

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Dozier A. De Vane, Referee.

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP
CLERKS, FREIGHT HANDLERS, EXPRESS
AND STATION EMPLOYES**

NEW ORLEANS PUBLIC BELT RAILROAD

STATEMENT OF CLAIM: "Claim of Thomas J. Root for (1) restoration to seniority roster and as an employee of the New Orleans Public Belt Railroad on position of Joint Interchange and Yard Clerk and Weighmaster, Cotton Warehouse Terminal, Transportation Department, rate \$3.39 per day, covered by Bulletin No. 51 of November 18, 1936, application dated November 18, 1936, signed by Thomas J. Root and mailed to Mr. E. J. Becker, Superintendent of Transportation, New Orleans Public Belt Railroad, under registered United States Mail, Register No. 29776, and receipted for by Mr. Louis Fourmigue, per E. J. Becker; (2) reimbursement of wage loss represented by difference between \$3.39 per day and amount that he would have earned per day retroactive to November 23, 1936, to date of settlement of this claim."

EMPLOYEES' STATEMENT OF FACTS: "Agreement governing hours of service, rates of pay, working conditions, etc., was entered into by and between the above named parties to this dispute dated and made effective March 1, 1936. Prior to November 18, 1936, Clerk Thomas J. Root had been displaced May 12, 1936, from the position Belt Clerk in the General Office of the New Orleans Public Belt Railroad by Clerk Ray Brunett who had exercised his seniority rights in accordance with the current agreement, having himself been displaced by a senior employee.

"Clerk Thomas J. Root exercised his seniority on May 12, 1936, and was assigned to the Position Clerk Mechanical Department, in the office of Master Mechanic.

"After a period of fifteen days Clerk Thomas J. Root was disqualified on the position Clerk Mechanical Department in the office of Master Mechanic by mutual agreement between he and Mr. V. J. Bedell, Assistant to General Manager of the New Orleans Public Belt Railroad, as provided in Section 4, Rule 6 of the current agreement.

"SECTION 4, RULE 6.

'Employee awarded bulletined positions but failing to qualify within thirty (30) days shall retain their seniority rights and may bid on any bulletined positions, but may not displace any regularly assigned employee.'

"For a period of six weeks prior to August 8, 1936, Clerk Thomas J. Root, because of illness had received benefits from the Metropolitan Insur-

accepted by the Brotherhood on February 1, 1937, with Clerk Root's name omitted therefrom and it can no longer be contended at this time that Clerk Root is still in the service."

OPINION OF BOARD: The disposition of this case turns upon the status of Employee Root after he was disqualified on the position on which he made displacement when he was displaced by another employe holding seniority rights over him. The first question to be decided is whether Root was required to keep his name and address on file with the carrier while out of service, as required by Rule 12 of Section IV of the prevailing agreement and failing so to do ceased to be an employe of the carrier.

Carrier contends that Root was out of service because of a reduction in force; that Rule 12 of Section IV applied, which required him to file his name and address with the carrier each 90 days; and that his failure to comply with this requirement left the carrier no alternative but to remove his name from the seniority roster, as required by said rule.

Rule 12 of Section IV is as follows:

"When positions are abolished or forces are reduced seniority rights shall govern. When forces are again increased employes displaced will be returned to service in the order of their seniority rights. Employes desiring to avail themselves of this privilege must file their addresses with proper officers at time of reduction, advising promptly any change in address and renew same each ninety (90) days. Those failing to renew their addresses each ninety (90) days or return to the service within seven (7) days after having been duly notified (letter or telegram directed to the last address given will constitute notice) will be considered out of the service."

According to the record in this case, the carrier on May 7, 1936, abolished four positions, and on the same day bulletined three new positions in lieu of those abolished. This resulted in a force reduction of one employe, and this employe exercised his seniority rights and displaced another employe. The employe so displaced also exercised his seniority rights and displaced Root, whereupon Root, exercising his seniority rights, displaced a third employe.

