

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37045
Docket No. MW-35986
04-3-00-3-81

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier terminated the seniority of Machine Operator J. M. DeGray on September 1, 1998 (System Docket MW-5347).
- (2) As a consequence of the violation in Part (1) above, "... Mr. DeGray should be reinstated to the rosters of the New England Seniority District and he should also be reimbursed for all lost wages or SUB Payments including his insurance coverage."

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.

The Claimant, an employee since July 6, 1976, held seniority on two seniority districts - Mohawk Hudson and New England. At the time this dispute arose, the Claimant was on furlough.

By letter dated August 19, 1998, the Claimant was notified that he was recalled from furlough and awarded a front-end loader position headquartered at Selkirk, New York, which is in the Mohawk Hudson District. The Claimant was further advised in that letter that "[f]ailure to report promptly in accordance with Rule 4, Section 3 of the Schedule Agreement could result in the forfeiture of your seniority, in the Mohawk Hudson Seniority District."

The Claimant did not report in accord with the August 19, 1998 recall letter, nor did the Claimant contact the Carrier stating that he declined the position. By letter dated September 1, 1998, the Carrier advised the Claimant that because he did not report within the required ten day period, "... pursuant to the Agreement, Rule 4, Section 3, your seniority as Class 3 and Class 4 Machine Operators is hereby forfeited in the Mohawk Hudson Seniority District."

The record contains a "corrected copy" of the letter from the Carrier dated August 19, 1998 stating, "[f]ailure to report promptly in accordance with Rule 4, Section 3 of the Schedule Agreement could result in the forfeiture of your seniority, in its entirety." The record also contains a "corrected letter" dated September 11, 1998 referencing "the attached certified letter dated August 19, 1998" and states that because the Claimant did not report within the prescribed ten day period "... pursuant to Agreement Rule 4, Section 3, your seniority is hereby forfeited in its entirety."

The claim does not dispute the Claimant's loss of seniority on the Mohawk Hudson District. Instead, the claim protests the Claimant's loss of seniority on the New England District.

Initially on the property, in its September 22, 1998 letter, the Organization took the position that the Claimant never properly had seniority on the Mohawk Hudson District "... as the date was for an award on a production gang ... and not in Mr. DeGray's home seniority zone then he had no obligation to accept the position and thus should retain all his seniority on the New England Seniority District." In response, in its December 14, 1998 letter, the Carrier demonstrated that in July 1994, the Claimant bid for and was awarded a Class 2 Machine

Operator position on a maintenance gang headquartered at Selkirk in the Mohawk Hudson District, thereby establishing that the Claimant had seniority in that district.

In its December 29, 1998 letter, the Organization took the position that the Claimant did not respond to the August 19, 1998 recall to the position at Selkirk because "[d]ue to personal problems Mr. DeGray felt that he could not cover this position due to the travel involved [and b]y not responding to the recall understood that he would forfeit his seniority in that district [Mohawk Hudson] only." Further, according to the Organization, because the original September 1, 1998 seniority forfeiture letter from the Carrier caused by the Claimant's failure to report notified him that he would only forfeit seniority in the Mohawk Hudson District, "no further response was necessary" from the Claimant. The Carrier responded in its May 3, 1999 letter, that by not responding to the recall notice, the self-enforcing provisions of Rule 4, Section 3 mandated that the Claimant "... forfeited all BMW seniority."

Rule 4, Section 3 states:

"Section 3. Return to service.

An employee not in service will be subject to return to work from furlough in seniority order in any class in which he holds seniority in his working zone (either Divisional, Zone or Regional). If he fails to return to service within ten (10) days from date notified by certified mail to his last recorded address for a position or vacancy of thirty (30) days or more duration, he will forfeit all seniority under this Agreement. Forfeiture of seniority under this paragraph will not apply when an employee furnished satisfactory evidence to the officer signatory to notification that failure to respond within ten (10) days was due to conditions beyond his control. Copy of recall letter shall be furnished the designated union representative. An employee who declines, in writing, within this ten (10) calendar day period to accept recall to a Regional Unit shall only forfeit all Regional seniority.

Employees that possess seniority on more than one seniority district shall have the right to decline recall to service, but will forfeit all

seniority in the seniority district to which they declined to accept recall."

Under the facts of this case, the claim has merit.

