

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35401
Docket No. MW-32767
01-3-96-3-74**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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. E.G. Brubaker to displace junior employee D.R. Miller on Ballast Regulator Position #05-035-3604-5823-7 which was advertised on Bulletin #197, dated July 13, 1993 and awarded under date of July 20, 1993 (System Docket MW-3626).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. E.G. Brubaker shall be ‘ . . . allowed Class Two Machine Operator seniority effective July 26, 1993 in advance of Mr. Miller. Additionally, all lost wages and/or the difference in wages along with all lost credits and or benefits normally due must be allowed. This claim is continuous as per Rule 26 f ***”

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.

Agreement Rules 4 and 5, portions of which are deemed pertinent to this dispute, state the following:

“RULE 4 SECTION 1:

- (a) An employee displacing a junior employee who was promoted in his absence in accordance with Rule 5(a) shall acquire the same seniority date as the employee displaced and shall rank immediately above such employee.
- (b) If two (2) or more employees acquire seniority in a higher class on the same day, their relative rank in the higher class shall be the same as in the class from which they are promoted. If promoted from different classes, they will be ranked in accordance with their earliest seniority dates.

RULE 5 - Returning to duty after leave of absence, sickness, etc. -Exercise of Seniority:

- (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.
- (b) If, during such absence, his former position is abolished or filled by another employee in the exercise of seniority, he may exercise seniority as outlined in Rule #4, Section #2 or may displace any junior employee promoted during his absence, subject to Rule #3, Section #2.
- (c) An employee displaced from his position by the return of an employee from leave of absence, vacation, sickness, jury duty, disability, or suspension shall exercise seniority as outlined in Rule #4, Section #2.
- (d) An employee, failing to exercise seniority within the five (5) days specified in paragraph (a) of this Rule, will forfeit the right to exercise seniority.”

The Claimant established and holds seniority in the Track Department on the Philadelphia Division. He qualified as a Class 2 Machine Operator and was qualified as a Ballast Regulator Operator, dating from September 20, 1993. Commencing June 21, 1993, the Claimant took a sick leave of absence from his assignment, and did not return to work until August 24, 1993. During the Claimant’s leave of absence, on July 13, 1993, the Carrier advertised by Bulletin #197, Ballast Regulator Position #05-035-

3604-5823-7 on the Pittsburgh Seniority District. On July 20, 1993, said position was awarded to D. Miller, who was not qualified as a Ballast Regulator Operator at the time. However, shortly thereafter, on July 26, 1993, Mr. Miller established his seniority as a Class 2 Ballast Regulator on the Pittsburgh Seniority District.

When the Claimant returned from sick leave on August 24, 1993, he exercised his seniority under Rule 5 (a), supra, to displace the junior employee Mr. Miller who had been awarded and filled the Ballast Regulator position from July 26, 1993 until the Claimant returned from medical leave. However, because the Carrier would not allow the Claimant the same July 26, 1993 seniority date as displaced junior employee Miller on the seniority roster, on October 1, 1993, the Organization submitted the present claim on behalf of Mr. Brubaker, asserting that:

“Conrail violated Rule 5 of the prevailing agreement on August 24, 1993 when it failed to allow the Claimant seniority following his return from sick leave. On that date, the Claimant began to fulfill the duties of the position which had been vacated by Mr. Miller. Claimant had operated the ballast regulator, without exception, until it was awarded to W.P. Arens on September 20, 1993.

In view of Claimant’s previous qualification on the ballast regulator, had he not been on sick leave the Carrier under usual circumstances would have awarded the position to him in advance of Mr. Miller. Although Mr. Miller has an earlier BMW date, he was not qualified on the ballast regulator. Thus, Mr. Brubaker would have been awarded the promotion in question instead of Mr. Miller.

In recognition of the foregoing, it is necessary to request the Claimant be allowed Class Two Machine Operator seniority effective July 26, 1993, in advance of Mr. Miller. Additionally, all lost wages and/or difference in wages along with all lost credits and or benefits normally due must be allowed. This claim is continuous as per Rule 26(f) so long as the Claimant is deprived from his rightful seniority.”

The Carrier denied the claim contending that Rule 5 did not apply to employees who acquire new seniority in a separate class, and therefore, the Claimant had not even been entitled to displace onto the rostered position. According to the Carrier, the Claimant was paid as a “non-incumbent” on the position in question, and was excluded from overtime and not denied the proper rate for the position.

The clear intent of Rules 4 and 5 was to ensure that in certain enumerated circumstances, including sickness, employees would not be required to forego the benefits which accrue to them by virtue of their seniority during the time they were off duty due to said illness or disability. The Organization correctly notes that the

February 1, 1982 Agreement between the Parties changed the pertinent provisions and the “new” language, found in Rules 4 and 5 of the current Agreement are clear and unambiguous. For its part, the Carrier relied upon denial Award 25935 as dispositive of this dispute. However, a review of Award 25935 establishes that the Rule upon which that Award is predicated is substantively different from Rules 4 and 5 of the current Agreement between the Parties. Moreover, the same issue, arguments and alleged precedents were presented by the Parties in a more recent case which resulted in a sustaining decision in Award 33632. In that decision, the Third Division carefully considered and distinguished the decision in Award 25935 and sustained a claim which was literally the same as the present dispute. We find no reason to consider Award 33632 anything other than authoritative precedent which requires a sustaining award in the present case.

AWARD

Claim sustained.

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 26th day of April, 2001.