

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 13050
Docket No. 12846
96-2-94-2-4

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(International Brotherhood of Firemen & Oilers
((System Council No. 6)
PARTIES TO DISPUTE: (
(Bessemer & Lake Erie Railroad Company

STATEMENT OF CLAIM:

- "1. The Bessemer and Lake Erie Railroad unreasonably, arbitrarily, capriciously, and without just cause removed Firemen and Oiler James M. Templeton's name from the active seniority roster.
2. That accordingly the Bessemer and Lake Erie Railroad Company be required to reinstate his name to the roster and make whole Mr. Templeton for all lost wages and other benefits caused by the unjust removal of his name from the active roster."

FINDINGS:

The Second 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 Claimant was hired in 1970, at which time he had certain physical restrictions. He nevertheless worked in several different positions until May 1990, when there remained no position for which he was physically qualified. He performed no work for the Carrier thereafter. It is the Carrier's contention that the Claimant was "furloughed" as of May 25, 1990, a contention contested by the Organization and which is at the heart of this dispute.

The Claimant's situation was the subject of two previous Awards. In 1983, Public Law Board 4067, Award 1, found that the Carrier properly disqualified the Claimant from filling a one-day Laborer vacancy, noting that the Claimant had previously disqualified himself from a Hostler Laborer position. In each instance, the Claimant's seniority was sufficient for these positions, and the disqualifications were the result of his physical limitation.

Second Division Award 12221 concerned events upon the discontinuation of the Engine Wiper position. The denial Award supported the Carrier's position in refusing to permit the Claimant to displace in a Laborer position, again based on physical limitation. That position was filled by a junior employee. There is no dispute that the Claimant's seniority would have permitted the displacement if there were no physical limitations involved.

In a letter dated January 4, 1993, the Carrier notified the Claimant as follows:

"Your employment relation with this Company has been terminated and your name removed from the roster, effective January 1, 1993, inasmuch as you did not comply with the provisions of Rule 21(a) of the Agreement, when you did not file your name and address as provided."

Rule 21(a) reads as follows:

"When reducing forces, seniority rights, as defined in Rule 15, shall govern. At least five (5) working days' advance notice shall be given employees affected in reduction of forces. Employees displaced may exercise their seniority rights, which must be done within five (5) calendar days after they are displaced. When force is increased, senior laid-off employees shall be returned to service in the order of their seniority rights."

An employee laid off in reduction in force must promptly inform the proper authority of the company of any change in his address and refile his address during December of each year. An employee failing to file his address as provided herein, or to return to the service within seven (7) calendar days after being notified to do so, by mail or telegram sent to the last address filed, or give satisfactory reason for not doing so, shall be considered out of service and his name shall be removed from the roster or rosters."

The Carrier contends that the Claimant is a "furloughed employee" who, after submitting the necessary address form in 1990 and 1991, failed to do so in December 1992, thus setting up self-execution of Rule 21(a), resulting in the January 4, 1993 letter. The record shows that the Claimant maintains that he did submit the form in December 1992, a contention he supported by somewhat belated production of documents to this effect.

The Board, in its appellate capacity, is not in a position to resolve this conflict in the parties' contentions. The Board finds, however, that such is unnecessary. Rule 21(a) clearly concerns the retained right of exercise of seniority by employees on furlough, that is, "laid off in reduction in force". There is no question that the Carrier, on an overall basis, did reduce its forces. However, it is equally clear that the Claimant was not working because his physical limitation permitted him to perform only a limited range of assignments. He was not out of service because of lack of seniority. There is, therefore, merit to the Organization's argument that Rule 21(a), with its annual reporting requirement, does not apply to the Claimant's situation.

The Organization suggests that the Carrier is also in error by failure to notify the Claimant in writing to "return to the service within seven days". The Board does not accept this reasoning, since it obviously applies only when a furloughed employee is actually recalled to service based on seniority. Further, this requirement to return to work follows the requirement of annual address notice by an "or", not "and".

The Organization seeks the restoration of the Claimant's name to the seniority roster, and the Board finds this is proper. As to the Claim for "lost wages and other benefits", the record fails to show that the Claimant could have returned to work since 1993. If the Organization can convincingly demonstrate to the Carrier that there has been a loss of wages or benefits, then the Claimant shall be "made whole" for same.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 25th day of September 1996.