

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Elwyn R. Shaw, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA
THE CHESAPEAKE AND OHIO RAILWAY COMPANY**

STATEMENT OF CLAIM: "That under the proper application of the rules of the Signalmen's Agreement dated September 1, 1940, Signal Gang Foreman W. H. Sims must return to his home seniority district (Cincinnati Division) or forfeit all seniority rights on his home seniority district."

JOINT STATEMENT OF FACTS: "Prior to September 1, 1940, signal gang foremen were not included within the scope of the Signalmen's Agreement dated April 1, 1928, and assignments to these positions were made through appointment by the management, and when such appointments were made from the employees classified under the Agreement, their seniority rights were governed by Rule 44 of the Signalmen's Agreement dated April 1, 1928.

"Rule 44 reads:

'Employees Promoted to Official Positions. Employees accepting official or subordinate official positions with the Railway or the Brotherhood of Railroad Signalmen of America, will retain and accumulate seniority on the seniority district from which promoted, and should they for any cause return to service will exercise such accumulated seniority, to positions for which qualified, within thirty (30) days or forfeit all seniority rights.'

"Prior to May 1, 1940, Mr. Sims was employed as a signal maintainer with seniority rights confined to the territory over which Signal Supervisor Persinger has jurisdiction (Cincinnati Division). On May 1, 1940, Mr. Sims was appointed by the management to the position of signal gang foreman at the Barboursville Reclamation Plant. The Barboursville Reclamation Plant is a separate and distinct seniority district from Mr. Sims' home seniority district. At the time this appointment was made, Mr. Sims' seniority was governed by old Rule 44 above quoted.

"On September 1, 1940, a revised Signalmen's Agreement was placed in effect which included the signal gang foremen within its scope. During the negotiations of the revised agreement a verbal understanding was had between the parties to the effect that when the agreement became effective on September 1, 1940, the assignment of the employees occupying the then existing positions of signal gang foremen would not be disturbed and their present rates of pay would be for all service performed.

"The new agreement, while not effective until September 1, 1940, was signed on July 25, 1940. Between that date and September 1, 1940, question arose as to what should be done about filling signal gang foreman vacancies or new positions occurring between the signing of the agreement and its

desire, and provides a protection under such conditions. The actual wording is: 'Employees declining promotion shall not lose their seniority except to the employee promoted and only in the next higher class.'

"From this it will be seen that had Sims been on the Cincinnati Division working as signalman, he would not have had to bid on the position the employees claim he was required to return and fill. Certainly, therefore, the claim that the rules required Sims to return to the Cincinnati Division and be promoted on that division falls for lack of support. Sims, as earlier pointed out, bid on the Cincinnati Division position only as a 'precautionary measure.' He indicated to the carrier at the time, and he indicates by his statement now (Carrier's Exhibit 'A'), that he does not wish to return to the Cincinnati Division. He makes no claim (nor does the carrier claim for him) any seniority as foreman on that district.

"The case of Dixon is directly parallel, and while it is true that no question has been raised by the employees as to Dixon having to return to the Cincinnati Division now, in the handling it has been held by the employees that he too will have to return to the Cincinnati Division and accept work as foreman or lose seniority there as soon as the point is reached at which 'he stands' to return for promotion. This alleged requirement forcing an employee to accept promotion is, as previously indicated, to be nowhere found in any agreement rule, and can be viewed in the case of Dixon only as a postponement of the 'evil day.' Dixon was promoted to foreman position on the Chicago Division on December 16, 1937, or some two and one-half years earlier than Sims was promoted to foreman at Barboursville. The principle here involved is consequently of as great or greater effect upon Dixon as upon Sims.

"The carrier submits that it has proceeded in a fair, reasonable, and unbiased manner in applying the understanding that men occupying foreman positions as of September 1, 1940, would not be disturbed. It has considered the two off-division men as fixed on such positions as long as their present status is maintained, and seeks to give them not a single mite of preferential consideration beyond and over the provisions 'not to disturb.' On the other hand, it nowhere finds that it has violated agreement rules or the understanding 'not to disturb.'"

