

Award No. 2093
Docket No. MW-2039

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC LINES

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(a) Against the establishment by the Carrier of seniority date of September 1, 1926 for W. R. Rosenbaum as B. & B. Foreman on the Palestine Division, who is recorded on the 1941 roster as W. R. Miller; and

(b) That all employes adversely affected by the establishment of said date and the assignment of W. R. Rosenbaum to work in accordance with said date shall be compensated for all monetary loss suffered.

EMPLOYEES' STATEMENT OF FACTS: W. R. Rosenbaum was discharged from the service of the Carrier on May 16, 1940.

Under date of December 18, 1940, the Carrier reinstated Rosenbaum as B. & B. Foreman on the Palestine Division and accorded him a date on the 1941 roster of September 1, 1926, instead of December 18, 1940.

The Carrier, subsequent to December 18, 1940, has continued to permit and assign Rosenbaum to the position of B. & B. Foreman. Rosenbaum was permitted to displace a foreman who had been regularly assigned to a bullelined position, thus adversely affecting employes holding seniority rank below the date of September 1, 1926.

Upon learning of the reinstatement with seniority unimpaired of Rosenbaum by the Carrier, the Employees' representative protested the action of the Carrier. The Carrier has repeatedly declined the Employees' claim.

POSITION OF EMPLOYES: Rule 2 of the current agreement between the Missouri Pacific Lines and the employes thereon represented by the Brotherhood of Maintenance of Way Employes, effective August 1st, 1938, provides how seniority is to be established for the various classes of employes covered by the agreement. The rule reads as follows:

"Rule 2. (a) Seniority begins at the time the employe's pay starts on the position to which assigned following bulletining of the vacancy as provided in Rule 11, * * *."

Rule 3 provides how seniority can be exercised by employes.

Rule 4 provides that seniority rosters shall be maintained for all employes covered by the agreement.

On May 16, 1940, W. R. Rosenbaum was discharged from the service of the Carrier.

“(d) An employe dissatisfied with a decision will have the right to appeal in succession up to and including the highest official designated by the management to handle such cases, if notice of appeal is given the official rendering the decision within ten (10) days thereafter. The right of the employe to be assisted by duly accredited representatives of the employe is recognized.”

The Carrier takes the position that in reinstating Mr. Miller to the service of the Carrier, as herein indicated, there was no violation of Rules 2, 11 (b), and 12 (b) and (d), as claimed by the Organization, or any other rule in the agreement, and your Honorable Board is respectfully petitioned to deny the claim.

OPINION OF BOARD: Effective as of January 1, 1941, Seniority Rosters for that year were posted showing W. R. Rosenbaum (whose name was legally changed to W. R. Miller) with seniority as of September 1, 1926, and B. and B. foreman on the Palestine Division. Within 90 days, (See Rule 4), the Organization protested the seniority date given him, contending the correct date was December 13, 1940. The Carrier declined to correct the date as contended for by the Organization on March 29, 1941.

On April 22, 1940, a fire destroyed a bridge near Adams, Texas, for which Miller and another employe were held responsible, and on April 26, 1940, an investigation was held in accordance with Rule 12 of the agreement. On May 11, 1940, Miller was discharged from the service for his responsibility for the fire, and on May 16, 1940, he protested his dismissal to the B. and B. Supervisor. Three days later, his protest was referred to Superintendent L. A. Gregory, who forwarded to Miller a copy of the investigation papers on May 23, 1940.

The Carrier states Miller handled his case for reinstatement verbally with different officers, and on October 25, 1940, he wrote the Assistant Chief Engineer asking for reinstatement on a leniency basis, saying he felt he had been “punished sufficient.” In compliance with a demand of the Carrier, he admitted his responsibility for the fire and again asked for reinstatement.

On December 13, 1940, Miller was reinstated on a leniency basis with seniority unimpaired.

Under these facts there is no doubt that Miller was discharged from the service on May 11, 1940, and on that date he ceased to be an employe of the Carrier.

The only rule dealing with reinstatement is Rule 12, which, among other things, provides:

“If the charge against the employe is not sustained, it shall be stricken from the record. If, by reason of such unsustained charge, the employe has been removed from the position held, reinstatement will be made and he shall be compensated for the wage loss, if any, suffered by him.”

Assuming, without deciding, that Miller did take all the necessary steps to perfect his appeal, the fact remains he did not win his appeal, but admitted his responsibility for burning the bridge as evidenced by the letter of F. H. Cook, Assistant Chief Engineer, dated October 31, 1940, and by Miller's reply to that letter dated November 14, 1940, his reinstatement was solely on a leniency basis. (See Awards Nos. 1243 and 468 of Second Division).

It follows that under Rule 2, the Carrier erred in placing on the Seniority Roster Miller's seniority as of the date September 1, 1926. The correct date should be December 13, 1940.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the provisions of the current agreement.

AWARD.

Claim (1 and 2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of March, 1943.