**Award No. 4546**

**Docket No. 4477**

**2-NYNH&H-MA-'64**

# NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

**The Second Dvision consisted of the regular members and in addition Referee P. M. Williams when award was rendered.**

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## PARTIES TO DISPUTE:

## SYSTEM FEDERATION NO. 17, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Machinists)

## THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement Machinist A. Barry was improperly removed from the Machinist Seniority Roster at Van Nest Shop.

2. That accordingly Carrier be ordered to restore Machinist A. Barry, to that seniority roster with a date of May 1, 1947, with vacation and pass rights unimpaired.

EMPLOYES' STATEMENT OF FACTS: Machinist A. Barry, hereinafter referred to as the claimant, was employed by the carrier on May 9, 1939, as a shop laborer at its Van Nest Shop, Bronx, New York. He was subsequently promoted to machinist helper on June 16, 1941, and to machinist on May 1, 1947. Claimant worked in this capacity until he was furloughed on April 23, 1955, shop notice No. 1130.

Claimant was retained on a temporary Machinist vacancy until May 17, 1955, which was his last day worked. Claimant while in furlough status from Van Nest Shop, was employed by the carrier on May 29, 1955, as a yard brakeman, on the carriers New York division.

On July 27, 1955, claimant received notice of recall to a temporary machinist vacancy. Claimant declined the temporary vacancy and advised he would accept recall to a permanent vacancy and notation was made on carriers records that the claimant would respond to a permanent vacancy. Claimant continued in the service of the carrier as a yard conductor, passenger trainman, freight trainman, until March 2, 1959.

On July 31, 1959, the carrier closed down permanently the Van Nest Shop.

On June 1, 1961, claimant visited carriers Stamford, Connecticut Shop

Board in the presentation and consideration of Claims, will remove the necessity of proof of essentials material to the establishment of a favorable Award."

In a very recent award of this Division Referee Daugherty, in discussing the burden of proof, said:

"Faced with rules ambiguity and conflicting unbuttressed statements on past practice, the Division has no alternative but to find that petitioner, who fairly must be said to have had the burden of presenting affirmative evidence, has failed here to support its contentions. Accordingly, a denial award must issue." Award 4075, Machinists v. Missouri Pacific.

We submit the authorities are clear that where, as here, the record presented by the employes lacks any evidence, then they have failed to meet their burden and the claim must be denied.

In summary, carrier submits that the unreasonable delay of the claimant in asserting his claim, coupled with the complete lack of any evidence of improper action on the part of the carrier, warrants the dismissal of the instant claim.

We respectfully request that the instant claim be denied.

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 employe 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.

Arthur Barry, the claimant, was first employed by the Carrier on May 9, 1939; he became a machinist on May 1, 1947 at Carrier's Van Nest, New York City, Shop. The claim here concerns claimant's request for restoration to the Van Nest Seniority Roster with pass and vacation rights unimpaired. The record discloses the following facts about Machinist Barry's employment: He was furloughed from his machinist position on April 22, 1955 though he did temporary work until May 17; he was employed as a yard brakeman on May 29, 1955; on July 27, 1955 he was recalled to work as a machinist however he advised the Carrier that he would accept a permanent position as machinist, he did not return to work as a machinist but continued as a yard brakeman; his name was on the semi-annual Seniority Roster of Machinists at Van Nest on July 1, 1955 but his name was not on the succeeding Roster of January 1, 1956 nor was it on any subsequent Rosters; he left Carrier's employ on March 2, 1959.

On June 1, 1961 the claimant sought employment from the Carrier at its Stamford, Connecticut Shop and asked that his application be processed in accordance with the terms of Rule 26, which states:

"Furloughed men laid off in force reduction will be given privilege

of transferring to other points when men are needed. Men desiring to avail themselves of this privilege will make their desires known and will state their preference as to the point or points at which they wish consideration. They will be permitted to return to home station when force is increased, such transfer to be made without expense to the Company.

"In case more than one man at a point files notice of a desire to transfer under this rule, the senior man will be given preference."