OPINION OF BOARD: A decision of this case must depend upon a consideration and interpretation of the agreement which was made between the Employees and the Carrier parallel with but not a part of the formal written agreement of September 1, 1940. The parties have stipulated in the record and agreed on oral argument that this separate agreement was one of the considerations for entering into the written agreement of September 1, 1940 and the only differences between them are as to the interpretation of this understanding.

Prior to the adoption of the September 1, 1940 agreement foremen were not included under the provisions of the rules of April 1, 1928 which were then in force. Under those rules Mr. Sims had acquired seniority rights on the Cincinnati Division as a signalman but none as a foreman. Prior to the rules of 1940 the management appointed foremen at their own discretion and in any division they saw fit without regard to previous employment or seniority rights, and these foremen were brought under the agreement with the Brotherhood for the first time on September 1, 1940. On May 1st, 1940 Mr. Sims was appointed a foreman on the Division known as the Barboursville Reclamation Plant, which was a separate and distinct seniority district from his home district of the Cincinnati Division, and he was a foreman on the Barboursville Reclamation Plant district at the time of the verbal agreement hereinafter referred to when the 1940 rules became effective on September 1st of that year, and so far as the record shows is still in that position. The difficulty in the case arises from the inability of the parties to reconcile the collateral agreement with the main one and properly to adjust Mr. Sims' position as a foreman in one district while holding seniority rights in another.

Rule 34 of the 1940 agreement provides that an employe shall be restricted in his seniority rights to the territory over which one Maintenance Supervisor has control. This would clearly restrict Mr. Sims' seniority rights to the Cincinnati Division where he acquired them. Since the prior agreement did not apply to foremen he never had nor acquired any seniority rights in that capacity.

The parallel agreement, which was arrived at verbally between the parties and the existence of which is admitted by everyone, was made necessary by the extension of the agreement to include foremen who had never before been included. The agreement was, that as to foremen, "men occupying such positions as of September 1st, 1940 would not be disturbed." It appears from the record and oral argument that only Mr. Sims and one other foreman were left in a doubtful position by an attempt to interpret these rules.

Just before the written rules went into effect, on August 23, 1940, the carrier bulletined for bids a position of signal foreman on the Cincinnati Division and Mr. Sims bid for this position which was awarded to him on September 18, 1940. Thereafter on October 12, 1940 this award was cancelled by the carrier. It appears from the record that Mr. Sims made this bid because of an uncertainty as to his status and from a fear that his position and seniority might be jeopardized if he failed to do so. The extent to which this case has been argued and the fact that it has been temporarily deadlocked in this Board indicates that he was justified in feeling some uncertainty as to his position and we do not think that his making of this bid or its having been accepted and later cancelled by the carrier can be of any controlling importance in this case.

The controlling and important point is a determination as to what was meant by the agreement not to disturb and this must be reconciled with the plain provision of Rule 34 that a man can have seniority rights only in one territory.

The claim is made that Mr. Sims must return to his home seniority district "or forfeit all seniority rights in his home seniority district."

It is impossible to reconcile this broad claim with any agreement that Mr. Sims should not be disturbed. There is nothing in the written agreement nor in the parallel verbal agreement authorizing the destruction of Mr. Sims' existing seniority rights which he has acquired by many years of presumably faithful service. To so hold would be to impose upon him a very bitter penalty through no fault of his own other than having been promoted to be a foreman. If he is not to be disturbed it is clear that he may continue as a foreman on the Barboursville Reclamation Plant, and if he is not to be disturbed it is clear that his seniority rights cannot be destroyed. It may be equally clear that he cannot acquire any seniority rights on the Barboursville Reclamation District, but that does not mean that his existing rights in the Cincinnati District must be taken away from him. If he prefers to remain where he is, without accumulating seniority rights, it can harm no one but himself, and of that he is entitled to be the judge. There is nothing in this record to indicate that Mr. Sims is claiming any seniority rights in the Barboursville District and it is quite clear from Rule 34 that he could not do so. On the other hand there is nothing in any rule which suggests or even hints of any reason why he should suffer the penalty of a destruction of his already acquired rights. It follows that the claim must be denied.

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 employe involved in this dispute are respectively carrier and employe 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 claim is disposed of in accordance with the foregoing Opinion.

AWARD

Claim disposed of in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of July, 1941.