

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36423
Docket No. MW-35381
03-3-99-3-254**

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

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned and used Sectionman A. A. Kelzer, Machine Operator R. R. Kienow and Sectionman R. W. Erickson (subsequently replaced by Machine Operator J. L. DeMarce) to fill three (3) new machine operator positions on Seniority District 11, instead of assigning furloughed District 11 Machine Operators D. E. Longworth, J. C. Shafer and M. A. Loken beginning January 6, 1997 and continuing (System File T-D-1315-H/MWB 97-06-05AN BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants D. E. Longworth, J. C. Schaefer and M. A. Loken shall ‘ . . . each receive pay for eight hours each work day, Monday through Friday beginning January 6, 1997 until such time they are recalled, or the positions are filled by a bulletined assigned employee. We further request that Claimants receive pay equal to any and all overtime paid Mr. Kelzer, Mr. Kienow, Mr. Erickson and Mr. DeMarce during claimed period of time, and that Claimants be accredited for any and all other benefits, vacation and lump sum payment accreditation, accreditation for Feb. 7, labor protection, insurance, retirement and unemployment payments.’”**

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 Organization filed claim on behalf of three furloughed Machine Operators for violation of seniority. It argued that the Carrier created three new Group 4 Machine Operator positions in Aberdeen, South Dakota, on January 6, 1997, and permitted junior employees to operate the machines, rather than recall the Claimants from furlough. Because the established positions on Seniority District 11 were in existence for more than 30 days and the Carrier failed to recall in order of seniority, the Carrier violated Rule 2 (Seniority) and Rule 9 relating to new positions of more than 30 calendar days' duration.

The Carrier on the property raised a procedural issue of time limits and argued initially that the Claimants were "junior to the employees the Carrier placed upon the positions." While this issue is contested in that the Organization maintains it is irrelevant as the central issue is the Carrier's failure to recall the Claimants from furlough, the issue of time limits is central. The Organization similarly argues that there was no time limit violation.

The Board reviewed the claim at bar. The claim was filed by letter dated March 3, 1997. It was received on March 4, 1997 and that date must be counted on this property as the first date under Rule 42A, which permits a claim to be proper if received "within sixty (60) days from the date of the occurrence on which the claim or grievance is based." The claim before the Board states that the Group 4 position was created on January 6, 1997.

The record in this dispute rests upon the occurrence on which the claim is based. The Organization filed its claim based upon January 6, 1997 and if that is the proper date, then this is a claim within the Rule and timely presented upon which the merits must be considered. However, the Carrier stated that the position was created earlier and presented payroll records to demonstrate that the Group 4 position was created on January 1, 1997. The Board notes that the Organization acknowledges that the position was operated on District 11 on January 3, 1997. If so, that would bar the claim as late indicating 61 days. However, even a review of the record indicates that the payroll records demonstrate that the position was worked on January 2, 1997 and not January 6, 1997, as alleged by the Organization. We also note that the defense of the Organization is that Aberdeen, South Dakota, has both District 11 and 14 located within the same city and that they could not file a claim until it worked District 11, which was on January 6, 1997.

The Board is not persuaded that this is the case. We find no probative evidence to support that argument. Nor do we find rebuttal to the Carrier's position that "... the position was created on District 11 and was operated by District 11 employees at a date earlier than January 3, 1997." The evidence in this record is convincing that the date of occurrence was the date the position was created and said position was used on District 11 prior to the date of January 6, 1997 and prior to the date necessary for compliance with Rule 42. Accordingly, this claim was not timely filed and must be dismissed without consideration of merits.

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 17th day of March 2003.

LABOR MEMBER'S DISSENT
TO
AWARD 36423, DOCKET MW-35381
(Referee Zusman)

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 the claim 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, 33153, 33516 and Fourth Division Award 1839.

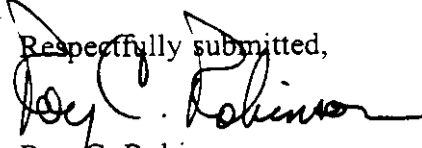
Moreover, a review of Award 36421 adopted this same date reveals the following concerning a continuing claim:

"Rule 42.A. of the parties' Agreement requires claims or grievances to be presented in writing within 60 days of the occurrence on which the claim or grievance is based. The Carrier contends that the three March 7, 1997 claims were untimely since they were presented well after 60 days of November 1996, when Sectionmen, Truck Drivers, Foremen and Machine Operators were first assigned to snow removal equipment.

The three claims presented on March 7, 1997 allege a continuing violation of Rule 9 of the parties' Agreement, in the Board's opinion. The Organization is contending that the Claimants should have been recalled from furlough beginning January 10 or 11, 1997, and continuing throughout that winter. This is certainly an alleged continuing violation of their purported rights under Rule 9. As such, Rule 42.D. governed their claims. Pursuant to Rule 42.D. the March 7, 1997 claims were timely presented. However, no monetary relief may be allowed the Claimants for more than 60 days prior to March 7, 1997 in accordance with the clear terms of Rule 42.D." (Emphasis in original)

A review of the above-quoted findings reveals that the same issue was argued by the Carrier in that case and the same findings should have been held in this dispute.

Therefore, I dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member

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