It is the opinion of the Board that when Root exercised his seniority rights and displaced another employe, Rule 12 of Section IV was no longer applicable to him. Thereafter, other applicable provisions of the agreement governed his status. The force of this interpretation of the agreement is well illustrated by assuming that the employe whom Root displaced could make no displacement and went out of service under the provisions of Rule 12. It would hardly be contended that a force reduction of one employe could subject two employes to the rule. Moreover, the record shows that Root's seniority gave him the right to displace several employes, and that there was no question as to his qualification to hold most of the other positions. He chose a position on which he failed to qualify, and it was this act of Root's that was responsible for his being out of employment and not the force reduction that caused him to be displaced from his former position.

The prevailing agreement under which Root was working became effective March 1, 1936, and the record in this case indicates considerable confusion in the minds of both parties thereto as to its meaning and application. As a result of this apparent confusion, a number of collateral questions were raised by each of the parties as to the proper construction and application of Rules 6, 11, and 12 of Section IV of the Agreement. The conclusion reached by the Board that Rule 12 is not applicable in this case makes it unnecessary to consider any of these collateral questions. In this connection, however, it should be stated that the agreement does not require employes out of service to file with the carrier their names and addresses, except those employes out of service under Rule 12.

Rule 1 of Section IV of the agreement provides that a seniority list will be published in January of each year, for a period of ten days, allowing all concerned to enter protest, if any, against it. If no corrections or alterations are required, the list shall be signed by the Local Chairman of the Employees' Committee, and then will be official. The roster of January, 1937, omitted Root's name. The omission was not protested, and the Local Chairman signed the seniority roster without Root's name appearing thereon.

Carrier contends that the failure of the employee, or anyone in his behalf, to protest the omission of Root's name from the seniority roster constitutes an estoppel against the employee's asserting any right to have his name thereafter appear on said roster and operates to defeat his claim in this case.

The record shows that when Root was notified by the carrier on September 14, 1936, that because he had failed to renew his address at the expiration of 90 days after leaving the service, in accordance with Rule 12 of Section IV of the agreement, he was no longer in the employ of the carrier, a protest was immediately filed, which led to the exchange of letters between local representatives of the Brotherhood and the carrier, and finally to a conference on October 5 between the General Chairman of the Brotherhood and the Assistant General Manager of the carrier, at which the carrier refused to recede from its position and it was agreed by the parties to make a joint submission of the matter to this Board. It is the opinion of the Board that under these circumstances it was unnecessary for either Root or anyone in his behalf to protest the striking of Root's name from the seniority roster. The question as to the right of the carrier to do so had already been properly raised, and the carrier had definitely taken the position that Root was no longer an employee because of his failure to comply with the requirements of Rule 12. It was therefore unnecessary to again inject this controversy into the 1937 roster to preserve to Root the right to have this Board pass upon the striking of his name from the seniority roster of the carrier. This employee was among the oldest in service of the carrier, being No. 17 on the 1936 roster of 61 employees. He had through these long years of service acquired a valuable right, which cannot be taken away from him except for good cause shown and in accordance with the prevailing agreement between the parties.

The record shows that on November 18, 1936, the carrier posted Bulletin No. 51, advertising position of Joint Interchange and Yard Clerk and Weighmaster, Cotton Warehouse Terminal, Transportation Department, for which Root submitted an application on November 21, 1936. Not hearing from his application Root wrote the carrier on December 3, 1936, making inquiry about it. Reply was made by the carrier December 5, 1936, to the effect that his application was not considered because he was deemed to be out of the service of the carrier as he had been previously informed by letter of September 14, 1936. It is conceded that otherwise Root was entitled to the bulletined position.

The Board finds that Root's name was improperly stricken from the seniority roster of the carrier and that he is entitled to have his name restored to said roster. As the carrier's failure to assign Root the position for which he bid was also a violation of the agreement, he is entitled to recover the compensation lost by him as the result of this improper action of the carrier.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the carrier violated the agreement as claimed by the petitioner.

