

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Railroad Company
(Former St. Louis-San Francisco Railway Company)

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

(1) The Agreement was violated when the Carrier failed to list Mr. R. L. Gatrell on the Eastern Division, Seniority District No. 1 Machine Operator's Seniority Roster (System File B-786/EMWC 85-4-26).

(2) The Agreement was also violated when the Carrier, on March 12, 1985, assigned junior employe G. L. Traylor instead of R. L. Gatrell to the ballast regulator operator's position advertised by Bulletin No. ED-06-1985.

(3) As a consequence of the violation referred to in part (1) above, Mr. R. L. Gatrell shall be listed on the Eastern Division Seniority District No. 1 Machine Operator's Seniority Roster with a seniority date of June 8, 1970.

(4) As a consequence of the violation referred to in part (2) above, the Assignment Bulletin for Bulletin No. ED-06-1985 shall be corrected to show that Mr. Gatrell was assigned to the ballast regulator operator's position in question and Mr. Gatrell shall be compensated for all wage loss suffered as a result of the improper assignment."

FINDINGS:

The Third 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.

The instant Claim was precipitated in February, 1985, when Carrier issued Bulletin No. ED-06-1985 advertising a ballast regulator operator's position. Claim was filed when an employee allegedly junior to the Claimant was assigned to the position.

The Organization contends that Claimant established seniority as a machine operator on the Eastern District dating from July 2, 1970. Tracing the history of his employment with Carrier, the Organization notes that Claimant entered Carrier's service and established seniority as a laborer on Eastern Division on January 23, 1967. On June 8, 1970, Claimant was assigned to the ballast regulator operator's position on a System Mechanized Gang. The Organization further asserts that on July 2, 1970, Claimant's Supervisor certified him as qualified, and therefore at that point Claimant established seniority as a machine operator.

According to the Organization, the Claimant operated the ballast regulatory on the System Mechanized Gang as it worked across the Eastern Division, which was the Claimant's "home division." However, on September 1, 1970, the System Mechanized Gang left the Eastern Division to start work on a different Division. Hence, the Claimant vacated the ballast operator's position to return to a laborer's position on the Eastern Division. Effective September 3, 1970, the Claimant filled a laborer's position headquartered at Cuba, Missouri on the Eastern Division in accordance with Paragraphs 1(g) and (h) of a Letter of Agreement dated March 19, 1956, which amended Article 2, Rule 14 of the April 1, 1951 Agreement. For ready reference, Paragraphs 1(g) and (h) read:

"(g) Employees assigned to system mechanized gangs will have the right to work over the entire system but may exercise seniority displacement rights in their home seniority district in line with Article 2, Rule 28, when a system mechanized gang moves from their home division to another division or employees may file their names and addresses as provided in Article 2, Rule 20, of the agreement effective April 1, 1951, in the same manner as the rule is applicable to employees laid off by reason of force reduction.

(h) An employee who voluntarily gives up a position when a system mechanized gang moves from his home division to another division will not be permitted to exercise seniority displacement rights in system mechanized gangs when such a gang resumes service on his home division unless the employee has exhausted his seniority rights to regular positions in this seniority district."

When the 1971 Eastern Division Seniority Roster was published, the Claimant was not listed as a machine operator. After seeking the assistance of the Vice General Chairman, Claimant received the following response:

"Dear Sir and Brother:

Please refer to our letter of February 11, 1971 to R. N. Schmidt (carbon copy to you) in which we advise your name was left off the 1971 eastern division seniority roster as machine operator.

Mr. Schmidt replied to our letter February 16, 1971. His letter reads in part as follows:

'We have corrected our Seniority Roster of January 1971, showing Mr. Gatrell's TP-14 operator date as July 2, 1970.'

Your should check the April 1, 1971 revised roster when it comes out to make sure your name appears therein.

With best wishes, I am,

Fraternally yours,

/s/ C. E. Glenn

C. E. Glenn
Vice General Chairman"

Despite the purport of the foregoing letter, the Seniority Roster for April 1, 1971, did not include Claimant's July 2, 1970, seniority date as a machine operator. The Organization maintains, however, that based on the letter he received from the Vice General Chairman, Carrier's Roster did have him listed as a machine operator with a date of July 2, 1970.

