

The Third Division consisted of the regular members and in addition Referee Jack Warshaw when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Chesapeake & Ohio Railway Company
(Northern Region)

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

(1) The Carrier violated the Agreement when it removed Mr. A. R. Rice from all seniority rosters (System File C-M-2849/MG-5466).

(2) Mr. A. R. Rice shall have his seniority restored with the seniority dates he held prior to the violation referred to in Part (1) hereof and he shall be recalled in accordance with his recall request."

FINDINGS:

The Third 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 employees 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.

Prior to being recalled from furloughed from Force 1285 the Claimant filed a recall request to any position to which his seniority entitled him. He was later recalled to service on April 8, 1985, to Force 1269. The Claimant did not actually perform duty as he was displaced from that position on the same date by a senior employee. Also, according to the Carrier's records, the Claimant's mother contacted his supervisor to advise that the Claimant was ill and she believed he was going to enter an alcoholic rehabilitation program.

On April 22, 1985, the Claimant filed a new recall request indicating his desire to be recalled only to Force 1269. On May 24, 1985, the Claimant was again recalled to service to Force 1285 from which he had originally been furloughed. The Claimant failed to report for duty or give any indication as to his reason for not doing so within ten calendar days following notification of recall. Again, according to Carrier records, the Claimant's mother advised the Carrier at a later, unspecified date, that the Claimant was then in jail and had been "for some time".

Subsequently the Claimant discovered that the Carrier had terminated his seniority because he failed to respond in accordance with Rule 13 to the May 24, 1985, recall notice. On September 24, 1985, the Organization filed a claim in the Claimant's behalf asserting the Claimant had no obligation to respond to the attempted recall of May 24, 1985, in view of the Claimant's newly filed recall request of April 22, 1985, that he be recalled to Force 1269, the location from which he was furloughed on April 8, 1985. The Organization contends that the Claimant's name should not have been removed from the seniority roster, that it should be restored and the Claimant recalled in accordance with his April 22, 1985, recall request.

The Carrier contends that the Claimant was properly recalled in accordance with the original and only valid recall request. It argues that when the Claimant failed to respond within ten days, the self-executing provisions of the Agreement dictated that his seniority was forfeited. Alternatively, the Carrier argues that even assuming, arguendo, the Claimant's right to file a new recall request, the Claimant was confined to jail on May 24, 1985, and unable to protect his seniority. Accordingly such confinement when the Claimant otherwise stood to work, constituted absence without proper leave in violation of Rule 12, the Leave of Absence rule, which also dictated forfeiture of seniority.

The Carrier further contends that when first furloughed, the Claimant elected to be recalled to any force to which his seniority entitled him; Thereafter he was bound by that choice as there is no Agreement provision for changing one's choice. Rule 13(a), the Carrier argues, makes no allowance for notifying Management of any change except for subsequent changes of address.

The pertinent provisions of the Agreement state:

RULE 13

"(a) Employees laid off by reason of force reduction desiring to retain their seniority rights, without displacing junior employees, must within fifteen (15) calendar days file their name and address through the foreman in writing with the Manager Engineering and notify the Manager Engineering in the same manner of any subsequent change of address.

(b) When forces are increased, employees laid off will be notified and they must return to the service within ten (10) calendar days thereafter. Failure to return within ten (10) calendar days unless prevented by sickness or other unavoidable cause (in which case they will advise the foreman and Manager Engineering in writing, giving the

cause of their inability to return to the service at that time, and arrange to keep in touch with the foreman and return to the service at the earliest possible time) will result in the loss of all seniority rights. If employees return to the service when notified and have complied with the provisions of this rule, their seniority will be cumulative during the period in which they are laid off. Postmark date of letter or date of telegram will constitute date of notice.

(c) Employees will not be required to refile their names and addresses if called back into the service for a period of less than thirty (30) days."

RULE 12

"(a) Employees given leave of absence in writing by the Manager Engineering or other corresponding supervisory officer for thirty (30) calendar days or more, but not exceeding six (6) months, will retain their seniority. Employees failing to return to duty at the expiration of their leave of absence will lose their seniority rights, unless an extension has been obtained in writing.

(b) Leave of absence or extensions may be given in cases of sickness or other disability, or for reasons acceptable to the Railway."

IT IS AGREED:

1. Rule 5(b) of the Schedule Agreement will be amended by deleting the following provision which comprises the last sentence of Section (b):

"When filing such notice the employee must indicate whether he wishes to be recalled for work in any force on the Supervisor's District on which he was working when affected by force reduction or whether he wishes to be recalled for work only on a force at the location where he was working at the time he was cut off."

and substituting the following provision in place of the deleted sentence:

"When filing such notice the employee must indicate which of the following types of recall for work he will accept:

1. Only to the location from which furloughed.
 2. To any force on the supervisor's district from which furloughed.
 3. To any force on the seniority district which is headquartered in camp cars."
2. Rule 5(c) (1) of the Schedule Agreement will be amended by deleting the current Section (c) (1) in its entirety and substituting therefor the following provisions:

"When forces are increased, vacancies occur, or new positions are created, trackmen in cut-off status who have protected their seniority as outlined in Section (b) of this rule will be recalled in seniority order according to the choice indicated on their notice. If more than one choice is shown or if no choice is shown, the Carrier shall recall such employee only to the location from which furloughed. Employees recalled hereunder must report within ten (10) calendar days after being notified by mail or telegram at the last known address or forfeit seniority. Postmark date of letter or date of telegram will constitute date of notice."

3. Rule 5(c) (2) of the Schedule Agreement will be amended by deleting the current Section (c) (2) in its entirety and substituting therefor the following provisions:

"Trackmen recalled to a force on the Supervisor's district from which furloughed or to a force headquartered in camp cars on the seniority district in accordance with Section (c) (1) of this rule may be displaced by senior trackmen in cut-off status anywhere on the seniority district providing such displacement is made within thirty (30) calendar days from the date the employee recalled reports to work."

The Board finds nothing in the Agreement which deals with the question of whether an employee can amend or file a new recall request. We conclude from the language of Rule 13(c) that although employees are not "required" to re-file they may nevertheless choose to do so, in the absence of any prohibition to the contrary. Moreover, if the Carrier believed the Claimant's new recall request of April 22, 1985 was not valid, it had an obligation to so inform him at that time. In its submission to this Board the Organization has argued that the Carrier has not established the fact that the Claimant was incarcerated and therefore unavailable for service. As there is nothing in the record to indicate that the Organization ever refuted either of the Carrier's assertions during its handling of the claim on the property, the Board will not deal with those issues and must assume to be factually correct the Carrier's letter of January 22, 1986 to the Organization's General Chairman and the report of the Carrier's Conference reply dated February 20, 1986.

As the Carrier's principal assertions on the property stand unrefuted the Board concurs in the Carrier's conclusion that the Claimant forfeited his seniority under the Leave of Absence Rule by being unavailable for duty owing to his confinement in jail. Accordingly the Board will deny the Claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September 1988.