On June 7, 1961 claimant was advised that his employment at Stamford would be as a new machinist rather than by reason of the application of Rule 26 because his name was no longer on the Van Nest Machinist Roster. We are advised by claimant that this latter date was the first time that he was aware that his name had been removed from the Van Nest Machinist Roster and he claims that his name was improperly removed, that it should be restored and that his vacation and pass rights should be unimpaired.

The record discloses that the Carrier closed its Van Nest Shop on July 31, 1959 and that there is no chance that the shop will re-open.

The basis for the claim herein stems from any rights which the claimant had by reason of his seniority at Van Nest.

Seniority rights can be described as being in the nature of incorporeal hereditaments in that they are rights which grow out of and are concerned with, or annexed to a job or position, without being an actual part of the job or position but yet they are rights which are exercisable within the job or position. Usually, and such is the case here, the only requirements for obtaining seniority rights are to (1) remain on the job, or (2) be available for the job should the employe be on furlough. Therefore, it can be said that seniority rights granted by the employment contract are inherited from the job itself. Without question the rights are contractual and come about by reason of the employment contract or collective bargaining agreement. Consequently, so long as the contract or agreement or a continuation thereof remains in existence, the rights are viable; when the contract or agreement terminates the rights created therein may become vested, as they did in this case, for those employes who are then covered by the contract or agreement.

The applicable agreement in the instant case made provision for Machinist Seniority Roster to be posted at Van Nest semi-annually so that it could be reviewed by the employes and/or the Organization. Provision was made correcting errors and settling disputes arising from the publication of the Roster.

Claimant discloses to us that he was not aware that his name had been removed from the Roster even though a period of over five years had elapsed since his name had been removed. He gives us no reason for failing to pursue a course of action which would have tended to protect his seniority rights. Such laxness on the part of Claimant is indicative of indifference to such an extent that we believe that we would be justified in denying his claims because of the line of Awards from this Board which hold that when one has slept on his rights for such an extended period he cannot effectively assert his claim; however, we also have another factor which more conclusively convinces us that Machinist Barry was not concerned with losing his seniority rights at Van Nest and that is that he refused to return to work when he was recalled on July 27, 1955—he admits the recall notice was received and asserts that

he stated that he would accept a permanent position. We believe that claimant, in 1955, could not make conditions upon which he would accept recall to work and still maintain his seniority. Moreover, as to the Claimant and the other machinists at Van Nest, the Organization there had the duty of reviewing each semi-annual Seniority Roster for the purpose of protecting the rights of all machinists whom it was representing; then too the Carrier had the duty to list all employes on the Roster. In the absence of some facts that would tend to show that the Claimant was removed from the list by the collusion of his Organization and the Carrier we believe that the Organization and the Carrier did assume their respective responsibilities by protecting and granting to all machinist employes at Van Nest the seniority rights to which they were entitled.

If we were to render an affirmative award herein it would mean that all machinists who were junior to Claimant or who were employed after he ceased work as a machinist at Van Nest would be divested of some of their rights—rights which they acquired when the Van Nest shop closed and which have become vested to them. The facts presented to us in this case will not allow us to take a course that could in any way be interpreted as jeopardizing, reducing, or restricting the vested rights of those machinist employes who were on the Van Nest Roster when the shops closed on July 31, 1959. Claimant herein, as a member of the Van Nest bargaining unit during his employment as a machinist, acquired seniority rights granted by the applicable agreement however, those rights could not have become vested in him until the applicable agreement terminated on July 31, 1959. From the date of Claimant's furlough as a machinist until July 31, 1959, three significant and important things occurred which vitally affected his rights, i.e., (1) the refusal to return to work except in a permanent position; (2), the semi-annual review of the Seniority Roster by Carrier and the Organization, and (3) the admitted fact that Claimant never bothered to inquire as to his status from the date he elected to not return to work in accordance with the received recall notice and the date the shop closed. We believe that when these three enumerated occurrences are considered together and in light of the further fact that the Carrier and the Organization, acting together for the good of all employes, have the power and the right to create or abolish seniority rights, it is evident that Claimant was not improperly removed from the Van Nest Roster as he has claimed but rather he was removed by reason of his own acts and the acts of those who had the power to make such a determination.

AWARD

Claims denied in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of July, 1964.