

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DELAWARE & HUDSON RAILROAD CORPORATION

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

1. That Mr. Lyle Ellis be accorded a seniority date of 4-1-24 as a Plumber Foreman, Susquehanna Division;
2. That Mr. Lyle Ellis be awarded a position of Assistant Plumber Foreman as advertised on bulletin No. 52 dated June 9, 1941;
3. That Mr. Lyle Ellis be allowed the difference in pay between what he did receive as a Plumber and what he would have received had he been awarded the position of Assistant Plumber Foreman.

EMPLOYEES' STATEMENT OF FACTS: The records will disclose that Lyle Ellis entered the service in the Maintenance of Way Department as a plumber January 26, 1923, promoted to the rank of Plumber Foreman April 1, 1924, worked in that capacity until November 15, 1930 at which time he was displaced by a senior Plumber Foreman. Lyle Ellis then exercised his seniority in the rank of Assistant Plumber Foreman, working as Assistant Plumber Foreman until February 1, 1933 at which time he was displaced by another Plumber Foreman. Mr. Ellis then exercised his seniority and went to work as a plumber, working as a plumber until May 1, 1937 when he accepted the assignment of Work Equipment Inspector, worked in that assignment until April 4, 1938 when he returned to the rank of plumber and has worked in that capacity since.

Mr. L. R. Strong entered the service as a plumber April 3, 1920, promoted to the rank of Plumber Foreman November 16, 1926 and has since worked in the capacity of Plumber Foreman, Assistant Plumber Foreman and plumber.

On June 9, 1941 Bulletin No. 52 was issued advertising for bids for the position of Assistant Plumber Foreman. Lyle Ellis and L. R. Strong bid for the position. L. R. Strong was assigned on June 19, 1941.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: The first point at issue in this claim is the establishment of appropriate and proper seniority rights for the claimant, Lyle Ellis. As stated in Employees' Statement of Facts, Lyle Ellis was promoted to the rank of Plumber Foreman on April 1, 1924, worked in the capacity of Plumber Foreman until November 15, 1930 when because of consolidation of gangs with subsequent reduction in the number of foremen employed, Ellis was displaced by a senior Plumber Foreman. Lyle Ellis then

OPINION OF BOARD: The Carrier advertised the position of Assistant Plumber Foreman by bulletin dated June 9, 1941. Bids were submitted by the Claimant Ellis and L. R. Strong. The position was awarded to Strong, on the Carrier's assumption that he was the senior applicant. This action is challenged on behalf of Ellis on the claim that he was senior. There is no question as to qualifications of either applicant, the case turning upon the single issue of seniority.

There is a showing satisfactory to a majority of the members of the Division that Ellis acquired seniority as a Plumber (Pipe Fitters) Foreman on April 1, 1924, and that Strong has like seniority as of November 16, 1925. The Carrier contends, however, that Ellis forfeited his seniority when, on May 1, 1937, he accepted a position as Work Equipment Inspector and occupied the same for more than 11 months, without obtaining and protecting a leave of absence.

The Agreement in effect when the position of Assistant Plumber Foreman, here involved, was awarded to Strong was that of July 1, 1939, which was the first collective bargaining contract between these parties. Before that time the Maintenance of Way employes on the Carrier's railroad had no representation. It appears from the record, however, that prior to the negotiation of the initial agreement some measure of recognition was given to the principles of seniority, but the details of this voluntary arrangement are not disclosed, if any existed. The 1939 Agreement contemplated the establishment of seniority rosters but it appears that no such rosters had been settled up to the time of the hearing of this claim on November 3, 1944. Said 1939 Agreement also contained numerous rules pertaining to seniority rights, leaves of absence, etc., which were, with some inconsequential modifications, carried forward into the current Agreement, effective November 15, 1943. The parties agree, however, that we must determine their rights in the light of the applicability of the 1939 Agreement to the facts.

Rule 10 of the 1939 Agreement provided in paragraph (a) that an employe might, when the requirements of the service would permit, obtain a leave of absence not to exceed thirty (30) days, upon request; and it was further provided in (b) of said Rule that:

"An employe who engages in other work while on leave of absence, will forfeit his seniority, unless special arrangements have been made therefor with the proper officials of the Management and the General Chairman of the Employes' Organization."

