

CORRECTED

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 11190
Docket No. 10077
2-SP-SMW-'87

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (Sheet Metal Workers' International Association
(Southern Pacific Transportation Company
(Western Lines)

Dispute: Claim of Employees:

1) That the Carrier arbitrarily changed the seniority date of claimant W. L. Powell from April 25, 1977 to April 1, 1978 on the roster of the Sheet Metal Workers craft at Sacramento, California on October 28, 1981 and moved his position on the roster from number 52 to number 65, in violation of his contractual and constitutional rights.

2) That the Carrier restore claimants proper seniority date of April 25, 1977 on roster of the Sheet Metal Workers Craft at Sacramento, California.

3) That claimant be made whole for wages and benefits lost, if any, due to being improperly furloughed and returned to work improperly as result of the change of seniority date by the Carrier.

4) That the Carrier has denied claimant his rightfully earned number of days of vacation as indicated by claimant exhibit R, as result the Carrier's disallowance for time served by claimant in Air National Guard in violation of his contractual and constitutional rights.

5) That claimant be made whole for earned vacation denied by the Carrier as indicated in claimant exhibit R.

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.

Claimant was hired as an Apprentice Sheet Metal Worker on January 20, 1972, and holds seniority as a Journeyman Sheet Metal Worker at Carrier's Sacramento, California Heavy Maintenance Plant. The precise date of Claimant's seniority on the Seniority Roster of the Sheet Metal Workers Craft at the Sacramento facility is the particular issue in dispute in this case.

According to the record, concurrent with his work as a Sheet Metal Worker Apprentice, Claimant served in the California National Guard Reserve from 1973 to 1977.

On April 1, 1978, Claimant had completed 1,011 days of the then required 1,040 days of apprenticeship under Rule 42 of the Motive Power and Car Department Agreement. The date of April 1, 1978, is significant to the instant dispute because the parties had previously signed a new Memorandum of Agreement for Apprenticeship effective that date. The purpose of the new Agreement, inter alia, was to reduce the apprenticeship qualifying time from 1,040 days to 732 days.

Pursuant to the implementation of the new Apprenticeship Agreement, twenty-two (22) incumbent Sheet Metal Worker Apprentices (including Claimant), who had started their apprenticeship training prior to April 1, 1978, were accorded Sheet Metal Worker seniority as of that date, and were listed on the seniority list in numerical order according to their relative standing in the Apprenticeship Training Program based upon the respective number of days they had completed up to that date. Seven (7) of the twenty-two Apprentices (including Claimant) had already attained in excess of 732 days' training and they were upgraded to Journeymen Sheet Metal Workers and listed as such on the July 1, 1978 Seniority Roster. Claimant's seniority on the July 1, 1978 Roster, however, was listed as April 25, 1977, rather than April 1, 1978. The remaining fifteen (15) incumbent Apprentices were listed on subsequent Seniority Rosters as each acquired the requisite 732 days of apprenticeship training.

As noted previously hereinabove, as of April 1, 1978, Claimant had served 1,011 days toward the completion of his apprenticeship, and said amount was the greatest number of days completed by any Sheet Metal Worker at that time at the Sacramento facility. In addition to the July 1, 1978 Seniority Roster erroneously listing Claimant's Sheet Metal Worker's seniority date as being April 25, 1977, Claimant's seniority date was similarly listed, again erroneously, on the three (3) succeeding Seniority Rosters for 1979, 1980 and 1981.

In a letter dated October 28, 1981, Carrier's Sacramento Works Manager notified Organization's Local Chairman as follows:

"Per our conference of 2:00 p.m., Tuesday, October 27, 1981, the following information is being furnished:

Sheet Metal Worker William L. Powell, SSA
#553-82-2861-9

Personal record has been reviewed and time for reserve military service towards his apprenticeship has been disallowed and he has been assigned a seniority date of 4-1-78 instead of the erroneous date assigned on the 1981 current Sheet Metal Workers roster of 4-25-77. Mr. Powell's date and seniority position will be changed and new roster will reflect the change from No. 052 with date of 4-25-77 to No. 065 with date of 4-1-78. New rosters for the Sheet Metal craft will be issued as soon as possible."

