

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Roukis, Referee

Award Number 24423  
Docket Number MS-24478

PARTIES TO DISPUTE: { Brian R. Johnson  
{ Consolidated Rail Corporation

STATEMENT OF CLAIM: "This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of Brian R. Johnson's intention to file an ex-parte submission within thirty (30) days of the date hereof covering an unadjusted dispute between Brian R. Johnson and the Consolidated Rail Corporation involving the following unadjusted claim:

'Claim of Brian R. Johnson that:

(1) The loss of seniority by Brian R. Johnson in the following classes: Foreman, Hy-Rail Patrol Operator, Track Welder, Division PMO, District PMO, for failure to bid the position of Maintenance Helper is in violation of Rule #1 of the BMW Agreement with the Consolidated Rail Corporation in that Rule #1 specifically provides that an employee will lose seniority only in such higher rank that he fails to bid, not all ranks in which he holds seniority.

(2) Brian R. Johnson be restored all seniority in the higher ranks above described and reimbursement be made for all wage loss suffered."

OPINION OF BOARD: The essential facts in this case are undisputed. The basic question before us is the appropriate application of Agreement Rule which is referenced hereinafter:

"Rule I - Seniority

Except as provided in Rule 5, seniority begins at the time the employee's pay starts from time of last entering the service as a new employee. An employee assigned to a position of higher class than track man or laborer will begin to earn seniority in such higher class on the date first assigned to an advertised position in such higher class. He will retain and accumulate seniority in the lower class from which assigned. An employee entering the service in a class, or promoted to a class, above that of track man or laborer will establish seniority as of the same date in all lower classes of the same sub-department in the same seniority district, except as he has previously established an earlier date in some intermediate lower class.

Except for temporary work not subject to advertisement as hereinafter provided an employee, who, after promotion, returns to the rank from which promoted on account of reduction in force, and thereafter fails to bid for and accept a position in the higher rank, will lose his seniority in such higher rank, unless

otherwise agreed to between the Management and the General Chairman of the Brotherhood of Maintenance of Way Employees.

No change in roster dates in the highest class in which the employe holds rights as existing on the effective date of this agreement will be made except as to promotions which occur on or subsequent to such effective date."

The record shows that Claimant established a seniority date as Trackman on the Providence District on September 8, 1975. He was subsequently awarded a position of Hy-Rail Car Patrolman on September 13, 1976 which also carried seniority status in the following position classes:

Track Welder  
Division Power Machine Operator  
District Power Machine Operator  
Maintenance Helper  
Track Maintenance Operator  
Hy-Rail Car Patrolman Helper and Track Welder

This was a routine and pro forma positional designation. Claimant was later reduced in class and was working as a Trackman when on April 22, 1980, a position of Maintenance Helper was advertised and he did not bid on this position. He was apprised by the Division Engineer by letter, dated August 22, 1980, following discussions concerning his seniority in higher classes, that he forfeited his seniority in the higher classes, consistent with Rule 1 (Supra). Claimant did not respond to this communication until April 3, 1981 when his attorney notified Carrier that he was protesting the August 22, 1980 seniority forfeiture action. On August 20, 1981, Claimant was sent a recall notice from furlough status, which was signed by him on August 22, 1981 but he did not report to service. He was terminated pursuant to Agreement Rule 3, effective September 22, 1981. The pertinent portion of this is cited as follows:

"Employees laid off by reason of force reduction will retain their seniority rights. They will keep the officer in charge advised of their address. Failure to return to the service within ten (10) days after being so notified at the address last given, the employee will forfeit all seniority rights."

In defense of his petition, Claimant contends that he was improperly removed from his seniority status in the aforesaid higher ranked classes, since Rule 1 applies only to the loss of seniority in the higher ranked position, which the employee failed to bid on and accept. He argues that if the parties intended to apply Rule 1 in a more expansive fashion, it would have been relatively easy at the time the Rule was written to craft a more comprehensive provision. He asserts that he was never informed that Carrier observed as a matter of practice a broader application of seniority forfeiture, and was never accorded a formal hearing on the property to determine his claim.

Carrier contends that when an employe has been required to return to a lower rank and then fails to bid for a position to a higher rank, the employe automatically forfeits seniority in all ranks higher than the position in which

he is currently working. It asserts that this practice has been uniformly observed on the property by the contracting parties and argues that the Organization concurs with its interpretative position. It avers that Claimant has not demonstrated a contrary practice or application, but maintains that he is seeking a variant construction that comports with his understanding of the Rule. It argues that the claim is now moot since Claimant was properly terminated on September 22, 1981 when he failed to return to service.

In our review of this case, we agree with Carrier's position. While an employee has the right to contest a particular rule's application, it is difficult to prevail if the signatory parties unequivocally agree on a different interpretation. It would be judicially imprudent for this Board to read into Rule 1 a more restrictive application when the weight of the evidence conclusively shows that the Organization and Carrier intended the seniority forfeiture provision of Rule 1 to cover all the higher ranked seniority classes. For us to conclude otherwise would be an unwarranted usurpation of the collective bargaining process. Carrier has amply proven that an employee who fails to bid on a higher ranked position, forfeits seniority in all ranks higher than the position the employee is currently working. The Labor Organization who negotiated and administered this provision concurs with this view. Claimant has not proven that Carrier followed a more restrictive on situs practice. He merely seeks seniority protection which the signatory parties jointly concede does not exist. As a matter of judicial practice, we are estopped by the Railway Labor Act 1926, as Amended, and the decisional law of all the Divisions from rewriting a labor Agreement. We can only construe and apply what the parties intended. In the instant case, the record clearly shows that the contracting parties manifestly intended that the seniority forfeiture language of Rule 1 applies to all higher ranked positions, and we are constrained to give effect to what the parties intended. By his failure to bid on the Maintenance Helper's position, Claimant forfeited seniority in all ranks higher than the one in which he was working. When he did not report for duty in August, 1981, he was terminated from service in accordance with Rule 3, which is a self-executing provision and his claim to that extent is moot.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was not violated.

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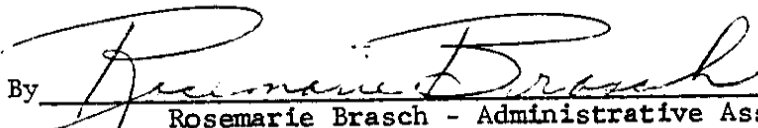
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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of June 1983.

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