NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 10754
Docket No. 10554
2-D&RGW-MA-'86

The Second Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Denver and Rio Grande Western Railroad Company

Dispute: Claim of Employes:

1. That the Carrier violated Rules 15, 23, 27, 45 and Supplement "L" of the Agreement effective July 31, 1980, when it refused to permit Machinist D. G. Shoemate (hereinafter referred to as Claimant) to exercise his seniority on February 12, 1982, and displace junior employe.

2. That, accordingly, Carrier be ordered to compensate Claimant an amount equal to all overtime earned by the junior employe he was not permitted to displace.

3. That the Carrier violated the time limit provisions of Rule 31 of the current Agreement.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

The dispute herein arose because the Claimant, upon abolishment of his machinist position in the Carrier's facility at Denver, Colorado, was not permitted to displace a junior employe occupying position of Roadway/Machine and Equipment Repairman, the Carrier taking the position that Claimant did not meet Carrier's qualification for the position of Roadway/Machine and Equipment Repairman. The record shows that the Roadway/Machine Equipment Repairman position was bulletined on January 21, 1982 (Bulletin No. 35) as follows:

> "There is a vacancy for one Machinist to work as Work Equipment Road Machinist, 7:30 A.M. to 4:00 P.M., and to work in Work Equipment Shop, 7:00 A.M. to 3:30 P.M. when not on road work. Successful bidders must possess a valid Colorado Driver's license, six (6) months experience in work equipment or equivalent outside experience. REST DAYS - Saturday and Sunday.
>
> Bids will be received in the office of the Master Mechanic until noon, Tuesday, January 26, 1982."

On January 28, 1982, the position was awarded to Machinist R. R. McDaniel, whom the Carrier considered the senior qualified applicant.

In the handling of the dispute on the property, time limit issues also developed and are present in the dispute before the Board. The Board must initially dispose of the time limit contentions. The Organization contends that Carrier's Chief Mechanical Officers, one of the Appeals Officers on the property, did not decline the Claim within sixty days from date of appeal as required by the time limit rule of the applicable Agreement. The Carrier contends that the denial of the Chief Mechanical Officer was not rejected within sixty days, nor was appeal to the next highest officer perfected within sixty days; that the Claim was not properly handled on the property; is not properly before the Board and must be dismissed. The Carrier also contends that the designation of "General Chairmen" by the Organization was not proper.

A review of the record shows that the Claim was appealed to the Chief Mechanical Officer by the General Chairman in letter dated September 27, 1982. The Chief Mechanical Officer denied the Claim in letter dated December 7, 1982, which was beyond the sixty-days time limitation. The Chief Mechanical Officer, being an Appeals Officer, knew or should have known, the requirements of the Time Limit Rule. By his failure to comply with the sixty day time limit requirement, the Claim became allowable under the Time Limit Rule.

By Memorandum of Agreement dated May 31, 1963, the Carriers and the Organizations representing certain employes subject to the jurisdiction of the Third Division, created what was described as the National Disputes Committee to decide, among other disputes, those arising under the Time Limit Rule of August 21, 1954, which contained provisions similar to, if not identical with, Section 1 through 5 of Rule 31 of the Agreement involved herein. On March 17, 1965, the National Disputes Committee issued unanimous Decision No. 15 wherein it was held:

> "The National Disputes Committee rules that there was no extension of the time limit within which the Superintendent was required to render his decision on appeal, and finds that such decision was not rendered within the applicable time limit.

> "In this connection the National Disputes Committee points out that where either party has clearly failed to comply with the requirements of Article V the claim should be disposed of under Article V at the stage of handling in which such failure becomes apparent. If the Carrier has defaulted, the claim should be allowed at that level as presented; and if the employee representatives have defaulted, the claim should be withdrawn."

Considering the above quoted portion of National Disputes Committee Decision No. 15, we do not agree with the contentions of the Carrier concerning the Organization's rejection of the Chief Mechanical Officer's late denial or appeal to the next higher Officer.

