

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

PARTIES TO DISPUTE: ( (Brotherhood of Maintenance of Way Employees  
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier refused to allow Roadway Machine Operator Helper D. W. Scott to perform machine operating work in accordance with his seniority beginning on August 25, 1987 (System File MW-87-160/466-64-A).

(2) As a consequence of the violation involved in Part (1) hereof, the Claimant shall be allowed:

'...the difference in rate of pay of a track laborer and that of a relief roadway machine operator from August 25, 1987, through October 16, 1987, and for 8 hours at the straight time rate of pay of a relief machine operator beginning October 19, 1987 and continuing until such time Mr. Scott is allowed to perform service in accordance with his seniority.'

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 waived right of appearance at hearing thereon.

We are forced by our review to first address the Carrier's contention that the Claim was barred as untimely progressed. The Carrier raised this issue on property in its last response wherein it argued that the incident upon which the Claim was based occurred in May, 1987, while the Claim was not filed until well beyond the sixty (60) day Agreement period for progression of claims.

We note that the Claimant was notified by the Carrier's letter dated May 15, 1987, that he was assigned by Bulletin No. 135 to Air Compressor group (SPO 1617) at Langtry, Texas. There is no dispute that the Claimant believed his forced assignment to a position he did not desire was unacceptable and noted same to the Carrier by letter dated May 18, 1987.

The record on property indicates that this Claim was filed on October 23, 1987, after Claimant was furloughed from his track laborer's position effective October 16, 1987. Our review of the basis of this Claim finds the following. Because of a no bid, Claimant was force assigned by letter dated May 15, 1987. He declined. When the Organization filed its Claim on October 23, 1987, it noted that Claimant bid on other positions.

This Board will not often accept hypothetical circumstances or claims based upon what might occur. Initially, whether or not the Organization could have filed Claim in May is irrelevant, given that they had a concrete dispute when Claimant actually bid on Bulletin No. 140, dated May 6, 1987. It is clear from the record that the bulletin went "no bid" from all other employees, but Claimant was denied his bid for that position. The position went to a junior employee. The facts establish that he was advised of the Carrier's position that his bid would not be accepted for a full year.

Even after this incident wherein a junior employee established a machine operator seniority date ahead of Claimant, this instant claim was not filed. The record also establishes that Claimant was informed around June 9, 1987, that junior employees were working as relief machine operators, while Claimant "could not be used to perform relief machine operator duties...."

Based upon the above stated facts, the instant Claim is centered upon Carrier's action of May, 1987. It is at that time that the Claimant was clearly denied a bid based upon the Carrier's invoking Article 8, Section 2(b). Whether or not that position had merit, the Claim was not filed. The Carrier's denial of the Claimant's bid was not timely protested.

The Claim at bar is when the "Carrier refused to allow [Claimant] to perform machine operating work in accordance with his seniority beginning on August 25, 1987." However, the Carrier refused in May, 1987, and at times thereafter. The Claimant was fully informed by June 9, 1987, that junior employees were working positions he had seniority rights to bid for; positions to which Claimant was refused, based upon a notification that "his bid was not accepted for a period of one year." That is the date of the occurrence on which this Claim is based. Claimant bid on a job and was denied on a specific basis. That was the time to file the Claim denying him the right to bid for a year or arguing against forced assignment. This is not a continuing claim, although it has continuing consequences. If the Organization wished to challenge the Carrier's act which did occur in May or June, it had to respond within the time limits of Article 15, Section 1(a) when the Carrier acted to deny for one year the Claimant's right to bid.


After reviewing these instant facts, we lack any alternative but to ignore the merits. We have reviewed the Organization's position and Awards on timeliness, but find them inapplicable to these circumstances (Second Division Award 1552; Third Division Awards 27339, 12516, 11570). We are forced to dismiss the Claim as being untimely (Third Division Awards 27327, 26328, 26689, 20631, 26124; Second Division Award 11515).

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1991.

LABOR MEMBER'S DISSENT  
TO  
AWARD 28848, DOCKET MW-28626  
(Referee Zusman)

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THIRD DIVISION

The Majority dismissed this docket based on the erroneous presumption that the claim had not been properly handled on the property by the Organization. Without rearguing the merits of whether the claim was a continuing claim and timely appealed, it is important to point out that the Carrier did not challenge the timeliness issue at the initial level of declination. Having failed to raise that issue at the initial level, the Carrier effectively waived its right to raise the issue at a later level of appeal. This Board has consistently held that the failure of either party to timely raise a procedural issue constitutes a waiver of any defense based on said issue. See Second Division Award 1552, Third Division Awards 11570, 12516, 27339 and Fourth Division Award 1839. Therefore, I dissent.

Respectfully submitted,

  
D. D. Bartholomay  
Labor Member