

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award No. 30128

Docket No. MS-28950

94-3-89-3-399

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

(Earl Harden
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation
(Amtrak)

STATEMENT OF CLAIM:

"Why a fellow employee (Robert Richards) was promoted ahead of myself?

1. Mr. Richards was able to somehow work by his written statement; when I myself was furloughed (laid off from work) from January 5, 1986, to mid-May in which gave Mr. Richards time to gain the sixty days needed to be promoted, and then I was furloughed again in January of 1987 for about the same length of time, four months.
2. Even though given a written notarized statement by Mr. Richards, it seems to have gone unnoticed by my union representative (Mr. Monroe) and by Amtrak's labor relations in Chicago (Ms. K.T. Safstorm) and Washington D.C.'s Director of Labor Relations (Mr. L.D. Miller). Not only unnoticed but unmentioned!.
3. This is clearly in violation of my seniority rights by my company (Amtrak) and misrepresentation by my union (the Amtrak Service Workers Council). For not given the time to fully recognize a mistake has been made, surly Mr. Richards should not have been able to work when I am ahead of him on the seniority roster, I should be first not last.
4. If Amtrak had recognized their mistake, they would have to pay me for all time that Mr. Richards has worked ahead of me and for the time that I have lost being furloughed, I believe this is what they are trying to get around. Mr. Richards works as Chef with a 1986 seniority date and I work as Chef with a 1988 seniority date. How is that possible?"

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 employe 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 dispute presently before the Board had its genesis in a letter dated October 4, 1987, written by the Claimant. His handwritten letter reads as follows:

"I, Earl Harden 340-40-6031 working in catagory (sic) of food Specilist (sic), I am formally protesting the fact that I've been asked to run as chef on different occasions since June 1985, yet I have been denied chef rights; it is my understanding that rights should go by senitority (sic) not by who you want or whatever. I feel that this matter should be looked into and governed accordinally (sic)."

As it developed, Claimant was protesting the fact that employee R. Richards, who was one number junior to him as a Food Specialist, received a Chef seniority date ahead of him.

The Carrier met with the Claimant's Union Representative, and subsequent to the meeting, wrote the following letter (dated January 31, 1989) confirming the conference:

"This refers to our three conferences and numerous phone calls concerning the seniority of Mr. E. Harden in the classification of Chef.

We discussed several issues including the timeliness of the roster protest, Carrier compliance with Rules 2 and 20 of the Agreement and the seniority date of Mr. R. Richards who is junior to Mr. Harden as Food Specialist but senior as Chef.

At the request of the Organization, I agreed to waive the time limit and treat this issue as a timely protest to the 1988 roster. I will also overlook the propriety of initiating the protest with this office rather than with the Passenger Service Department. It is understood that the above is due solely to the unusual circumstances involved herein and will in no way constitute a precedent for handling of future cases.

Mr. R. Richards and Claimant have the same seniority date on the Food Specialist Seniority Roster, however, Mr. Harden shows as senior to Mr. Richards. The instant protest revolves around the junior employee, Mr. Richards, obtaining Chef seniority prior to Mr. Harden. Rule 20 of the ASWC Agreement provides the opportunity for senior food specialists to qualify in the category.

Rule 20 of the ASWC Agreement provides the opportunity for senior food specialists to qualify in the category of Chef. Paragraph (A) of Rule 20 reads, in part:

'the opportunity to qualify in these categories will be offered to the senior "Food Specialist" in the case of chef vacancies ...' (emphasis added).

Senior Food Specialist E. Harden enjoyed such opportunity on January 10, 1985. He also worked as Chef on February 9 and 18, and April 9 and 14, 1985. Junior employee Richards had his first opportunity to work as Chef on April 15, 1985. Mr. Harden, as shown above, had already worked five trips as Chef at that time. Carrier did not violate Rule 20. Clearly the senior man had the first opportunity to qualify.

Rule 2, Seniority, provides:

1. Amtrak employees who have been assigned to work as "chef" and have qualified as "chef" by working sixty (60) days on such positions will be assigned to the chef seniority roster with a seniority date as of the date they were first qualified as "chef".

At our most recent meeting on January 26, 1989, yourself and Mr. Herz of my staff jointly reviewed crew base records affecting this case. In July, 1986 Mr. Harden bid and was awarded a regular position as 3rd cook Trains #5-6 which he held until September 15, 1986. During this period Mr. Richards remained on the extra board and worked forty-two (42) days as chef. He accumulated sixty (60) days in that classification on September 7, 1986.

Mr. Harden reverted to the extra board on September 15, 1986, and stood for call as chef, when needed. He worked ten (10) days in 1987 and eighteen (18) days the first two months of 1988. He accumulated sixty (60) days in the chef classification on February 11, 1988.