The question then arises as to the remedy for Carrier's violation of the sixty-day provision of the Time Limit Rule. Here again we refer to decisions of the National Disputes Committee. On March 17, 1965, that Committee issued unanimous Decision No. 16, involving the same Carrier as involved herein:

> "Claim on behalf of clerk Eklund, dated October 5, 1959, was received by the carrier on October 15, 1959 and denied on December 29, 1959. The local chairman received the denial on December 30.
>
> * * *
>
> "The National Disputes Committee rules that receipt of the carrier's denial letter dated December 29, 1959 stopped the carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement."

See also Second Division Awards Nos. 4853, 6370 and Interpretation No. 1 to Award No. 6326.

In Third Division Award No. 24298, with this referee participating, it was held.

> "Many awards have been rendered by this Division involving late denial of claims by Carriers, especially since Decision No. 16 of the National Disputes Committee. See also Decision No. 15 of the same Disputes Committee. Decision 16 of the National

> Disputes Committee, and awards following the issuance of that decision, have generally held that a late denial is effective to toll Carrier's liability for the procedural violation as of that date. From the date of late denial, disputes are considered on their merits if the merits are properly before the Board."

See also Third Division Award No. 25417.

We find that the proper measure of damages for Carrier's violation of the sixty-day time limit of Rule 31 is to allow Claimant the difference in earnings that he may have had if permitted to exercise his seniority as requested effective February 17, 1982, and what he did earn from February 17, 1982, to and through December 7, 1982. Allowance of this portion of the Claim on the time limit issue has no effect on the merits of the dispute.

As to the merits of the dispute, we do not find a violation of the Agreement. Supplement L of the Agreement effective September 1, 1940, under which the Shop Crafts Agreement of the Mechanical Department would apply to Roadway Machine and Equipment Repairmen and helpers, contained the following:

> "4. The present practice in the various Roadway, Motor Car Equipment Shops in regard to character of work permissible or duties required will be continued."

In the handling of the dispute on the property the Chief Mechanical Officer described the work:

> ". . . Such work encompasses, but is not limited to, mechanical repairs to diesel and gas engine powered tractors, shovels, dozers, front-end loaders, drag lines and Steel Gang rail laying equipment. For the most part, this work is performed in and for the Maintenance of Way Department and may be at the direction of the Division Engineer, the Superintendent of Work Equipment, a Roadmaster or a Section Foreman."

and went on the state:

> "Since these positions are Roadway Equipment Repairman positions, and are not Machinist positions, Carrier correctly requires that any Machinist desiring consideration for such a position must first meet Carrier's qualifications for the position; the seniority of an unqualified machinist is not thereby impaired. Rule 15(d) also supports this point."

The Organization contends that in denying the Claimant the right to displace the junior employe on the Roadway Machine and Equipment Repairman position because he did not possess the necessary qualifications, the Carrier denied him the right to a fair trial on the position in accordance with Rule 15 of the Agreement.

The Board agrees that the Carrier has the right to set qualifications and to determine the job content of positions. See Award No. 6760. The record shows that it has been the practice on the property to list qualifications for positions in bulletins, especially for Roadway Machine and Equipment Repairman positions. Also, Rule 15(d) of the Agreement recognizes that qualifications must be sufficient for the filling of a position. We consider the following from Award No. 9414 to be applicable in the present dispute:

> "The contractual references to a trial period are not framed in language overcoming the provisions for ability and qualification requirements as an initial consideration in filling a position. Thus, it is reasonable to conclude that an applicant in the position of Claimant had no contractual right to a trial period based on seniority alone; and no employe has a right to fill a permanent vacancy who lacks qualifications to perform the duties of the position without training.
>
> If the Carrier chooses to place an unqualified applicant in a new position or a permanent vacancy, then the trial period provided for is operative. Here, the Carrier had a qualified applicant and, consequently Claimant's greater seniority did not govern in the assignment of Job Symbol No. 930."

