

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41733
Docket No. MS-41964
13-3-NRAB-00003-120325**

The Third Division consisted of the regular members and in addition Referee Martin W. Fingerhut when award was rendered.

**(Nicholas P. Lengares
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)**

STATEMENT OF CLAIM:

“This dispute concerns the denial on or about January 25, 2011 of my proper position on the seniority roster for train dispatchers for the carrier's Northeast Corridor which was posted on that date. I filed a seniority protest and subsequent grievance in accordance with the terms of the applicable working agreement. My grievance was finally denied by the Carrier's Director of Labor Relations, William H. Robinson, Jr., by letter dated August 18, 2011. Under the applicable working agreement, I have nine (9) months from that date to lodge this notice of intent to file a submission with the NRAB.

I am seeking an award on the questions of whether my request to correct my train dispatcher seniority was improperly denied, and if so, what the remedy should be.

As to relief, I request that my seniority date be corrected to reflect my service as a train dispatcher as having commenced on December 12, 1992, rather than on May 25, 2009 as shown presently; that my name be placed in its rightful position on the train dispatcher's seniority roster for the Northeast Corridor; and that I receive any and all back pay and lost benefits that I may have lost, or that I may lose in the future, by virtue of the improper placement of my name on the train dispatcher's seniority list.”

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.

On March 23, 2011, the Claimant filed a protest claiming that the seniority roster posted by the Carrier for his craft of Train Dispatchers incorrectly listed his date of seniority. The roster showed his position as No. 168, with a seniority date of May 25, 2009. The Claimant asserted that his roster position should be adjusted based upon a seniority date of December 12, 1992. In response, the Carrier advised the Claimant that his roster protest was denied on the basis that the August 31, 2009 decision rendered by the Board in Third Division Award 39931 rendered his protest moot. In the remainder of the claim handling on the property, as well as before the Board, the parties continued to disagree on the impact of Award 39931, as well as other issues raised by the Carrier, including its defense that the Claimant had forfeited his seniority date of December 12, 1992, when he failed to return from a leave of absence in a timely manner on April 18, 2002.

Inasmuch as a finding by the Board that Award 39931 would be dispositive of this dispute and would render it moot, we turn first to that Award. Award 39931 set forth the dispute as arising on March 30, 2004, when the Carrier notified the Claimant that it had denied his bid for a position as Train Dispatcher in favor of another employee who the Claimant argued had less seniority. The Carrier's defense to the claim filed by the Claimant was that the Claimant had forfeited his seniority on April 18, 2002, when he did not return to service following a leave of absence. The Board, with Referee Martin H. Malin participating, described the dispute before it, as follows:

“The parties are in considerable conflict over whether the Claimant forfeited his Train Dispatcher seniority by failing to return from his leave of absence by April 18, 2002, whether he was covered by the Carrier's Agreement with the American Train Dispatchers, whether the Claimant could properly bid on the Philadelphia position, and whether the Claimant filed the claim with the proper Carrier officer.”

The Board held that it not need reach any of these issues because the initial claim was not filed with the Carrier in a timely manner. The Board concluded:

“On its face, the claim indicates that the occurrence on which the claim is based arose on March 30, 2004, when the Claimant was informed that he was not awarded the position in Philadelphia. Yet, the Claimant did not file his claim until June 3, 2004, outside the 60-day period during which the claim must be filed. Accordingly, the claim was not filed in a timely manner and must be denied.”

Returning to the facts of the case now before the Board, the Claimant's basis for contending that Award 39931 is inapposite to this dispute was stated in an appeal letter dated May 24, 2011:

“The decision upheld the denial of a previous grievance by me concerning among other things, the removal of my name from the seniority roster in 2004. The NRAB decision did not address the merits of that grievance, but rather was rendered on the sole ground that my earlier grievance was filed two days late.

. . . the NRAB's decision, because it was not issued on the merits, is not relevant to the determination of my correct seniority or in deciding this protest and grievance. I contend that each seniority list that is issued and fails to correct my seniority as requested above constitutes a new and/ or continuing violation of my seniority rights.”

It is clear from the above that the Claimant is not rejecting the relevance of Award 39931 on the basis the issue therein is not the same issue as the one now before the Board - that is, whether the Claimant forfeited his 1992 seniority date, but solely

because the issue was not decided on the merits but was instead dismissed as untimely. The Claimant apparently takes the position that a failure to comply with a procedural requirement is, ipso facto, without prejudice to the right to file a subsequent claim requesting the same relief. The Claimant cites no authority for that proposition, and we find such contention particularly unpersuasive in this case. On the contrary, with respect to issues involving seniority, the parties made it particularly clear that it was their intent to allow an employee only a single opportunity to challenge his seniority status. Thus, Section 3 of the parties' Agreement deals with the subject of seniority rosters. Section 3(b) provides, in pertinent part:

“The seniority date first appearing on any roster shall be subject to protest and correction for a period of sixty (60) days after posting If protest is not made in writing within this period, the names and dates shown thereon shall be considered as permanently established.”

The use of the term "permanently established" patently does not support the Claimant's position that "each seniority list that is issued constitutes a new violation of my seniority rights" with the right to protest every time a yearly roster is posted. While the protest was by way of a claim in Award 39931, rather than a roster protest, we do not find such "difference" as requiring a different result. In effect, the filing of the claim by the Claimant was the equivalent of a roster protest; the 60-day time limit for filing the claim was equivalent to the time limit for filing a protest. In either instance, the failure to act in a timely manner resulted in the Claimant's seniority becoming "permanently established." The violation of the Claimant's seniority rights, if it occurred at all, occurred when the Carrier refused the Claimant's bid on March 30, 2004, for the position of Train Dispatcher - the subject raised by the Claimant in the dispute that resulted in Award 39931. The time limits for challenging the Carrier's action can be traced to that point in time. Because Award 39931 is final and binding, we find it to be dispositive of the issue of the Claimant's seniority rights. Accordingly, the instant claim must be dismissed.

AWARD

Claim dismissed.

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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 30th day of September 2013.