On that same day, Organization filed a Claim alleging that Carrier's unilateral revision of the then current July 1, 1981, Seniority Roster violated Rule 32 of the Controlling Agreement. Said Rule, in pertinent part reads as follows:

"Seniority rosters will be revised as of July 1st, each year, and posted in places accesible (sic) to employees affected; list of additions, eliminations, and corrections will be posted as of January 1st each year. Errors in any roster or list to which attention is called within sixty (60) days from date of posting, will be corrected. The General Chairman and the Local Chairman will each be furnished three (3) copies of such rosters and lists, pertaining to their craft."

Organization's basic contention in this dispute is that Claimant's seniority date was properly computed when he was upgraded to Journeyman as per the April 1, 1978 Apprenticeship Agreement. According to Organization, Claimant was contractually entitled to a seniority date of April 25, 1977, which was adjusted as per Title 38, Chapter 43 - Veterans Re-Employment Rights to reflect Claimant's service with the California Air National Guard during the years of 1973 through 1977.

Additionally, Organization further argues that Carrier cannot arbitrarily revise Claimant's seniority date more than four (4) years after it was originally assigned. As support for this position, Organization cites Second Division Awards 2910, 7414, 7627 and Third Division Awards 12297, 13844 and 14862 which allegedly denied challenges to seniority roster standings which, similar to the instant case, were presented years after the original posting. Still yet further on this same point, Organization also cites Edwards v

Clinchfield Railroad, 408 F. 2d 5 (1969 CA 5) which held that for reemployment purposes, returning veterans are "... entitled to be restored, after resuming employment; ... to the position which he would have held if he had remained continuously in civilian employment...."

Finally, Organization further cites as relevant herein Paragraph 3 of the Controlling Memorandum of Agreement dated September 16, 1946, and Section D(c) of the Memorandum of Agreement for Apprenticeships, effective April 1, 1978. Said provisions state as follows:

"Memorandum of Agreement (September 16, 1946)
Paragraph 3:

Upon completing the number of service days or service years remaining to be worked to conclude their apprenticeship at time of entry into service of the United States, as referred to herein, either as helper apprentices or while upgraded to mechanics classification, employees covered by this Memorandum of Agreement will be allowed the mechanics seniority date they would have established if they had remained in the service of this company as apprentices, and will be placed on the respective mechanics seniority roster accordingly."

* * *

"Memorandum of Agreement for Apprenticeships
(April 1, 1978)

* * *

D(c) - Incumbent apprentices who started their apprenticeship training prior to the effective date of this Memorandum of Agreement shall have the remainder of their training changed to conform as nearly as practical to this Memorandum of Agreement. Apprentices who are so accelerated and have or will attain the requisite number of days specified herein prior to or following the effective date of this Memorandum of Agreement, and the overall length of his training shall not exceed the time specified in Section B(b) if it has not already done so. Any apprentices who are so accelerated and have or will attain the requisite number of days training specified herein prior to or following the effective date of this Memorandum of Agreement will be accorded a seniority as journeyman mechanic on their respective

seniority rosters in accordance with the provisions of Section D(b), but in no event will such seniority date be prior to the effective date of this Memorandum of Agreement. Such apprentices will, however, be accorded a seniority date on their respective seniority rosters in the order of their relative standing in the training program determined by the number of days completed. Seniority date will reflect time lost from this training program in military service, on jury duty and/or paid vacation."

Carrier argues that Claimant's April 25, 1977 seniority date was the result of a clerical error and that Claimant was subject to that portion of Section D(c) of the April 1, 1978 Memorandum of Agreement for Apprenticeships, cited hereinabove, which provides that "... but in no event will such seniority date be prior to the effective date of this Memorandum of Agreement."

Continuing, Carrier further challenges Organization's contentions by arguing that Claimant's National Guard time cannot be counted toward seniority because some of his duty time occurred concurrently while he was furloughed from his employment with Carrier.¹ Moreover, Carrier also contends that the Controlling Agreement, as revised by the April 1, 1978 Memorandum, contains no provisions for considering National Guard training as apprenticeship qualifying time. According to Carrier, the April 1, 1978 Memorandum supersedes the September 16, 1946 Agreement and its subsequent Interpretation dated December 9, 1949. (Third Division Awards 3813 and 11331.)

Carrier, in its argumentation, further reads Rule 32 of the Agreement as imposing a time limit on employee challenges to seniority ranking while retaining Management's right to revise and correct seniority on an annual basis. As support for this theory, Carrier cites Second Division Award No. 7414 which, interpreting a rule similar to Rule 32 involved herein, concluded in pertinent part as follows:

1. Beginning with his initial employment on January 20, 1972, Claimant was "laid-off" or "furloughed" for the following periods:

April 7, 1972 to May 30, 1972;
July 6, 1972 to October 4, 1972; and
May 9, 1975 to November 20, 1975.

