedings before the Board. It was not, however, until some 16 months after such denial of the claim that the Claimant filed a notice of intent to progress the claim to the Board, or seven months beyond proscribed time limitations. Therefore, notwithstanding that the claim is procedurally defective or barred for other stated reasons as set forth above, the Board has no alternative but to conclude that it is time-barred from consideration by the Board under the clear and explicit provisions of Rule C-3, supra.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 26th day of May 2009.