

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION**

Award No. 13171

Docket No. 13041

97-2-95-2-67

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**PARTIES TO DISPUTE:** (Sheet Metal Workers' International Association  
(Union Pacific Railroad Company)

**STATEMENT OF CLAIM:**

**"DISPUTE - CLAIM OF EMPLOYEES**

(1) The Carrier violated the provisions of the controlling agreement, and in particular Rule 18, Rule 27, Rule 29, Rule 31 and Article IV - Carrier's Proposal No. 6 when they did not allow senior furloughed employee J. A. Sabatka to return to work on October 10, 1994 and instead allowed junior furloughed employee J. L. Ebert to return to work.

(2) That accordingly, the Carrier be required to return J. A. Sabatka to work and compensate Claimant for all wages due, plus overtime received, and all benefits due by agreement while junior employee J. L. Ebert is working and Claimant remains furloughed."

**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.

Claimant is a furloughed Sheet Metal Worker (S.M.W.) with a seniority date of March 8, 1984 on the Omaha/Fox Park Roster. After he was furloughed, Claimant commenced working for Carrier as a Lineman under the I.B.E.W. Agreement. After Investigation, he was dismissed for theft from that position on April 28, 1993. His dismissal was upheld after hearing by Public Law Board No. 5531, Award 1 on September 12, 1994.

As a result of the retirement of S.M.W. Wayne Tidwall, a vacancy occurred in the Omaha/Fox Park Roster, which Carrier filled by calling back furloughed S.M.W. J. L. Ebert with a seniority date of March 12, 1984 rather than Claimant. The Organization filed this claim protesting this call-back as a violation of the following seniority rules.

**"Rule 18. Filling Vacancies or New Positions.**

(a) When ..... vacancies occur, the oldest employees at the point shall, if sufficient ability is shown by fair trial, be given preference in filling such .... vacancies that may be desirable to them.

(b) Bulletins must be posted seven (7) calendar days before vacancies are filled permanently. Employees desiring to avail themselves of this rule will make application to the official in charge .....

\* \* \* \* \*

(d) Employees absent on account of sickness, suspension from service, or leave of absence, will have the right to displace junior employees from positions bid during such absence provided applications are made within seven (7) calendar days after returning to work.....

**Rule 27. Reduction of Forces.**

\* \* \* \* \*

(e) In the restoration of forces, senior laid off employees will be given preference in returning to service, if available within a ten (10) days, and shall be returned to their former positions if possible. An employee's failure to report to service within ten (10) days of notification by certified mail to the last address of record will automatically

terminate his service and seniority unless the ten (10) days is extended by mutual agreement between local committee and local managers. Recall letters will be issued in a standard form.

(f) The local committee will be furnished a list of employees to be restored to service. In the reduction of the force, the ratio of apprentices shall be maintained.

**Rule 29. Transferring - Furloughed Employees.**

(a) Prior to hiring new employees, furloughed employees that have complied with this rule will be given preference to transfer with privilege of returning to home point when force is increased, such transfer to be made without expenses to the Company. Seniority of employees who have given written indication to transfer under this rule will govern in all cases....

**Rule 31. Seniority.**

(a) Seniority of employees shall be confined to the point employed in each department....

**Article IV - Carrier's Proposal No. 6**

\* \* \* \* \*

**NOTE 3: Furloughed employees shall in no manner be considered to have waived their rights to a regular assignment when opportunity therefor arises."**

The Organization argues that these provisions give Claimant the right to return to his home point seniority roster as the senior furloughed employee to fill the vacancy of the retired S.M.W., and obligate Carrier to call him back, citing Second Division Award 12772. The Organization contends that it has been common practice for Carrier to fire employees and then allow them to return to their original roster when job openings were available; it cited five examples of other craft employees so treated in its correspondence on the property.

Carrier first notes that since this is a rules case, the Organization bears the burden of proving that the cited furlough and seniority rules mandate Carrier to recall a previously furloughed S.M.W. that it has dismissed for theft while working for Carrier in another craft. Carrier argues that the Organization has failed to meet its burden since the cited rules only pertain to a S.M.W. that has some form of employment relationship with it. Carrier contends that once a dismissal for theft is upheld, any employment relationship is severed, making the cited rules inapplicable, relying on Special Board of Adjustment No. 279, Award 636; Public Law Board No. 3202, Award 20; Public Law Board No. 5157, Award 8; Public Law Board No. 4561, Award 27; Public Law Board No. 5311, Award 2; Second Division Award 11701; Fourth Division Awards 4704, 4103, 3652.

Carrier also noted on the property that it has never had a practice of recalling employees fired for theft, and gave specifics on the examples cited by the Organization to show that those individuals were terminated from supervisory positions due to their inability to properly perform them and were permitted to be recalled into their previous non-supervisory positions. Carrier argues that to permit the Organization to use seniority rules in dual seniority cases as it is attempting to do herein would deprive it of its right to discipline, citing Public Law Board No. 1758, Award 6.

Although this is a rules case, there is no dispute that Claimant maintained his seniority as a furloughed S.M.W. while he was working as a lineman under the I.B.E.W. Agreement. Under the instant Agreement, that seniority entitled him to certain rights, including the right to an Investigation prior to having his seniority taken away. That right appears to this Board to be independent of any similar right he may have had under the I.B.E.W. Agreement. While there is no doubt that Carrier must be permitted to rely upon Claimant's conduct while in its employ to discipline him, regardless of which craft he is working in, and that theft has been held to be an offense meriting dismissal, Claimant has a right to an Investigation under this Agreement which includes consideration of his S.M.W. seniority, prior to losing that seniority.

In exercising rights under Rules 18 and 29, an employee must make his desire to be considered for the vacancy or transfer known to Carrier before Carrier has any obligation to consider his seniority rights. Especially in the case where Claimant has been dismissed from service, and that dismissal is upheld, Claimant must be held to have some responsibility to "mark up" or make known to Carrier that he wishes to exercise his S.M.W. seniority and be considered for continued employment. Claimant failed to

do so in this case, and the Organization's appeal on his behalf cannot be held to be an adequate substitute. In the opinion of this Board, at the time Claimant expresses his desire to be considered for further employment under his original craft Agreement, Carrier must comply with the provisions of that Agreement and hold a timely Investigation if it wishes to sever the seniority rights he holds thereunder. As noted above, Carrier may rely upon Claimant's prior actions in the other craft in charging Claimant with improper conduct under the instant Agreement.

Under the specific circumstances of this case, we find that Carrier impermissibly removed Claimant from the S.M.W. seniority list without holding an Investigation under that Agreement, and that Claimant failed to "mark up" to properly notify Carrier of his desire to exercise his S.M.W. seniority after his dismissal was upheld. We direct Claimant to so notify Carrier if he desires to be considered for seniority rights under this Agreement no later than 15 days from the date of this Award, and Carrier to thereafter comply with the provisions of the instant Agreement by holding a timely Investigation into the charges of theft if it wishes to hold Claimant out of service. In light of our findings, we conclude that no loss of earnings has yet occurred in this case.

### **AWARD**

Claim sustained in accordance with the Findings.

### **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 29th day of October 1997.