

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29534
Docket No. MW-29699
93-3-91-3-43

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employees
(CSX Transportation, Inc. (former
(Seaboard Coastline Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, on July 24, 1989, it permitted Mr. J. B. Ussery to return to service as other than a new employee, i.e., with a seniority date of July 19, 1978 [System File 37-SCL-89-48/12(90-294) SSY].

(2) As a consequence of the above-referenced violation, the Carrier shall correct its records to reflect the applicable seniority date of July 24, 1989 for Mr. J. B. Ussery."

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 employee 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.

At the time this dispute arose, J. B. Ussery had previously established and held seniority on the Raleigh-Rocky Mount Seniority District when he began working in the Carrier's Track Subdepartment on July 19, 1978. Mr. Ussery's employment status became inactive from 1980 until July 24, 1989, when the Carrier assigned him to a Trackman position on the Raleigh-Rocky Mount Seniority District and allowed him to retain his former seniority date unchanged, such date being July 19, 1978.

The Organization maintains that the Carrier violated the Agreement because it allowed Mr. Ussery to return to an employment position as a Trackman on the Raleigh-Rocky Mount Seniority District after having previously severed his employment relationship with the Carrier in May 1980. The Organization argues that employees who established and held seniority in the Track Subdepartment, Group A, on the Raleigh-Rocky Mount Seniority District dating from July 19, 1978 until July 24, 1989, were adversely affected by the Carrier's actions in this regard. The Organization further argues that the Carrier's actions in this matter represent an example of the Carrier's total disregard for its contractual obligation regarding the seniority provisions of the Agreement, and its failure to live up to that obligation.

The Organization asserts that in fairness to other aforementioned employees with seniority, Mr. Ussery's seniority should date from July 24, 1989, the date when he accepted assignment as a Trackman, rather than July 19, 1978. The Carrier contends that although Mr. Ussery became an "inactive" employee from 1980 through July 24, 1989, he remained on the Carrier's seniority roster throughout such time period without complaint from either the Organization or fellow employees. The Carrier therefore argues that the Organization has not made an affirmative showing that represented employees have been adversely affected by Mr. Ussery's retention of seniority.

The Organization alleges that Rules 5, 6, 7, 10 and 17 of the Agreement, which collectively provide for seniority to be established and retained and leaves of absence to be granted, do not permit Mr. Ussery to retain his seniority in this case. The Organization asserts that Mr. Ussery permanently quit his job with the Carrier in May 1980, in the presence of five coworkers. The Carrier argues that the recollections of these witnesses are self-serving and should be afforded no evidentiary weight. The Organization further contends that during Mr. Ussery's nine year absence, Trackman positions on his formerly assigned work force became available for which he failed to bid.

The Carrier maintains that Mr. Ussery's initial seniority status was posted on seniority rosters that appeared during the above-stated nine year period, and that because neither the Organization nor the employees complained about Mr. Ussery's posted date of seniority during this period pursuant to Section 2 of Rule 7 of the Agreement, such posted date, i.e., July 19, 1978, should be allowed to stand. The Organization argues that seniority rosters, by themselves, do not create or convey seniority, and that the reasonable approach contemplated by the Agreement would be to correct such a clearly erroneous seniority date as that which was posted for Mr. Ussery and render the corrected seniority date to be valid and in full effect.

The Carrier asserts that Mr. Ussery was on furlough status from May 1980, until July 24, 1989, and that the instant claim would not be a continuing violation of the Agreement. The Organization contends that Mr. Ussery was not on furlough status during such time period given his failure to bid on Trackman positions on his former gang that became available from 1980 through 1983 and the statements of five coworkers who witnessed him quitting work in May 1980. The Organization also maintains that the instant claim would be a continuing violation in consideration of each day Mr. Ussery is permitted to retain a date other than July 24, 1989 as his seniority date.

Both parties have cited several Awards to support their respective positions. After reviewing said Awards, the Board finds Third Division Award 28467 (which sanctioned the correction of a seniority roster error where such error is clearly and convincingly shown) to be dispositive in this case.

Regarding the issue of the propriety of equity relief raised by the Carrier, the Board finds the Carrier's citation of Award No. 1 of Public Law Board No. 3430 to be inapplicable here as the facts in that case concerned a claim that did not draw its essence from the applicable Agreement. In the instant case, the Award is proper as it is based upon the Agreement and is rationally inferable from the letter and purpose of the Agreement. International Association of Machinists v. Southern Pacific Transportation Co. (9th Cir. 1980), 626 F.2d 715, 717.

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Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1993.