The Organization contends that the foregoing facts clearly show that Claimant established seniority as a machine operator on July 2, 1970, and, therefore, he was entitled to be assigned the position in question as the senior employee. The employees remind the Board that seniority is an extremely important property right and, contrary to Carrier's allegations, it is not reasonable to conclude that Claimant's seniority rights could be abrogated by a clerical error or omission in the Seniority Roster. A far more reasonable conclusion, in the Organization's view, is that the parties intended that such an error could be corrected at any time that one of the parties affected came forward with compelling evidence to provide that an error was made.

Carrier has no dispute that Claimant established seniority as a machine operator in July, 1970, nor does it disagree that there was an initial Roster correction made in the January, 1971 Roster to reflect that fact. However, Carrier argues that Claimant relinquished his operator's rights on September 1, 1970, to return to a laborer position with District Gang 20 at Cuba on September 3, 1970, and was clearly informed of that fact on June 7, 1971, by Carrier Bulletin which reads:

"Reference Bulletin No. SG-26 for Ballast
Regulator Operator on Unit K Mechanized Gang
951.

Following conversation date am attaching copies of all bids received on this Bulletin on the Eastern Division. The assignment of R. L. Gatrell to this position as per my letter dated May 27 is in error inasmuch as further investigation has established that this man gave up his Operator's rights on September 1, 1970 to return to Laborer with District Gang 20 at Cuba on September 3, 1970.

Recommend that Mr. John A. Allison, Operator Seniority 2-11-71 2C and 6A be assigned to this Bulletin as Ballast Regulator Operator."

Carrier's position is that Claimant should not be permitted to assert a Claim 14 years later when he never protested either the April 1, 1971 Seniority Roster or the subsequent removal of Claimant in May, 1971, from an operator position, referred to in the foregoing letter. To assert a Claim now, in Carrier's view, is a violation of the contractual time limits, and Rule 15 in particular which states:

"Seniority rosters will be revised as of January 1 of each year and be open for a period of sixty days thereafter for correction of any new entry on the roster. Clerical or typographical errors may be corrected at any time. Following expiration of the sixty-day correction period, rosters will be issued as of April 1 and remain in effect until April 1 of the following year."

Carrier maintains that since Claimant failed to follow the basic tenets of the Schedule Agreement, this Claim should be dismissed by the Board.

After careful review of the record in its entirety, we conclude that the instant Claim must fail. There are cases, many of them cited by the Organization, which conclude that the inadvertent or improper omission of an employee's name off a Roster does not destroy seniority. See Third Division Awards 23282, 5520, 7586, and 3625. In those cases, the view expressed is that since a Seniority Roster does not of itself establish seniority but is merely the means of formally recognizing the seniority to which an employee is entitled, it can always be corrected when it has been shown that an error occurred.

On the other hand, Carrier has cited equally persuasive precedent Awards which have concluded that a challenge to the Seniority Roster must be made within the requisite contractual time period or the right to do so is lost. See, Second Division Awards 7414, 1958; Third Division Award 12297; First Division Award 12782. The rationale expressed in those cases, perhaps best illustrated in Second Division Award 7414, is that the parties established time limitations within which Seniority Rosters could be corrected in order to avoid the very sort of circumstance present in the instant case.

While we are cognizant of the divergence of viewpoints on this subject, the Board is of the view that the facts in the case at bar do not fit the Organization's theory. In order to support its contention that the Seniority Roster should be corrected at this late date, it was necessary to show, clearly and convincingly, that an error in fact occurred. Based on the record before the Board, and in particular the June 7, 1971 Bulletin which suggests that Claimant relinquished his seniority as an operator, we cannot state with any degree of certainty that an error occurred. Thus, even if we were to accept the point of view as expressed by the cases cited by the Organization, there is lacking here the necessary proof to show that the instant matter falls within the rubric of that line of cases.

Equally important, in our view, is the fact that the removal of the Claimant's name from the April, 1971 Seniority Roster went unchallenged for over fourteen years. Agreement Rules require that employees check each annually published Roster in order to ascertain if it accurately reflects seniority dates. Moreover, Claimant was specifically instructed by the Vice Chairman to check the April, 1971 Roster. Claimant never challenged the validity of that Roster nor the subsequently published Seniority Rosters. No explanation was ever forthcoming from the Organization as to why the Claimant remained silent for so long. Under these circumstances, we find that the Claimant's decision to lodge a protest regarding an alleged seniority date comes too late, and, lacking sufficient evidence of a mistake or omission on the April, 1971 Seniority Roster, we must 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 7th day of August 1990.