NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19900

THIRD DIVISION Docket Number MU-19817

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Norfolk and Western Railway Company

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

(1) The Carrier violated the National Agreement dated February 10, 1971 when it failed and refused to allow Messrs. R. C. Maynard, H. Haney, M. C. Bowen, C. Maynard and S. Bowen retroactive pay from January 1, 1970 through August 3, 1970 (System File MW-BRS-71-5).

(2) Messrs. R. C. Maynard, H. Haney, M. C. Bowen, C. Maynard and S. Bowen now be allowed retroactive pay for the period referred to within Part (1) of this claim.

OPINION OF BOARD: Claimants seek retroactive pay under the February 10, 1971 National Agreement.

The facts which control this dispute are not controverted. The February 10, 1971 Agreement provided certain wage increases (effective January 1, 1970) and Article I(h) "coverage" provides:

> "All employees who had an employment relationship after December 31, 1969, shall receive the amounts to which they are entitled under this Section 1 regardless of whether they are now in the employ of the carrier except persons who prior to the date of this Agreement have voluntarily Left the service of the carrier other than to retire or who have failed to respond to a call-back to service to which they were obligated to respond under the Rules Agreement. Overtime hours will be computed in accordance with the individual schedules for all overtime hours paid for."

Claimants had an employment relationship after December 31, 1969, but were furloughed on August 3, 1970.

Claimants failed to comply with the notification requirements of Rule 9(a) of the Agreement which provides:

> "Employes laid off by reason of force reduction desiring to retain their seniority must file with their superior officer a written statement indicating

> "their desire, and setting out their address. This statement must be filed within ten (10) days after being laid off. They must immediately notify their superior officer of any change of address. Employes failing to comply with these provisions or to return to service within ten (10) days for a regular bulletined position after having been notified in writing by their superior officer will forfeit all seniority unless a leave of absence is obtained under the provisions of this agreement."

Accordingly, Claimants are entitled to retroactive amounts unless they voluntarily Left the service of the Carrier (other than to retire) or failed to respond to a call-back to service notice. No question of "return to service" or "retirement" is presented in this case; only the question of "voluntary termination."

The actions which removed the employees from active employment in August, 1970 were clearly not "voluntary." The employees were furloughed. Thus, the only question which must be resolved is whether a" involuntary action (furlough) can be converted into a voluntary leaving of the "service of the Carrier" by a failure to comply with a notification rule (9(a)). If the answer is in the affirmative, the claim must fail.

The precise question presented here has not been previously considered by this Board. The same basic agreement provision was considered in Award #19603 (O'Brien), but that dispute was concerned with a factual determination of whether certain employee action constituted a "retirement" and the resolution there is of Little assistance in this case.

The Board is aware of prior Awards which have upheld agreement provisions which forfeit seniority for failure to give required notifications. Those cases generally dealt with questions of "recall", "displacement" and interrelationship of employees' seniority rights. While those cases are well reasoned /Awards #1136 (Sharfman), 3840 (Wenke), 4535 (Carter), 5909 (Douglas), 9457 (Grady), 12858 (without Referee), 15678 (Kenan) and 17596 (Gladden)/, they do not materially aid this determination. Clearly, a failure to satisfy a contractual obligation to give certain notifications can, and does, result in seniority forfeiture (as is the case here). But the cases do not resolve the difference between these parties as to whether forfeiture of seniority equates to a voluntary termination of employment. To be sure, Award #9457 referred to an employee relinquishing her "employe status" and Award #17596 referred to a Claimant taking herself "out of service." But a full consideration of those Awards does not suggest that those terms were used in a context consistent with Carrier's contention herein, as the issues presented in those cases dealt clearly with a loss of seniority rather than the issues before this Board.

To the contrary, the Board, in Award #19231 noted that, ".... while the Claimants may not have acquired seniority under Rule...., they were subject to the rules of the Agreement."