Our recent Award No. 10431 considered a dispute quite similar to the one involved here, but between other parties, where Mechanical Department Machinists were denied the right to exercise their seniority and displace a junior machinist (Roadway Equipment Machinist). In that Award the Board held:

> "As utilized in Rule 22(g), the word qualified does not equate to meeting fitness and ability in order to qualify for a position necessitating further training. The term 'qualified to fill' relates to the displacing machinists' present qualifications to fill and perform the duties of the position in question. The Carrier's criteria for roadway equipment machinists has not been rebutted nor does the record contain any evidence the

> refusal to accommodate the Claimants' bumps to have been capricious or arbitrary. The burden of proof requires the Organization and Claimants to present pertinent information dealing with the qualifications of those involved at the time of displacement. In the face of the language of Rule 22(g), simply asserting one is a journeyman machinist fails to persuade this Board that the claim is mertiorious."

We agree with Award No. 10431.

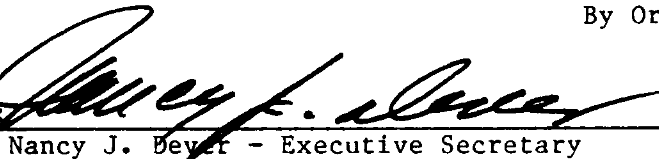
We will sustain the Claim only to the extent previously set forth as the proper measure of damages for carrier's violation of the sixty-day Time Limit Rule.

We do not consider the contention of the Carrier regarding representatives designated by the Organization to be a matter addressing itself to this Board.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division



Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1986.

LABOR MEMBERS DISSENTING AND CONCURRING OPINION TO AWARD 10754, DOCKET 10554

The July 31, 1980 agreement relied on by the organization reads in part.

Rule 15 (c)

> An employee exercising his seniority under this rule, <u>after a fair trial,</u> failing to qualify, shall be permitted to displace only the youngest employee in his craft. In case a new position or vacancy is filled in accordance with this rule and the applicant fails to qualify, the next applicant in order, qualified to do the work, will be assigned to the position. (Emphasis added)

Rule 23 (a)

> In making force reductions, the force at any point or in any department or craft may be reduced; seniority as per Rule 27 to govern. Employees affected will give written notice to the foreman, with copy to the local chairman, of their intent[illegible] to exercise seniority rights within five (5) da[illegible] after receiving notice of reduction [illegible] will take the rate of the job to whic[illegible] [illegible]ned.

In the instant dispute time [illegible]ts developed on the property, when the Car [illegible] Chief Mechanical Officer did not reject the claim [illegible]thin the sixty (60) day time limits. In applying Rule 15 of the National Disputes Committee, we agree that this Board did so properly and the claim should have been allowed and the claimant awarded the position and given a fair trial period.

By applying Rule 16 of the National Disputes Committee, this Board errored, in that this is not a continuing claim case as Rule 16 would address. This is a single issue case and if the claimant had not filed his claim within the original time frame, it would have been dismissed.

We are further supported in this matter by Second Division Awards 6946 and 10007.

Award 6946: Referee David P. Twomey in pertinent part:

> "From the entirety of the record, it is overwhelmingly evident that the Claimant did not receive a fair trial as required by Rule 15. <u>Our findings do not conclude that the Claimant is qualified: only that he was not given a fair trial.</u>

Award 10007: Referee Tedford E. Schoononer in pertinent part:

> "In reaching a decision in this case the Board is cognizant of Carrier's insistence upon its right to determine the fitness and ability of an applicant for a position. The Carrier will find no disagreement with the Board on this point. We fully agree with Finding on this point in Award No. 8449 as follows:
>
> > 'Carrier correctly argues that it is within Carrier's rights to establish reasonable standards of fitness and ability among its employees for purposes of hiring, promotion,

and job assignment. This particular right is a fundamental managerial prerogative which has been upheld by this Board and by other Boards in awards which are too numerous to enumerate herein. Suffice it to say, however, that the essence of these awards supports the proposition that said managerial right may be limited by specific contractual language, by the existence of a clearly established past practice, or by considerations of the unfairness or unreasonableness of management's actions.'

