

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

PARTIES TO DISPUTE: ( (Brotherhood of Maintenance of Way Employees  
(Union Pacific Railroad Company

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

(1) The Carrier violated the Agreement when it terminated the seniority and closed the service record of Tongman S. Gonzalez (System File D-86/013-210-21).

(2) The claimant shall be reinstated with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered as a consequence of the violation referred to in Part (1) hereof."

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 employees 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 waived right of appearance at hearing thereon.

This is a seniority termination case in which Claimant is alleged to have failed to comply with Rule 21 of the Agreement. Said Rule requires Claimant within ten (10) days of being displaced by a senior employee to either exercise his displacement rights or to file for recall. Failure to comply with the Agreement results in the forfeiture of seniority.

The Organization argues that Claimant had been notified of his displacement on June 23, 1986, and discussed his options with the Manager of Safety and Rules. As Claimant had just returned to light duty work he had the impression that he would remain working until his leg healed. Given a critical language problem, the Claimant failed to exercise his seniority, submit a letter of recall or apply for a medical leave of absence. It is the Organization's position that Claimant's seniority should be reinstated along with all rights and lost wages.

On merits, the record as exchanged on property does not support the Organization's position. First, the Carrier has provided ample evidence that Claimant understood the Agreement. There is no denial in the record that Claimant had many times complied with Rule 21 of the Agreement and understood his obligations when he was displaced by a senior employee. The record substantiates that Claimant was knowingly displaced on June 23, 1986. Second, the record indicates that Claimant's language problems were not sufficient to explain his behavior. Carrier's letter of January 12, 1987, contains assertions from the Cheyenne Division Engineer and others that Claimant had no difficulty understanding what was occurring and what he needed to do to protect his seniority. Such assertions are not refuted in the record.

Considering the above, the Board concludes that Claimant had sufficient past knowledge and understanding to be fully aware of his Agreement obligations. We also conclude that there is insufficient probative evidence to support the conclusion that language played a significant role in Claimant's failure to protect his seniority. Claimant's failure to comply with the Agreement resulted in his loss of seniority (Third Division Awards 26059, 25158, 25519).

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1990.