

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38381
Docket No. CL-39344
08-3-NRAB-00003-060227
(06-3-227)

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(CSX Transportation, Inc.)

STATEMENT OF CLAIM:

"Claim of the System Committee of the TCU (GL-13129) in behalf of Yolanda Smith.

- (a) The Carrier violated the CSXT/N Rules Agreement effective June 1, 1999, particularly Rule 5 (bulletin rule), when on November 24, 2004 Claimant bid, and on November 25, 2004, was awarded position 0191-R02 at Cleveland, OH only to have Carrier change the award 4 days later from Claimant to an individual J. Lauren, who had no clerical service.
- (b) Claimant Y. Smith, beginning November 25, 2004 and to continue each and every work day hereafter, be allowed the difference in rate between the 2 positions, if any, and in addition eight (8) hours penalty pay at the overtime rate of pay until this violation is corrected.
- (c) This claim is being presented in accordance with Rule 45 and should be allowed."

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 cause of action made subject of the dispute here at issue is not unlike that which was advanced on behalf of the Claimant in a prior claim which the Board heard in Third Division Award 38380 involving a contention that the Claimant was unjustly treated when a position she had just been awarded was given to a new hire. The Board denied the claim in that case. The only difference in that prior claim and the instant claim is that when the original claim was filed it was progressed under the unjust treatment provisions of Rule 44, whereas the instant claim for a compensatory penalty is progressed under Rule 45.

Rule 44 states:

"An employee who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of investigation, hearing or appeal and representation, as provided in rules 42 and 43, if written request setting forth the employee's complaint is made to his immediate superior within thirty (30) days of the cause for complaint." (Emphasis added.)

As concerns application of the above emphasized language to the instant dispute, we concur with the interpretation placed on this Agreement provision by the Board in Third Division Award 25169, wherein it was stated as follows:

"[The] specific language of Rule 44 indicates that such a hearing is not available to an employee in every instance. Instead, it is only available where the issue is not addressed in some other portion of the Agreement. This is the meaning of the phrase, 'otherwise than covered by these rules.'"

In the circumstances, having initially elected to protest the action taken by the Carrier under the unjust treatment provisions of Rule 44, it must be recognized that the Claimant did not thereafter have the right to progress a separate claim involving the same subject-matter under other Rules of the Agreement. As the Carrier submits, in seeking to do so, the Claimant and the Organization on her behalf are attempting to have the proverbial "second bite of the apple" involving the same dispute, or something which the Board is not prone to endorse. The instant claim will, therefore, be denied in a finding that the Claimant is estopped by the provisions of Rule 44 to seek Board review of the claim here presented.

AWARD

Claim denied.

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 21st day of December 2007.