First, while the first paragraph of Rule 4, Section 3 provides that "[i]f he fails to return to service within ten (10) days for a position or vacancy of thirty (30) days or more duration, he will forfeit all seniority under this Agreement," the second paragraph of Rule 4, Section 3 provides that "[e]mployees that possess seniority on more than one seniority district shall have the right to decline recall to service, but will forfeit all seniority in the seniority district to which they declined to accept recall" [Emphasis added]. When the Organization took the position that the Claimant was improperly considered as holding seniority in the Mohawk Hudson District, the Carrier demonstrated that the Claimant held seniority in that district. Therefore, it is undisputed that the Claimant held seniority in two districts - Mohawk Hudson and New England. Under the second paragraph of Rule 4, Section 3, it is fair to conclude that by not reporting for the position at Selkirk, the Claimant only forfeited "... seniority in the seniority district to which [he] declined to accept recall" - i.e., the Mohawk Hudson District.

Second, the Carrier initially was of the same opinion that by failing to report to the position at Selkirk the Claimant only forfeited his Mohawk Hudson District seniority. In its letter of August 19, 1998 advising the Claimant of his recall, the Carrier told the Claimant that failure to timely report to the position at Selkirk "... could result in the forfeiture of your seniority, in the Mohawk Hudson Seniority District." Further, in its September 1, 1998 letter, the Carrier advised the Claimant that because he failed to report "... your seniority as Class 3 and Class 4 Machine Operators is hereby forfeited in the Mohawk Hudson Seniority District" [Emphasis added]. The Claimant apparently did not care that he forfeited his seniority in the Mohawk Hudson District and, given those letters from the Carrier, there was nothing more for the Claimant to do. The Claimant simply accepted what the Carrier twice told him would happen - forfeiture of his seniority in the Mohawk Hudson District. Given those letters from the Carrier which clearly state that the Claimant would only forfeit seniority in the Mohawk Hudson District and further given the provisions of the second paragraph of Rule 4, Section 3 which provide that an employee such as the Claimant who holds seniority in more than one seniority district has the right to decline recall with the result that he will "... forfeit all seniority in the seniority district to which they decline to accept recall," it would be

manifestly unfair for the Board to interpret Rule 4, Section 3 in this case to operate as a total forfeiture of the Claimant's seniority.

Third, the Carrier's reliance on the "corrected" letters of August 19 and September 1, 1998 which changed the scope of the forfeiture of seniority from just the Mohawk Hudson District to all BMW seniority and its further argument that in order for the second paragraph of Rule 4, Section 3 to come into play, the Claimant was obligated to take affirmative steps to decline the position rather than make no response, do not change the result. See the Carrier's letter of May 3, 1999 ("He did not decline the position, as contemplated by Rule 4, Section 3, he simply ignored the recall notice"). By its letter of September 1, 1998, the Carrier advised the Claimant that he had only forfeited his Mohawk Hudson District seniority - and that was fine with the Claimant. The Claimant obviously relied upon what the Carrier told him would happen if he did not report to Selkirk - forfeiture of only his Mohawk Hudson District seniority. As of September 1, 1998, and given what the Carrier told him was going to happen and what did happen, there was nothing more for the Claimant to do. There was no direct action for the Claimant to take such as affirmatively "declining" the position. As of September 1, 1998, as far as the Claimant was concerned and from what the Carrier told him, although he forfeited his Mohawk Hudson District seniority, he still had his New England District seniority. It was not until its letter of September 11, 1998 that the Carrier advised the Claimant that it had changed the consequences of his failure to report to the position at Selkirk to now include a forfeiture of his seniority from just a loss of Mohawk Hudson District seniority to seniority "in its entirety." Having told the Claimant on September 1, 1998 that he only lost his Mohawk Hudson District seniority for failure to report to the position at Selkirk (which the Claimant accepted) the Carrier is estopped from changing the scope of the loss of seniority as it did in its September 11, 1998 "corrected letter" and then arguing that the Claimant was obligated under Rule 4, Section 3 to make an affirmative declination of the position in order to avoid loss of his seniority "in its entirety." If the Carrier is going to urge an interpretation of the second paragraph of Rule 4, Section 3 to require such an affirmative declination of a position rather than no response from the employee, then the Carrier cannot successfully do so by making that argument after it changed the scope of the employee's loss of seniority. In this case we need not decide whether an employee who holds seniority on more than one district is required under the second paragraph of Rule 4, Section 3 to make an affirmative declination of the position in order to avoid complete loss of seniority under the first paragraph of that section. Because the Carrier told the Claimant that he would

only lose his Mohawk Hudson District seniority and because the Claimant relied upon that representation, we find that the Carrier is estopped from making that argument in this case.

We therefore find that by not reporting to the recall position at Selkirk, the Claimant only forfeited his Mohawk Hudson District seniority. As a remedy, the Claimant's New England District seniority shall be reinstated as if it was not removed and the Claimant shall be made whole as requested in the claim.

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 22nd day of June 2004.