

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(CSX Transportation, Inc. (former Chesapeake &  
(Ohio Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier terminated the seniority of Mr. John W. Cupp effective April 26, 1989 [System File C-TC-4870/12(89-479) COS].

(2) Mr. John W. Cupp shall be reinstated to service with seniority and all other rights unimpaired, he shall be compensated for all wage and benefit loss suffered and receive appropriate credits for vacation qualifying purposes."

FINDINGS:

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

The carrier or carriers and the employe 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.

On April 21, 1989, Claimant was notified by telephone of a permanent trackman vacancy on the Huntington Division Seniority District at Peach Creek, West Virginia. At the time, Claimant was the senior employee on that roster who was furloughed, and not working. Four senior employees, also had been furloughed, had earlier accepted employment at the Barboursville Reclamation Plant, which is a different seniority district.

According to Claimant, he explained to the Roadmaster that Peach Creek was ninety miles from his home, and asked if he could call someone closer. Claimant states that the Roadmaster told him this would not be a problem.

By letter dated April 26, 1989, Claimant was informed his name had been removed from the seniority roster in accordance with Rule 5 of the Agreement, due to his failure to report for the Peach Creek vacancy. Rule 5 of the Agreement reads, in pertinent part, as follows:

"(c) When permanent vacancies or new positions are not filled by employees already in the service, cut-off men will be recalled to fill such positions in accordance with their seniority. The senior cut-off man must return within ten days after being notified, unless prevented by sickness or injury, and fill the permanent position or forfeit all seniority. Where cut-off employees desire to be used to perform temporary or extra work, they will notify the Manager-Engineering or other corresponding supervisory officer in writing accordingly. Men requesting temporary or extra work which may arise, will be recalled according to seniority, but if the senior man is not available at the time the work arises, any man available may be used until the senior man is available. For laborer positions only men must respond for thirty days' work or more or forfeit seniority similar to the provisions of Rule 2(i)."

By Letter of Agreement dated April 12, 1984, effective May 1, 1984, the above provision was amended as follows:

"2. Rules 2(i) and 5 are revised with respect to the requirement to report following recall to the extent that an employee must report for work within five (5) days after being notified by telephone or receipt of notice by certified mail sent to the last address on file."

The first issue raised by the Organization is that Claimant was not the appropriate employee to be called. According to the Organization, Carrier should have first called the four senior men who were working at Barbourville. It argues they should be considered cut-off, as they were unable to work within their own seniority district. Carrier, on the other hand, insists these employees were in service, even though it was on a different seniority district.

Neither party has given the Board any indication of past practice regarding the interpretation of the Rule, which is somewhat ambiguous as to whether the term "cut-off" refers to employees who are unable to work on their own seniority district, but take work on another district, or only to employees who are not working at all. The Board can only surmise that Carrier's interest would be in forcing employees to return to work only if they are not already working. The other employees, such as the four men senior to Claimant, could have exercised their seniority by bidding, as they were already in service. Accordingly, we accept Carrier's interpretation and find Claimant was not called out of turn.

Carrier does not refute Claimant's description of his conversation with the Roadmaster. It relies, instead, upon the Rule mandating forfeiture of seniority when an employee does not report within five days. We agree this is what the Rule requires. Claimant was notified, in proper seniority order, to report and he failed to do so. The Rule should require Carrier to remove his name from the roster. However, the evidence strongly leads to the conclusion Claimant was assured he could refuse the job without suffering such an adverse consequence. The Rule does not give the Roadmaster authority to excuse an employee in this manner. His obligation was to direct Claimant to report for the assignment or face the penalty of removal from the roster. Because he did not do this, we will not subject Claimant to the penalty. We will not, however, permit Claimant to be rewarded as a result of the accommodation which was afforded him by the Roadmaster. Accordingly, we direct that Claimant's seniority be restored, but without compensation for time lost.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 21st day of January 1993.