<u>Carrier is directed to assign claimant to the position of derrick engineer as bulletined and give him a reasonable trial to prove his qualifications."</u> (Emphasis added)

In Award 16164 Third Division, we find the issue of a continuing claim a single event. Referee Wesley Miller in pertinent part:

The claim at hand is quite unique in one particular: The Carrier did not make any written response to the claim filed November 7, 1962, until the claim was appealed to this Board. No written declination was made by the Carrier at any level as the Claim was presented and processed on the property. The Carrier's failure to comply with the time limit rules for declination is undisputed and

can only be justified on the theory that if the claim was invalid when presented, no declination was necessary.

Patently, this claim was invalid in its incipiency, and obviously the Carrier did not respond to the claim in the proper manner.

The findings of the National Disputes Committee in 1965 have been very helpful in clarifying the interpretation and application of Article V. However, it is important to remember that when the Carrier took its complained of course of action (or inaction) in regard to this claim, this occurred in the years of 1962 and 1963.

The findings of the National Disputes Committee in 1965 could not have been predicted with certainty in 1962. If the officials of this Carrier had been students of our Awards during that time period, they would have been aware of strong precedential authority to justify their taking no action at all: Award 9684 (Elkouri), adopted December 7, 1960, and Award 10532 (Mitchell), adopted April 19, 1962. In Award 10532, we held in part as follows:

"The claim in this case was first presented on March 5, 1955, which was in excess of 60 days after January 1, 1955. There is no dispute in regard to the late filing of the claim. The Claimant contends that the Carrier failed to raise the question that the claim was not filed within the 60

days on the property and by so doing waived this defense . . .

This is a case under an Agreement that requires the filing of the claim within a specific time. There was no claim here because it was not filed within the time required, and there being no claim, it was not necessary to deny same within the 60 day period."

It is still important that a claim be properly and timely filed. In a recent Award we stated:

". . . We further state that since no valid claim existed ab initio, the fact that the Carrier failed to give a reason for declining the Claim is of no consequence. Since the Claim was invalid in the beginning, we have no right to consider Carrier's later procedural error nor do we have a right to consider the merits of the case. We will dismiss the claim." Award 15631, adopted June 16, 1967.

We find that the instant claim is not a "continuing claim" and consequently reject the appellate argumentation of both of the Parties in this regard. The claim at hand is based entirely upon a single event, the abolishment of two positions and consolidating these into one - an action that occurred on June 20, 1962. Award 12984 (Coburn).

For the reasons indicated above, basically because this claim was not filed within 60 days after the occurrence out of which the claim arose, and no

waiver of the time limit rules on the part of the Carrier appears in the Record, we find this claim is barred and we are constrained to dismiss it.

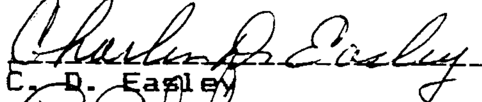
Award

Claim dismissed.

The majority of this Board correctly concluded that the sixty-day (60) time limits were violated. However to then ignore a clear contractual obligation to allow a fair trial, not only permits the Carrier to play God, but means this Board also is playing God by deciding who will or will not get a fair trial.

How a seasoned referee can contrive a single event into a continuing claim so that he can examine the merits of the case is inexcusable. Had the claimant not filed his claim within the time limits you can be assured the Carrier would have argued for its dismissal as a violation of time limits and we expect this referee would most likely grant that request.

Award 10754 is a blatant mistake and Referee Carter has exceeded his authority by substituting his opinion in place of a clear contractual requirement to a fair trial. We, therefore, file this most vigorous disent.


C. D. Easley

M. J. Cullen

R. A. Johson

D. A. Hampton

N. D. Schwitalia