

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25712
Docket Number MS-25531

Robert W. McAllister, Referee

PARTIES TO DISPUTE: (Helen M. Dix
(
(Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

- "1. Is claimant entitled to protective pay for January through June of 1983;
2. Is claimant entitled to compensation for losses due to having to protect a position in Needles, California while living in Lakewood, California;
3. Is claimant entitled to compensation for travel and/or moving expenses;
4. Is claimant entitled to compensation for pay loss due to non-use of Guaranteed Extra Board positions;
5. Is claimant required to follow normal grievance/dispute procedures."

OPINION OF BOARD: By date of November 4, 1983, the Board was served with multiple notices of Attorneys Michael D. Hanson's and Kirk S. Garvin's intention to file Ex Parte Submissions on behalf of Claimant, Helen M. Dix, and eighty-two (82) other Claimants. On June 10, 1985, Messrs. Hanson and Garvin appeared at a hearing before the Board with the referee in attendance. Thirteen (13) cases were chosen by the Claimants' attorneys as representative of all disputes. The representative cases are Dockets 25531, 25532, 25533, 25536, 25546, 25570, 25573, 25587, 25601, 25604, 25606, 25608, and 25611.

Although each individual Statement Of Claim contains multiple contentions, each statement has the following question in common:

"Is the Claimant required to follow normal grievance/dispute procedures."

The Carrier herein responds in the affirmative and argues it has no record of any claim being filed with it as required by Rule 47 of the applicable Agreement and, accordingly, contends the dispute is not properly before the Board. Rule 47, Time Limits on Claims and Grievances, is set forth below:

"47-A. All claims or grievances shall be handled as follows:

- (1) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. 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 (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.
- (2) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.
- (3) The requirements outlined in paragraphs (1) and (2), pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by Carrier to handle such disputes. All claims or grievances involved in a decision by the highest 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. It is understood, however, that the parties may by agreement in any particular case extend the 9-month period herein referred to.

- 47-B. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under Rule 47, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.
- 47-C. Rule 47 recognizes the right of representatives of the Organization, party hereto, to file and prosecute claims and grievances for and on behalf of the employees they represent.
- 47-D. Rule 47 is not intended to deny the right of the employees to use any other lawful action for the settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier.
- 47-E. Rule 47 shall not apply to requests for leniency."

The Claimants assert that, regardless of the Carrier's contentions with respect to Rule 47, this Board should find that the issue of timeliness has been waived by the conduct of the Carrier and/or representatives of the Organization. Accordingly, leniency is requested. The complained of Carrier's conduct is bad faith handling which assertedly prejudiced the Claimants' rights. The Organization is charged with failure to represent the Claimant and/or refusal to process the grievance. Lastly, the Claimants argue Rule 47-B states that a claim may be filed at any time for a continuing violation and avers that one or more of the issues raised herein constitute a continuing violation of the controlling Agreement.

Notwithstanding the above, it is represented that the Claimants have at all times attempted to follow precisely the mandates of the Organization's Agreement along with the appropriate provisions of the Railway Labor Act. Claimants refer to the numerous submissions and affidavits presented herein which are viewed as demonstrable proof the Claimants attempted to bring this matter before Carrier and Organization officials. Further proof is claimed to be found in the actions of the Claimants' representatives who have attempted to meet with the Carrier's highest designated officials, and, just one week prior to the hearing before the Board on September 4, 1984, the Carrier is alleged to have rebuffed these efforts.

With respect to the insistence this Claim was advanced on the property, there is no evidence of record which in any manner shows any Claimant to have taken any steps in accordance with Rule 47 or that any claim was handled on the property.

The record does establish that one of the eighty-three (83) Claimants did address a letter to the Carrier's President complaining about a variety of issues. The President responded and advised that employee that an ongoing dispute existed between the Carrier and the Organization and that the Organization had appealed to Special Board of Adjustment No. 605. The record also contains evidence of correspondence between a Claimant and the Organization General Chairman. Nevertheless, these documents do not constitute the filing of a claim or grievance. This record simply does not contain any information which would establish that any Claimant attempted to or, in fact, presented the Carrier a written claim or grievance prior to coming to this Board.

The National Railroad Adjustment Board was created as the dispositive appellate body in the progression of grievances. It is not a forum of first impression. Section 3, First (i) of the Railway Labor Act [45 USC Section 153, First (i)] states:

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this matter, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 3, First (v), [45 USC, Section 153, First (v)] required the Board to meet within forty (40) days after June 21, 1934, to adopt such rules as it deemed necessary to control proceedings before the respective divisions. On October 10, 1934, the Board in compliance issued Circular No. 1 which provided in pertinent part:

"All data submitted in support of employee's position must affirmatively show the same to have been presented to the Carrier and made a part of the particular question in dispute."

Thus, it is evident that any petitioner must comply with the requirement that a dispute will be handled in the "usual manner" before this Board will exercise jurisdiction. See supporting Third Division Awards 25130, 25131, 25252, 25298, 25346, 25035, 25077, 25081, and 25085.

This Board reaffirms that Claimants are "required to follow normal grievance/dispute procedures." Herein, there is no probative evidence to establish that any Claimant followed the requirements of Rule 47 and filed an on-the-property claim or grievance. Additionally, no evidence has been produced which supports the assertion the Carrier and/or the Organization in any manner thwarted any Claimants' right to utilize the provisions of Rule 47.

The contention that an on-the-property conference had been sought and was denied by the Carrier ignores the fact that such request was subsequent to the filing of these disputes with the Board. Likewise, reference to the continuing nature of the claims are moot inasmuch as up to the day of the Hearing on June 10, 1985, no claim had been presented to the Carrier on the property. Finally, it is implied the Carrier's intransigence rendered any on-the-property handling fruitless and futile. This allegation is not supported by the evidence of record. It is no more than an unsupported assertion. By assuming that the Carrier would have denied a claim based upon past experience or belief does not relieve Claimants from resorting to Rule 47.

Lastly, despite our reference to various Claimant's Submissions and affidavits, we note all were made for the first time in the Submission to this Board. It is a well settled doctrine that such evidence is "new" and may not be considered when it is presented to the Board, and it is the very first instance of its use. See Third Division Awards 21966, 21463, 21411, and 21882 for similar analysis.

In view of the foregoing analysis, we hold none of the Claims was handled in the usual manner on the property. The record is lacking in substantial evidence to support the Claimants' rationale for not following the Agreement's procedure for grievance handling. Accordingly, none of the Claimants complied with the requirements of the Railway Labor Act and Board Circular No. 1. We, therefore, must dismiss the Claims.

FINDINGS; The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

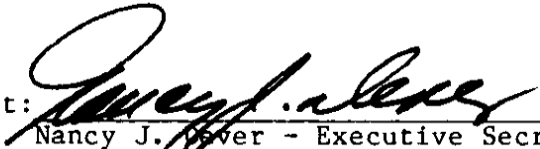
That this Claim is barred.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Pever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of November 1985.