Award No. 19117
Docket No. SG-19156

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Thomas L. Hayes, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ERIE LACKAWANNA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Erie Lackawanna Railway Company that:

(a) Carrier violated the current Signalmen's Agreement, as amended, particularly Rule 60, when it dismissed Signal Maintainer William R. Spence, Jr., on or about March 30, 1969, without a hearing.

(b) Carrier further violated the agreement, particularly Article V of the August 21, 1954 Agreement, when it did not respond within sixty days to the General Chairman's July 25, 1969, appeal to Chief Engineer R. F. Bush.

(c) Carrier should now be required to restore Mr. Spence to his original position of Signal Maintainer, second trick, West End Interlocking, with seniority and all other rights unimpaired and pay him from April 2, 1969, until he is restored to service.

(General Chairman's File: 350. Carrier's File: 171-SIG).

OPINION OF BOARD: In the handling of this case on the property and in its Statement of Claim, Petitioner alleged a violation of Rule 60 and the Time Limit on Claims rule, Article V of the August 21, 1954 National Agreement.

The merits of the original claim are not before the Board and we are called upon to decide only whether there has been a violation of the aforementioned Article V. The facts in the case follow:

On February 19, 1969, Claimant William R. Spence, Jr. applied for the position of Signal Maintainer on a form indicating that, if accepted, his connection with the Carrier would be temporary and could be terminated at any time during the first ninety days, if the applicant was not approved by proper authority. On that basis Claimant was put to work the same day.

On March 27, 1969 notice was sent to Signal Supervisor P. M. Miller that Claimant's application for employment was disapproved.

On March 30, 1969, Claimant was notified that he was disqualified for all service and not to report back to work.

On April 9, 1969, Carrier notified General Chairman and New York Division Local Chairman that Claimant was out of service on the ground that he was "Physically Disqualified."

On May 9, 1969, claim was instituted with the Signal Supervisor on Claimant's behalf, contending that Carrier's action was in violation of Rule 60 of the applicable agreement, or that Claimant was permitted a hearing under the rule. The claim was denied on May 28, 1969.

Thereafter the General Chairman appealed the claim to the Chief Signal Engineer who subsequently denied it.

On July 25, 1969, the General Chairman appealed the claim to the Chief Engineer.

On October 9, 1969 the General Chairman wrote the Chief Engineer in part as follows:

> "This claim was timely presented and appealed up to and including your office. The claim was not denied by you within the 60-day period stipulated in Article V, Section 1(a) of the August 21, 1954 Agreement. Claim should be allowed as presented."

The Time Limit on Claims Rule, Article V of the August 21, 1954 National Agreement provides that "all claims or grievances must be presented in writing by or on behalf of the employe involved * * *" and that "Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance" or "If not so notified, the claim or grievance shall be allowed as presented * * *" The time limit applies to decisions by the carrier on appeals as well as to original decisions.

The General Chairman appealed the claim to the Chief Engineer on July 25, 1969 and the claim was not denied by the latter until October 31, 1969, more than sixty days after the appeal was filed.

As stated previously, Claimant went to work February 19, 1969 and was notified on March 30, 1969 that he was disqualified for all service and that he was not to report to work. Carrier points out that the notice to Claimant was within the ninety (90) days period provided within Rule 32 of the applicable agreement.

Rule 32 reads in part as follows:

> "No seniority will be established by a new employe unless his employment application is approved. Employment applications not disapproved within ninety (90) days will be considered accepted."

Since an appeal of a claim or grievance "on behalf of the employe involved" must be disallowed within 60 days from the date of filing or the claim or grievance is allowed as presented, we must first reach the conclusion that Claimant held employe status for the purpose of the Time Limit on Claims Rule if we are to find a violation.

Carrier contends that Claimant did not have any seniority and did not have any employe status under the rules agreement and that Time Limit on Claims Rule therefore has no application here.

The meaning of Rule 32 is that an applicant for employment, who is put to work, is in a probationary status during the first ninety days. His application need not be accepted and Carrier may notify Claimant at any time before the expiration of the ninety day period that his application has not been approved. In the instant case, Claimant was told that he was disqualified and not to report back about thirty nine days after he began to work.

The rejection of Claimant's employment application was within the prerogative of the Carrier and since Claimant did not have permanent employe status prior to the filing a claim in his behalf, we find the Time Limit Rule has no application to the appeal on his behalf to the Chief Engineer. Thus, there was no violation of this Rule. In this connection we would direct attention to Award No. 3152, Third Division.

In Award 3152 Claimant filed his written application for a position as Trackman with the Carrier on July 17, 1944. He was permitted to go to work the same day. His application was not approved and he was relieved of work on August 2, 1944. The Referee Edward P. Carter, stated in the Opinion:

> "It is the contention of the Organization that Claimant became an employe and a party to the current Agreement when he was assigned to work on July 17, 1944. The Carrier contends that as Claimant's application for employment was rejected, he never was an employe within the meaning of the current agreement * * *"

The Referee went on to say in Award 3152:

> "The claim resolves itself into the question whether Claimant was an employe within the scope of the current Agreement when he was relieved from service on August 2, 1944."

The Referee concluded: "No basis for a sustaining award exists."

In another case, Award 3520 of this Division, Claimant made application for employment with the Carrier on June 14, 1943. She began work on June 22, 1943 and her acceptance as an employe was conditioned upon Carrier's approval within 60 days. The Referee held as follows: "When the application was disapproved within that period, whether with or without a justifiable reason, her relationship with the Carrier terminated without the accrual of any rights whatever under the contract."

In view of the facts, reasoning and precedents herein before set forth, we conclude that the claim must be denied.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 12th day of April 1972.

Dissent to Award 19117, Docket SG-19156

The Majority in Award 19117 has erred. In order to arrive at its award, it was necessary for the Majority to consider whether or not there was substance in the claim as originated rather than to confine itself to the procedural matter which constituted the only question before us. Because of the time limit violation we were precluded from considering the substantive merits of the claim itself. Award 18047, et al.

While we also differ with the Majority in other matters considered in the award, we will not follow its example of considering questions not before us, other than to state that our silence is not consent.

Award 19117 being in error, our dissent is registered.

/s/ W. W. Altus, Jr.
Labor Member

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