

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 38216
Docket No. MW-37639
07-3-02-3-762**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to allocate and list Mr. C. H. Mullin on any roster and when it refused to allow him any work opportunity after March 6, 2002 and continuing (Carrier’s File 12-02-0143 CSX).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. H. Mullin shall now ‘. . . be compensated for all loss wages, credits and benefits commencing March 6, 2002 in continuation until instant claim resolved,’ and have his ‘. . . seniority restored to the appropriate rosters.’”**

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, a Consolidated Rail Corporation (Conrail) employee, held seniority on the Buffalo Seniority District as a Trackman dating from January 20, 1975, in addition to seniority in other classifications as of later dates. During 1997 CSX Transportation, Inc. (CSXT) and the Norfolk Southern Railway Company (NS) each acquired parts of Conrail, which continued to operate as a separate railroad until June 1, 1999. During 1998 and 1999 CSXT and the Organization negotiated a single system-wide Agreement, which was signed on May 11, 1999 and became effective on June 1. In November 1998, the Claimant was furloughed. He protected his seniority by keeping his correct address and telephone number on file with Conrail.

On February 5, 1999, while the Claimant was still on furlough, Conrail employees were allocated to either CSXT or NS. The Claimant was allocated to CSXT. On March 24, 1999, Conrail sent a U.S. Certified Mail letter to the Claimant's address of record stating that he was awarded a Trackman position headquartered in Rochester, New York, and that "Failure to report promptly in accordance with Rule 4, Section 3 of the Schedule Agreement could result in the forfeiture of your seniority."

The March 24 letter was returned to Conrail undelivered. Although there was a U. S. Postal Service stamp on the envelope with boxes for the postal clerk to check the reason the letter was being returned to sender, such as "Not Deliverable as Addressed," "Unclaimed," or "Refused," none of the boxes was checked. On March 31, 1999, a second Certified Mail letter was sent by Conrail to the Claimant, with a copy to the Organization containing a copy of the March 24 letter, noting that the prior letter "came back returned to sender," and stating that "pursuant to the Agreement, Rule 4, Section 2c," the Claimant's "seniority is hereby forfeited in its entirety." The March 31 letter was also returned to Conrail undelivered. As with the first letter, no reason was checked on the envelope for returning the letter.

On March 9, 2002, BMWWE notified CSXT by e-mail that the Claimant had contacted the Organization on March 6 stating that "he was attempting to get a position on T5 SPG" but "was informed CSX did not have an ID# for him, and he would have to straighten out the matter before his return." The e-mail stated that "No claims are being sought by Mullin nor will any be filed by this office," that the Organization was just "looking to get Mullin's allocation to CSX completed and his return to active status by bid or fill in."

By letter dated March 13, 2002, the Carrier notified the Organization of its position that the Claimant was correctly dealt with in the allocation of former

Conrail employees between CSXT and NS and that by Certified Mail on March 24, 1999, he was awarded a Trackman position headquartered in Rochester, New York, but did not respond to the return-to-work directive. The Carrier further stated that on March 31, 1999, a Certified Mail letter was sent to the Claimant, with a copy to the Organization, notifying the Claimant that his seniority was forfeited in its entirety pursuant to Rule 4, Section 2(c) of the Agreement. Therefore, the Carrier stated, "Conrail/CSX/NS had no obligation to allocate this Ex-employee in connection with the 1999 Implementing Agreement."

The Carrier's March 13, 2002 letter asserted, in addition, that if the Claimant "had a genuine interest in preserving his standing as a dues paying BMW member, it would not have taken him three (3) years to surface and make an inquiry into work opportunities with the Railroad." The letter concluded, "Mullin's request for allocation appears mendacious and void of merit and is denied." Subsequently, in a letter to the Organization dated April 17, 2002, the Carrier stated that "in the spirit of cooperation" it would provide information to the Organization or the Claimant "of potential job opportunities as a New Hire with CSX Engineering." The Claimant decided not to pursue the Carrier's offer to consider him for a new hire position.

The Organization contends that the March 24 recall letter and the March 31, 1999 forfeiture of seniority letter both showed on their face that the U. S. Postal Service violated its own procedures in handling the letters and that this accounts for the failure to deliver the letters to the Claimant although both letters were sent to the correct address. The Claimant, the Organization stresses, protected his seniority in accordance with Rule 4, Section 2(c) of the Conrail-BMW Agreement by keeping his correct address on file with his employer and the General Chairman. In support of its position the Organization cites Third Division Awards 29534, 29606, and 33153. The Organization argues that "instead of investigating the obvious postal error or telephoning the Claimant at the correct phone number he had kept on file with the Carrier, the Carrier simply considered the Claimant's seniority forfeited. . . ."

It is the Carrier's position that the Claimant's seniority was properly forfeited under Rule 4, Section 3 of the Conrail-BMW Agreement, which provides as follows:

“RULE 4 - SENIORITY

Section 3. Return to Service

An employee not in service will be subject to return to work from furlough in seniority order to 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 furnishes satisfactory evidence that failure to respond within ten (10) days was due to circumstances beyond his control. Copy of recall letter shall be furnished the designated union representative.”

The Carrier asserts that “[m]any past awards have held that when an employee fails to take action to protect his seniority when recalled from furlough the forfeiture of such seniority is automatic.” It argues that it correctly determined that the Claimant had forfeited all BMW seniority when he failed to report for duty as instructed after being recalled from furlough and when there were no conditions beyond his control that would have justified his failure to report as instructed. The Carrier notes that, in addition to the Claimant, notice of forfeiture of the Claimant’s seniority was also sent to the Organization. The Carrier stresses that for nearly three years neither the Claimant nor the Organization protested the Claimant’s lack of standing on the seniority rosters. The Carrier contends that the Organization failed to prove that the Carrier violated any Agreement in refusing to continue to recognize seniority previously forfeited by the Claimant.

The Board finds that the March 24 and March 31, 1999 letters on their face indicate a failure by the U. S. Postal Service to comply with its own regulations regarding the handling of certified mail. These irregularities on the face of each envelope raise a real doubt that the Claimant ever received notice of the Certified Mail letters that had been mailed to him. This brings the exception of Section 3 of Rule 4 into play that “[f]orfeiture of seniority under this paragraph will not apply when an employee furnishes satisfactory evidence that failure to respond within ten (10) days was due to circumstances beyond his control.” In neither Third Division Award 24348 or in any of the other Awards relied on by the Carrier was there credible evidence that U. S. Postal Service procedures designed to assure

either delivery, or notice of attempted delivery, of certified mail addressed to the employee were not complied with. On the other hand, the Claimant's failure to accept the Carrier's offer to apply for employment as a new employee, and thereby mitigate his damages, or to make any effort for almost three years to inquire about his seniority status or the availability of employment precludes the award of any backpay to him. See Third Division Awards 31535 and 33153.

The Board finds that the Claimant should be restored to service with seniority unimpaired, but without compensation for time lost.

A W A R D

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant 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 25th day of June 2007.