AWARD

That the name of Thomas J. Root shall be restored to the 1937 and subsequent seniority rosters, with the same dating it carried on the 1936 roster; he shall be assigned to the position he sought under Bulletin No. 51 of November 18, 1936, or any position bulletined subsequent thereto on which his seniority, competency and fitness entitled him, and he shall be reimbursed for all wage loss sustained, retroactive to November 23, 1936.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of October, 1938.

DISSENT ON AWARD 733—DOCKET CL-658

The award in this case is unsound in its reasoning and unjust in its conclusion; it ignores specific acts of the parties and their motivation, consideration of which are essential to a fair disposition of the case; it imputes to the parties a confusion as to the meaning of their own agreement which the record refutes.

Extended discussion is unnecessary. It is only necessary to point out the questions that the award raises which are at variance with the intent that reasonable men impute to the language of the agreement.

The Opinion states that after Root exercised a displacement right Rule 12 of Section IV was no longer applicable to him. Does this mean that when forces are increased, as provided in Rule 12, that the privilege of being returned to service in the order of his seniority is denied to Root? This rule also provides that employees who do wish to avail themselves of that privilege must file their names and addresses, etc. If Root does desire to exercise that privilege, has the carrier any obligation whatever toward him? (See Third Division Award 633). And if so, how can it be discharged since the carrier is without knowledge of his whereabouts?

If Root is no longer subject to Rule 12 of Section IV, and therefore is under no obligation to keep the carrier informed of his whereabouts, but is under Rule 6 of Section IV and has the privilege of bidding on bulletined positions what is the limitation upon his exercise of it? May Root remain out of the service and not subject to call by the carrier for one year, three years, five years—accumulating seniority the while and return at his own pleasure? If this award accords him that privilege, then what is his status under the Railroad Retirement Act. The Railroad Retirement Board says that an employee, though not actually working, is in employment relation when on furlough subject to call for service and ready and willing to serve, or on leave of absence or absent because of sickness or disability.

As to that feature of the award, dealing with the seniority roster and its validation by the Chairman representing the employees, as provided in Rule 1 of Section IV, we need only point out that on October 5, at conference, the parties agreed to make a joint submission to the Third Division, National Railroad Adjustment Board, on the question of whether Root had

removed himself from the service of the carrier by failure to comply with the requirements of Rule 12 of Section IV, but that subsequently the employes had made no move whatever to that end; in the meantime Root had applied for a position on bulletin and been denied it because, as he was told, he was deemed to be out of service; and that it was four months after the conference, at which agreement was reached to submit the case to the Board, jointly, and during which period nothing had been heard from the employes on the subject, that the Chairman approved as official the seniority roster which did not carry Root's name. As to the consistency of this ruling, it is not necessary to do more than to refer to Awards 124 and 250 of this Division.

The injustice of requiring the carrier to pay wage loss back to November 23, 1936 (under the rules the carrier had until November 28 to make the assignment) may well excite the indignation of fair-minded men. The carrier undertook to accommodate Root's request for leave of absence and at the same time protect his seniority rights by an amendment to Rule 12. Root's associates (44 of 61 on the roster were his juniors in seniority) would not consent to amend Rule 12, and the carrier, therefore, had no alternative but to assess the penalty imposed by it. Furthermore, the record does not disclose evidence of any protest against the carrier's failure to award the position bulletined November 18, 1936, to Root (other than Root's inquiry of December 3 as to why he hadn't been awarded it) until in May, 1937. In the meantime the roster of January 2, 1937, not carrying Root's name, had been issued and approved by the Chairman as official, without protest or reservation.

/s/ GEO. H. DUGAN

The undersigned concur
in the above Dissent:

/s/ J. G. TORIAN
/s/ C. C. COOK
/s/ R. H. ALLISON
/s/ A. H. JONES