

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39321
Docket No. MW-37843
08-3-NRAB-00003-030135
(03-3-135)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to assign Mr. J. L. Kirk to the Mecham section foreman position by Bulletin ORD07698, dated January 17, 2002, and instead assigned junior employee J. T. Pruden. (System File J-0220-54/1308013)**
- (2) The Agreement was violated when the Carrier failed and refused to assign Mr. J. L. Kirk to the Gibbon section foreman position by Bulletin ORD07724, dated January 31, 2002, and instead assigned junior employee M. C. Hanson. (System File J-0220-55/1309857)**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant J. L. Kirk shall now be compensated for the difference between the section foreman rate of pay and that of system laborer beginning January 17, 2002 and continuing and he shall be compensated at the section foreman’s time and one-half rate of pay for all overtime hours worked by junior employee J. T. Pruden on the Mecham section foreman position beginning January 17, 2002 and continuing and the aforesaid Bulletin**

ORD07698 shall be corrected to show the Claimant as assigned to the position.

- (4) As a consequence of the violation referred to in Part (2) above, Claimant J. L. Kirk shall now be compensated for the difference between the section foreman rate of pay and that of system laborer beginning on January 31, 2002 and continuing and he shall be compensated at the section foreman time and one-half rate of pay for all overtime hours worked by junior employee M. C. Hanson, or any other junior employee subsequently assigned, on the Gibbon section foreman position beginning January 31, 2002 and continuing and the aforesaid Bulletin ORD07724 shall be corrected to show the Claimant as assigned to the position.”

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.

As set forth above it is the contention of the Claimant that the Carrier was in violation of Agreement Rules when it denied him a seniority right to bulletined positions of section Foreman.

The record discloses that under date of August 30, 1999, the Claimant voluntarily entered into a letter agreement with the Carrier whereby, in waiver of any disciplinary action involving a series of safety and other Rules that could have resulted

in personal injury to fellow employees, the Claimant acknowledged due to the severity and serious nature of the violations that he was “hereby disqualified in all classes of Foreman for the Union Pacific Railroad as of the date of this writing.”

The Claimant subsequently sought to establish that he was unjustly disqualified without cause or reason, and the Organization on his behalf filed a claim in a contention that the Carrier violated numerous Rules of the Agreement when it disqualified the Claimant from the then position of System Distribution Gang Foreman and all Foremen positions.

Study of the record shows that contrary to the belated contentions of the Claimant that he did not understand the terms of the letter when he signed it, and his subsequent attempt to dispute the specifically stated basis for his disqualification as set forth in the letter or that he had not been working in an unsafe manner or found sleeping in a shed when he was supposed to be the watchman for a group of employees, the Carrier submitted at the time a statement from the supervisory official who had executed the letter on its behalf in which it was stated that he (the supervisory official) not only read the letter to the Claimant, but the Claimant appeared to read the letter himself before signing it.

In the opinion of the Board it appears that the Claimant and the Organization on his behalf in advancing the instant claims are seeking to further grieve the prior August 30, 1999 disqualification to which the Claimant acquiesced. The Board finds such action to constitute what the Carrier properly argues is a subject matter barred by laches or time limits from being considered by the Board. Certainly, if the Claimant chose to sign the August 30, 1999 letter of disqualification without fully understanding its import, or without contacting a union official before doing so, then he did so at his own peril. The Claimant cannot now be heard to complain that had he opted for an Investigation he would have been in a position to refute the stated basis for his disqualification from Foreman positions. The Claimant is bound by his own decision to accept “disqualification in all classes of foreman.”

While the Organization submits that the Claimant’s name continued to be listed on the seniority roster, it must be considered, as the Carrier submits, the word “disqualified” is next to the Claimant’s Foreman seniority dates. In view of this

notation and the specific terms of the August 30, 1999 letter, the Board does not find the factual situation in this case to come within the provisions of Rule 20(d) as urged by the Organization, that because the name of the Claimant continued to show on the roster that the Claimant retained a right to be granted an opportunity to re-qualify for a position of Foreman.

Lastly, the Board will note that the Claimant's right to work is not an issue, only his acknowledged inability to work as a Foreman. And in this regard it is noted in study of the record that notwithstanding the clear intent of the August 30, 1999 letter, even if it was to be considered, arguendo, that the Claimant be allowed to re-qualify that the Carrier submits his record demonstrates he does not have sufficient ability to supervise employees; his record showing 11 incidences of discipline or counseling.

In view of the above considerations and overall study of the record the Board finds that the Claimant was not unjustly deprived of seniority rights as the petitioner contends, and that the claim must therefore be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of September 2008.