During the period of his employment, which is significant in this dispute, Claimant served in the California National Guard Reserve during the following periods:

November 5, 1972 to May 25, 1973;
July 9, 1973 to July 20, 1973;
August 17, 1974 to August 31, 1974;
August 11, 1975 to November 6, 1975; and
July 9, 1977 to July 23, 1977.

"The applicable and controlling part of Rule 23, Seniority, reads as follows:

'The seniority lists will be prepared from the Company's record as of January 1st of each year for each craft and subdivision thereof and will be posted and open for protest for a period of sixty (60) days after the posting of each roster. Committees will be furnished with copies.'

* * * * *

Rule 23, it may be noted, provides that the list will be revised each year and that, if not protested in 60 days, it shall be deemed permanent. This surface contradiction, providing for flexibility and rigidity at one and the same time, can be resolved and harmonized if we bear in mind the objectives of the parties. The seniority roster is compiled to have an unimpeachable source of authority upon which to base decisions in which seniority may be involved. This authority must be established in advance if quarreling and bickering over relative standing is to be avoided at the time it is called into use. The parties had two major concerns in the establishment of the roster. First there had to be recognition that the composition of any work force varies from time to time as old employees drop out or transfer to other jobs and as new employees are added. Management must make periodic revisions if the list is to reflect these inevitable changes. The parties must also have foreseen that in making revisions there would always be the possibility of error. This possibility was their second concern. It was solved by giving the employees limited time in which to call attention to an error and have it corrected. Thus the needs of Management to revise and the employees to correct having been provided for, and both having been exercised, the list was then to become permanent.

The permanency contemplated by the parties could not mean that Management might not thereafter revise it, for this would be a direct contradiction of the provision calling for yearly revision. It was to be, however, permanent in other respects, and it precludes the right of an employee to enter a protest once the initial time limit of 60 days has elapsed."

(Carrier's emphasis)

Carrier also argues that seniority rights are derived from the Collective Bargaining Agreement and that Management is powerless "... to take away from any employee seniority rights to which he is entitled under the Memorandum of Agreement, or to give any employee seniority rights which he has not earned under the agreement" (Second Division Award 7077).

Finally, Carrier contends that it is not bound by the erroneous acts of subordinate officials when, upon discovery by higher authority, Management promptly terminates the practice (First Division Award 15485; Second Division Awards 3782 and 9049; and Third Division Awards 18064, 21184 and 21857).

The Board has carefully read, studied and considered the complete record in this controversy, and finds that Organization has presented a valid Claim which has not been sufficiently rebutted by Carrier. In support for the foregoing determination, we note that Carrier was unable to adequately explain why, after four (4) years and after four (4) separate opportunities, it failed to correct what Management characterized, for lack of a better explanation, as a "clerical error." While Claimant may fall within the dictates of Section D(c) of the Memorandum of Agreement for Apprenticeships, effective April 1, 1978, which if applicable, ordinarily would establish his seniority date as April 1, 1978, the fact remains that Carrier sat on its right of revision for more than four (4) years. Had Carrier revised Claimant's seniority date in a more timely fashion, our decision might have been more favorably disposed to Carrier's position. However, this Division has consistently maintained a reluctance to alter Seniority Rosters after a discovery of error(s) which has/have existed for many years. This policy has been predicated upon the belief that an employment right, such as seniority, deserves certainty and predictability in its treatment on the part of Management. Moreover, in countless opposite sets of circumstances, we have consistently refused to alter seniority dates when employees have failed to timely challenge erroneous seniority rankings.

While Rule 32 permits Carrier the right to revision, it also imposes upon Carrier the mutual obligation of effectuating timely challenges to the Seniority Roster's accuracy.

By virtue of this ruling, we certainly are not holding Carrier to the sixty (60) day time limit requirement imposed upon employees; rather, we are holding that Carrier, by virtue of the doctrine of laches, has waived its right to change Claimant's seniority date four (4) years after originally determining said date to be April 25, 1977, rather than April 1, 1978. Claimant enjoyed the certainty and predictability of his 1977 seniority date for over four (4) years, and, consequently, the Board is reluctant to disturb the Seniority Roster's original rankings for no better reason than Carrier's alleged "clerical error."

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Claim sustained in its entirety.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:



Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of March 1987.