On balance, the prior Awards are not of significant assistance to the Board in this case of first impression. Unquestionably, under Rule 9(a), Claimants forfeited seniority. Unquestionably, the Claimants are not entitled to retroactive pay (in this dispute) if they voluntarily left the service of the Carrier. Seniority and service are not synonymous. Surely. quite frequently, seniority and active employment are considered in the same context. Yet, there may be instances when the two concepts are not totally compatible. A probationary employee may not have seniority - yet he is in an active employment status. There are situations where, by contractually permissible failure to act, "bump" or "displace", etc., a senior employee may not be in active service, while a junior employee enjoys such a status. Employees on leave of absence may have an altered status.

Whatever rights Claimants had to future active employment - after their forfeiture - may have been minimal, but the Board is of the view that a literal interpretation of the February 10, 1971 Agreement requires the conclusion that they are entitled to retroactive pay. They did not voluntarily leave the service of the Carrier when they were furloughed. Their subsequent inaction may have affected their future rights with the Carrier, but a forfeiture or loss of seniority is not necessarily a voluntary termination of service.

Within the context of the Agreement under scrutiny, the Board is of the view that the employees are entitled to retroactive pay for the period of their active employment during 1970.

The Board is compelled to point out that its determination here is limited to a determination of this Claim arising under the wording of the February 10, 1971 Agreement and particularly the wording of "(h) Coverage" of that document. Within the context of that document, and upon consideration of this record, the Claimants did not voluntarily Leave the service of the Carrier.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes 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 Agreement was violated.

A W A R D

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 8th day of August 1973.

DISSENT OF CARRIER MEMBERS
TO
AWARD 19900, DOCKET MW-19817
(REFEREE SICKLES)

Award No. 19900 is in serious error, not supported by the Agreement or precedent awards of this Board interpreting rules comparable to Rule 9(a) of the involved agreement,

The prior awards of the Division interpreting similar rules should have been of "significant assistance" had the Referee not chosen to simply brush them aside even after classifying them as "well reasoned". For example, in Award 9457 the Board held:

> "The filing requirement is not unduly onerous or unreasonable and was communicated to the employees by the Agreement. It was readily within Wilson's power to comply. She did not do so. She therefore relinquished her employe status under the Agreement. * * * We conclude that it was incumbent upon Wilson to file. * * * "

In Award 17596 it was held:

> "We concur with the Carrier that the Agreement places the responsibility of protecting seniority rights on the employe and in this instance, though the record shows Claimant was aware of this part of the Agreement and had given notice of prior changes of address she did cot do so after her change of address of November, 1965. She therefore took herself out of service." (Emphasis added).

Claimants' actions in failing to file their addresses as required by Rule g(a) was voluntary on their pal-t. They thereby terminated their relationship with the Carrier and therefore had "voluntarily left the service of the Carrier" as provided in Article 1(h) of the February 10, 1971 Agreement.

Award 19900 is without basis and we dissent.

P. C. Carter

H. F. M. Braidwood

G. L. Naylor
PCC

W. B. Jones
PCC

D. M. Youhn

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DISSENT OF CARRIER MEMBERS TO
AWARD 19900, DOCKET MW-19817

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Claimants had a" employment relationship after December 31, 1969, but were furloughed on August 3, 1970.

Claimants failed to comply with the notification requirements of Rule 9(a) of the Agreement which provides:

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> "their desire, and setting out their address. This statement must be filed within ten (10) days after being laid off. They must immediately notify their superior officer of any change of address. Employee failing to comply with these provisions or to return to service within ten (10) days for a regular bulletined position after having been notified in writing by their superior officer will forfeit all seniority unless a leave of absence is obtained under the provisions of this agreement."

Accordingly, Claimants are entitled to retroactive amounts unless they voluntarily left the service of the Carrier (other then to retire) or failed to respond to a call-back to service notice. No question of "return to service" or "retirement" is presented in this case; only the question of "voluntary termination."

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Claims sustained.

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By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 8th day of August 1973.

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TO
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Claimants' actions in failing to file their addresses as required by Rule 9(a) was voluntary on their part. They thereby terminated their relationship with the Carrier and therefore had "voluntarily left the service of the Carrier" asprovided in Article 1(h) of the February 10, 1371 Agreement.

Award 19900 is without basis and we dissent.

P C Carter

H A Weatherred

L L Naylor PCC

T B James PCC

E W Yourtee