The Carrier says, in substance, that said Rule 10 constitutes the yard-stick by which the Claimant's rights are to be measured; that he may not enjoy the seniority rights which were guaranteed by the Agreement in force when the assignment of which he complains was made, without showing that, by the terms of said Agreement, his claimed seniority was then effectual; and that, if there was evidence that Claimant acquired seniority as a Plumber's Foreman on April 1, 1924, the evidence also conclusively shows that said seniority was forfeited by his acceptance of the Work Equipment Inspector's position in 1937, without a leave of absence and without an approved special arrangement, as contemplated by Rule 10 (b) of the 1939 Agreement. On the other hand, the Claimant says that the 1939 Agreement was not in existence when he took the Inspector's position; that there was then no rule which authorized a leave of absence and no General Chairman who might have made an arrangement with the Management for the preservation of his seniority rights, as subsequently provided in the 1939 Agreement. Claimant further says that it is reasonably inferable that if any such rules as were afterwards embodied in the 1939 Agreement had been in effect in 1937 he would have fully complied therewith in protection of his rights.

We do not think we would be justified in determining this controversy upon speculation as to what either party might or might not have done if the

1939 Agreement had been in effect during 1937; nor will we invoke against the Claimant, retroactively, the provisions of the 1939 Agreement with respect to the forfeiture of his acquired seniority rights. Rather, we will resolve this case upon two facts, which do not appear to be in dispute. These are, first, that prior to the awarding of the position with which we are here concerned, the Claimant had established seniority as a Plumber's Foreman which, in point of time, antedated that of Mr. Strong; and, second, that under the 1939 Agreement, in effect when the position was assigned, the Carrier was bound to recognize the Claimant's seniority, his ability and merit being admittedly sufficient.

The Board ventures the admonition that what has been said in this opinion is in explanation of its disposition of this particular controversy, and is, in no-wise, intended to be influential in negotiations looking to the establishment of seniority rosters.

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 Employees involved in this dispute are respectively carrier and employes 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 Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of February, 1945.

DISSENT TO AWARD NO. 2815, DOCKET MW-2786

The Opinion of Board and Award in this case presume to declare retroactive application of but one provision (seniority) of the Agreement effective July 1, 1939, originating seniority rights for the employes involved, by first disposing of an 11-month break in the service of the claimant as a plumber prior thereto in 1937-1938. Though the Opinion recognizes that an assumption of forfeiture of seniority by Ellis account of that 11-month break prior to the time there was an Agreement may have been in harmony with the leave of absence provision of the subsequently executed Agreement of July 1, 1939, it proceeds to a conclusion that in effect was that he did not thus forfeit his seniority.

With that reversal of the theretofore understood relative status of L. R. Strong and Lyle Ellis incident to the latter's 11-month break in service as a plumber, the Award thereupon disregards their relative status as it had existed for a period of more than eight years prior to this first Agreement of July 1, 1939. Conceding, only for the purpose of comparing their relative standings, that Ellis had unbroken record despite his absence from his plumber's duties in 1937-1938, the file definitely disclosed that for six years prior to July 1, 1939, L. R. Strong filled the position of Assistant Plumber Foreman

while the claimant, Lyle Ellis, filled the position of plumber. For more than two years prior to that six year period L. R. Strong held the position of Plumber Foreman while the claimant, Ellis, held position of Assistant Plumber Foreman. Certainly the relative standings of these two employes were thus fixed and understood so far as this record is concerned.

There is no contention or record that the claimant, Ellis, throughout those eight years protested his standing. Disregarding the fact of more than eight years' superior seniority of L. R. Strong successively as Plumber Foreman and Assistant Plumber Foreman, which latter position only is involved by this dispute, and disregarding the fact that no protest was made before the signing of this first Agreement of July 1, 1939, the Award presumes to accept a statement that even prior to that eight year period, as of a date of April 1, 1924, Claimant Ellis was accredited as a Plumber Foreman because in occupancy of a position of Pipe Fitter Foreman he was as well a Plumber Foreman, despite the Carrier's denial that he thereupon became a Plumber Foreman.

Thereupon the Award presumes further to give retroactive application to the July 1, 1939 Agreement as applicable to the period embracing that date of April 1, 1924. The Award disregards all the elements of the then fitness or merit respectively of these two employes throughout the ensuing years until July 1, 1939, when seniority rights were first conferred upon them. It presumes that any situation throughout those preceding years, which credited L. R. Strong a standing in respect to seniority exercised and positions held superior to that of Lyle Ellis, was improperly thus existent for the reason that Lyle Ellis some years before had one element of greater seniority as a Pipe Fitter Foreman now adjudged by this Award to have been the same as Plumber Foreman.

Such disregard of actual and practical situations continuing for years without protest until inception of an Agreement conferring seniority rights, which also included considerations of merit and ability, is altogether unreal in its attempt to render relative justice as between two men whose interests predominantly are affected in respect to the only position, that of Assistant Plumber Foreman, by controversy brought to this Board for adjudication.

This Award represents an improper disposition of the respective rights of the two employes involved.

(s) C. C. Cook
(s) R. H. Allison
(s) A. H. Jones
(s) R. F. Ray
(s) C. P. Dugan