

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39890
Docket No. CL-40182
09-3-NRAB-00003-070495
(07-3-495)**

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

PARTIES TO DISPUTE: (
(Transportation Communications International Union
(CSX Transportation, Inc. (former Seaboard
(Coast Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Union (GL-13189) that:

- 1. Carrier is in violation of the current working agreement Rules 41, 42, 43 and others when it failed or refused to allow R. K. Langham (153654) to place himself on a Clerical position in Tampa, Florida, after being released as a manager with Intermodal on June 30, 2006.**
- 2. As a result of the above stated violation, Carrier shall compensate Mr. R. K. Langham for all time lost beginning July 7, 2006 when he tried to place himself on a Clerical position in Tampa, Florida and continuous until Mr. Langham is allowed to work as a Clerical employee.”**

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 instant dispute presents a remedy issue because the merits of the controversy were largely resolved during the handling on the property. To illustrate the nature of the remedy question, a brief review of the history is in order.

The Claimant established a clerical seniority date of April 26, 1968 on Roster SC08 at Tampa, Florida. In March 1988, he was granted a leave of absence to accept a position at CSX Intermodal, which was a subsidiary of the overall parent corporation. On June 30, 2006, more than 18 years later, the Claimant was terminated from his Intermodal position for alleged misuse of computer equipment. On July 7, 2006, the Claimant verbally sought to exercise his seniority under the terms of the Clerical Agreement. He was refused. On July 17, 2006, the Claimant renewed his request in writing. Once again, his request was denied. The stated reason was that he no longer had the requisite seniority.

The instant claim was filed on July 27, 2006 to assert the seniority rights which the Organization and the Claimant maintained were still in existence. The claim attached the most current Roster SC08 which showed the Claimant to be listed with his original April 26, 1968 seniority date in the 16th position on the list.

On August 15, 2006, the Carrier denied the claim. It cited a May 18, 1988 Agreement that provided for the retention of the Claimant's seniority for only 60 days after accepting the Intermodal position. The Carrier also cited an October 7, 1988 letter that listed the Claimant's name among several other employees whose clerical seniority was to be removed as a result of the passage of the 60-day time limit.

On September 2, 2006, the Organization appealed contending that the Carrier's position was wrong and that the Claimant had the right to return in accordance with the Rules cited in the Statement of Claim.

The claim was conferenced on either October 24 or 25, 2006. Both dates appear in the Carrier's correspondence. Following this conference, whenever it

was, the Carrier made a leniency reinstatement offer to the Claimant on December 12, 2006. The leniency offer required that the Claimant accept a nine-month disciplinary suspension and remain off work until April 1, 2007. The Claimant declined the offer rather than waive his Agreement due process rights.

On December 20, 2006, the Carrier declined the claim outright. It insisted that the Claimant had forfeited his clerical seniority on the basis of the May 18, 1988 Agreement between the Carrier and the Organization. The dispute remained in this posture for nearly seven more months.

On July 15, 2007, the Organization again filed an appeal with the Carrier's then highest designated officer. The Organization attached a copy of a September 14, 1989 letter from the then Vice President of Intermodal which made reference to a recent Agreement update between the Carrier and Organization that superseded the loss of seniority provisions of the May 18, 1988 Agreement. The updated Agreement allowed the Claimant to have his seniority reinstated if he so desired. It is undisputed that the Claimant took the proper steps at the time to have his seniority reinstated. The Organization's appeal also enclosed seven copies of Seniority Roster SC08, beginning with the 1989 roster, to show that the Claimant's seniority had been properly reinstated by the Carrier in 1989 and maintained on the roster continuously thereafter by the Carrier.

On August 29, 2007, the Carrier responded claiming that the Organization's appeal provided it with the "first knowledge" of the Agreement that allowed for the reinstatement of the Claimant's seniority. The Carrier went on to announce that the Claimant would be charged for his actions while working for Intermodal upon his return to service with the Carrier.

The Claimant was allowed to return to service on September 17, 2007, but was immediately charged with misconduct and was removed from service pending a formal Investigation. That disciplinary matter is not within the scope of the instant dispute. Accordingly, nothing herein should be read as any kind of a reflection by the Board on the merits of that matter.

Distilled to its essence, the Carrier's position is that it should have no back-pay liability due to the Organization's delay in providing the Carrier with its "first

knowledge” of the Agreement which allowed the Claimant to have his clerical seniority reinstated.

After careful review of the record, we are compelled to find that it does not contain any persuasive evidence whatsoever to credibly explain why, on the one hand, the Carrier could intimately be aware of the May 18, 1988 Agreement that removed the Claimant’s seniority while, on the other hand, it could justifiably claim total ignorance of the later Agreement the Carrier made with the Organization that superseded it. This evidentiary gap is especially gaping in light of the undisputed fact that the Carrier continuously kept the Claimant’s name on the applicable seniority lists from 1989 and for 17 years thereafter.

Given the foregoing, we must sustain the claim for the period from July 7, 2006 through September 17, 2007 subject to any applicable offsets or retirement benefit paybacks.

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 31st day of July 2009.