After thorough review of all events from 1985 through 1988 I can find no inconsistencies by the Carrier in providing the opportunity, nor awarding the chef seniority date to Mr. Harden. I therefore deny the protest."

On March 9, 1989, the Claimant's Union Representative wrote him, indicating "... records provided by Chicago crew base indicate that you were indeed awarded Chef seniority date in accordance with the agreement between our Organization and the NRPC. Provided those records are accurate, I regretfully have no recourse for pursuing this matter any further."

The Claimant then appealed the matter to the Carrier's Director of Labor Relations. The letter read as follows:

"Kindly accept this as an appeal in my own behalf of the attached decision of Division Manager, K.T. Safstrom regarding my Chef seniority date.

In her letter of denial, Ms. Safstrom fails to make mention of the fact that while I was instructed that I had to attend a Chefs class, other employees including Mr. R.C. Richards were never given such instructions and subsequently never received such training. Further, some of the dates listed as my having worked as Chef are inconsistent (sic) with my own records.

I would appreciate whatever assistance you might provide in regards to this matter. Given advance notice I will gladly meet with you at your earliest convenience."

The Carrier replied on April 25, 1989, as follows:

"This refers to your March 6, 1989, letter appealing Division Manager K.T. Safstrom's decision regarding your chef seniority roster protest.

We are certainly agreeable to meeting with you in person to discuss this matter, however, our review of the facts in this case leads us to support the January 31, 1989 decision of Division Manager Labor Relations K.T. Safstrom. Such decision denied your protest after a thorough review of the facts. Division Manager Safstrom's denial is also supported by ASWC Assistant General Chairman Isaac Monroe, who, in his letter to you of March 9, 1989, states as follows, "... records provided by Chicago crew base indicate that you were

indeed awarded chef seniority date in accordance with the agreement between our Organization and the NRPC.

We note your contention you were instructed to attend a chef's class for training and other employees were not. This contention has no bearing and by itself would not change your chef seniority date. The dates listed in Ms. Safstrom's letter were researched in the Carrier's official records, and we believe they are correct. If you are able to provide additional evidence that you did not work as a chef on any of these dates we will adjust our records accordingly. Even if such evidence is forthcoming, it must conclusively demonstrate how your seniority date would be changed, in order for us to consider your protest.

You may come to Washington to discuss this matter in person if you wish, however, we feel an obligation to inform you that there is little likelihood that such a conference would result in our granting your claim, given the facts of record.

For the reasons put forward in the record, we hereby deny your roster protest in its entirety."

Next, the Claimant on September 3, 1989, filed a notice with the Board of his intent to file an ex parte Submission.

In the documents he filed with the Board, the Claimant makes a number of assertions, not made on the property prior to his appeal to the Board. They include assertions (1) that he was laid off from January 5, 1986, until mid-May and Richards was not, thus giving Richards the opportunity to qualify as chef, (2) that the Claimant was told he had to attend Chef class, but Richards was not, and (3) that the Carrier's claim--made on the property--that he had bid for a third Cook position in July of 1986 is erroneous and, as a consequence, he should not have been removed from the extra list during that period of time. Indeed, the main argument of the Claimant before the Board is that he should not have been removed from the extra list. Thus, had he remained on the extra list, he would have completed his 60 days prior to Richards. This is the basis for his claim, that he should receive a seniority date of September 1986 and should be paid the losses he sustained as a result of his being deprived of a Chef's classification between September 1986 to the present.

It is the conclusion of this Board that the Petitioner's position cannot be sustained when viewed in light of the evidence properly before it. Under the rules of the Board and long

established precedent recognizing this Board as an appellate body, any evidence to be properly considered must have been exchanged between the Parties on the property before the matter is appealed. The Claimant's position rests on an assertion that was not made on the property, to wit that he was not assigned as a third Cook and was improperly removed from the extra list. This assertion was set forth in an affidavit that was attached to the Submission.

The Petitioner noted at the Board hearing that this was uncontroverted and that the Carrier failed to produce a bid sheet showing he had bid as a third Cook. To this the Board responds as follows. Of course, it was not challenged because it was never made on the property and, as such, the Carrier was not in a position to challenge it. Such assertions when made for the first time at the Board are too late.

Based on the proper record of evidence, we cannot conclude that the Claimant's position is correct. The Carrier contended on the property without rebuttal on the property from either the Claimant or his Union Representative that he voluntarily removed himself from the Chef's extra list by bidding on a third Cook position. Thus, the fact that Richards gained more experience faster is not the fault of the Carrier. Additionally, we are of the opinion that the Claimant's assertions as to Chef's class are irrelevant. He failed to show how this retarded his ability to obtain the requisite 60 days. The Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin / lw
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 4th day of April 1994.