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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33632
Docket No. MW-32302
99-3-95-3-133**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed to permit Mr. G. Gonzales to displace junior employee R. Crawford on Gang O4B1, Cleveland, Ohio on September 8, 1993 (System Docket MW-3262).

(2) As a consequence of the violation referred to in Part (1) above, Mr. G. Gonzales shall be awarded a B&B mechanic's date of August 30, 1993 and he shall be compensated for all wage loss suffered beginning September 8, 1993 and continuing until the violation ceases.”

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 employee 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 were given due notice of hearing thereon.

This claim involves the interpretation of Rule 5, Returning to Duty After Leave of Absence, etc. - Exercise of Seniority, which provides, in pertinent part:

“(a) An employee returning to duty after leave of absence, vacation, sickness, jury duty, disability, or suspension shall return to his former position and may, within five (5) days after his return to his former position, exercise displacement to any position advertised during his absence or may displace any junior employee promoted during his absence, subject to Rule 3, Section 2.”

The undisputed facts reveal that the Claimant, a Trackman on the Youngstown Seniority District, was off on disability from June 22, 1993 to September 8, 1993. During the Claimant's medical disability, junior Trackman R. Crawford from the same seniority district bid on, and was awarded pending qualification, a B&B Mechanic's position on Gang O4B1 at Cleveland, Ohio. Crawford's new position was at a higher pay rate and was effective August 30, 1993. Upon the Claimant's return from disability leave on September 8, 1993, he attempted to displace Crawford. The Carrier's refusal to permit such displacement led to the filing of the instant claim.

The Organization argues that Rule 5 clearly and unambiguously entitles the Claimant to displace junior employee Crawford from the position he was promoted to during the Claimant's absence due to disability. It notes that the new position was a promotion, and that Crawford was still in his qualification period when the Claimant sought to displace him. The Organization contends that the only modifying exception written in Rule 5(a) is that the displacement is subject to Rule 3, Section 2, which neither party claims is applicable herein. It asserts that the exclusionary principle applies and negates the Carrier's contention that Rule 5(a) does not contemplate acquiring seniority in another class, citing Second Division Award 12025 and Third Division Award 29852.

The Carrier contends that Rule 5(a) was never intended to give employees seniority in classifications in which they are not qualified. It asserts that Crawford obtained B&B seniority under Rule 4 on August 30, 1993, and that the Claimant had no B&B seniority which would enable him to displace Crawford on September 8, 1993. The Carrier argues that on-property Third Division Award 25935 is controlling and holds that a similar Rule did not allow an increase in seniority in other classes. The Carrier asserts that a rule of reason should apply, citing Third Division Awards 20650, 14240; Second Division Award 11250, and avers that the absurd result of granting the Claimant

seniority in a classification he never worked retroactive to a time he was still on disability leave would result from a sustaining award.

After careful consideration of the record, the Board finds that Third Division Award 25935 involving the former Penn Central Railroad is distinguishable based upon the language of the applicable Rule. In that case, the operative language was that an employee returning from leave shall "return to his former position or exercise seniority to any position advertised during his absence." There was no language in Rule 3-D-5 giving the returning employee the right to displace any junior employee promoted during his absence as there is in Rule 5(a). While the use of the term "junior employee" does imply that the employee being dispatched is on the same seniority roster as the returning employee, the Claimant was senior to Crawford on the Trackman Roster at the time of the B&B Mechanic job posting and award. That is the seniority the Carrier considered in awarding the position to Crawford. The fact that Crawford had obtained B&B Mechanic seniority between August 30 and September 8, 1993 while qualifying for the position cannot defeat this claim. There is no express limitation within Rule 5(a) concerning where the promotion could take place, although it does state a modifying exception, which it is agreed does not apply in this case.

This case must be governed by the principle - *Expressio unius est exclusio alterius*, see Second division Award 12025, Third Division Award 29852. The inclusion of a proviso to the ability of a returning employee to displace a junior employee promoted in his absence must be interpreted to infer that the parties did not intend any other limitation. The Carrier's interpretation would place a further limitation on this displacement right to include the fact that the displacement can only occur within the same class of seniority, and would effectively exclude promotions outside the seniority roster from its terms. Had the parties intended such a narrow construction, they certainly would have used less broad contractual language. Under such circumstances, we are inclined to find that the Carrier violated Rule 5(a) when it failed to permit the Claimant to displace Crawford upon his return from medical disability leave.

Having so found, we are in agreement with the Carrier that the application of Rule 5(a) to the facts of this case would not permit the Claimant to attain seniority within the B&B Mechanic Roster at a time previous to when he was medically qualified to return to work. The Claimant should be permitted to qualify on the B&B Mechanic position and have his seniority on that roster begin on September 8, 1993 should he

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qualify. He should also be made whole for any loss of wages suffered as a result of this violation.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of November 1999.

**Carrier Members' Dissent
to Third Division Award 33632 (docket MW-32302)
Referee Newman**

At the time he attempted to displace, Claimant Gonzales had no B&B seniority. The position he attempted to displace was a B&B position. It is self-evident that Rule 5(a) was never intended to award seniority in classifications that employees had never worked.

Third Division Award 25935 which was cited on the property as precedent without rebuttal, noted:

“... returning a disable employee to the same seniority he had when he become disable. . . . It does not allow an increase in seniority to other classes retroactively in terms of what ‘might have been’ or ‘could have been,’ had the employee actually applied and been qualified.”

Here, there was no dispute that Claimant was not qualified in the B&B classification. Common sense should have applied, instead we have the opposite.

We Dissent.


P. V. Varga


M. W. Fingerhut


M. C. Lesnik