

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated Schedule Rules 2, 3, 15, and 53 (a) by employing a junior section laborer when forces were increased on the Akron, Colorado Section on January 4th, 1943, instead of calling back to service senior Section Laborer Jess Hinton who had been laid off in force reduction December 28th, 1942;

(2) That Jess Hinton shall be paid for time lost from January 4th, 1943 until the time he was employed in the Carrier's roundhouse at Akron, Colorado.

EMPLOYEES' STATEMENT OF FACTS: The claimant, Jess Hinton, entered the service as section laborer on Section B-27, Akron, on October 19, 1942. Roy Kitchen and Robert Thurtel entered the service subsequent to October 19, 1942.

On December 28, 1942 Section Laborers Jess Hinton, Roy Kitchen, and Robert Thurtel were laid off in force reduction. On January 4, 1943 Jess Hinton, by registered mail, notified Roadmaster W. M. Stevens that, in conformity with Schedule Rule 15, he desired to protect and retain his seniority rights as section laborer.

On January 4, 1943 Roy Kitchen, who was junior to Jess Hinton as section laborer, was called back to the service.

Agreement effective June 1, 1938 between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rules 2, 3, 15, and 53(a) of Agreement effective June 1, 1938 between the Carrier and the Brotherhood of Maintenance of Way Employees read:

"Rule 2. Seniority begins at the time employee's pay starts, subject to Rules 4-(e), 9-(a) and 12."

"Rule 3. Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the railroad, and may be exercised only as hereinafter provided."

It is the position of the carrier that Rules 2, 3, 15 and 53(a) relied upon by petitioner are not relevant to the facts; that Jess Hinton was definitely and permanently released from the Company's service in capacity of section laborer on December 28, 1942, all within the rights of the carrier under provisions of Rule 1, and that claim for alleged time lost from January 4, 1943, consequently is without foundation of fact.

OPINION OF BOARD: The claimant entered the service of the carrier on October 19, 1942, as a section laborer. On December 28, 1942, he, with two other section laborers, was laid off because, as he says, of reduction of force. The carrier says that his service was terminated on that date because his work was unsatisfactory. In accordance with the provisions of Rule 1 he was considered a temporary employe on December 28, and it is conceded that the carrier then had the right to discharge him. If he was laid off because of force reduction, the claim must be sustained; for the record shows that a junior employe was used on his position after the claimant had complied with the provisions of Rule 15 in giving notice to the roadmaster of his desire to retain his seniority rights. The carrier's contention that the notice was not given as required by the rule, because it was sent by the claimant directly to the roadmaster instead of "through his foreman," cannot be sustained. The essence of the requirement was that his name and address should be filed in writing with the roadmaster and this was done.

The issue before this Board is, therefore, one of fact: Was the employment of the claimant terminated on December 28th? Or was he laid off on that date because of force reduction?

In support of its contention, the carrier claims that its records show that claimant's employment was terminated because of unsatisfactory service. On just what this record is based does not appear. As a matter of fact the only evidence indicating that he was discharged is a letter from his section foreman to Roadmaster Stevens, written December 27th, 1943, a year after the alleged discharge and after it was known that he was protesting the carrier's action in recalling to service a junior man ahead of him.

As against this we have the fact that he claims that nothing was ever said to him about his work being unsatisfactory, and he says that he never was told that he could not return to his job. Also he calls attention to the fact that he was laid off with two other men who were not discharged. The carrier says that this was a mere coincidence. But it certainly is a significant one. Furthermore he wrote a letter to the roadmaster on January 4, 1943, notifying him that he desired to preserve his seniority rights. No answer was made to this. If his employment had been terminated, was it not the natural thing to have told him so and to have let him know that he had no seniority right to protect? Then on February 6, 1943, Roadmaster Stevens wrote a letter to Mr. S. M. Keith, Local Chairman, in which there is no mention of the fact that claimant's employment had been terminated because of unsatisfactory service. The reason given was that he was doing emergency work which had been completed. We think that every inference supports the contention of the claimant that his employment was not terminated but rather that he and two other men were laid off at the same time in a reduction of force.

The action of the carrier in failing to recall the claimant to work on January 4, 1943, when the force was increased and calling at that time a section laborer junior to him was a violation of Rule 53 (a) of the Agreement.

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 Employes involved in this dispute are respectively carrier and employes 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 29th day of May, 1946.