

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30445
Docket No. MW-28444
94-3-88-3-230

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

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

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

- (1) The Agreement was violated when the Carrier revoked the welder helper seniority rights of Mr. M. W. Cottingham (Carrier's File 870409).
- (2) The Agreement was further violated when the Carrier failed and refused to allow Mr. M. W. Cottingham to fill a welder helper position on Welding Gang 7242 in the vicinity of Hope, Arkansas, from November 14, 1986 through December 1, 1986.
- (3) As a consequence of the violation referred to in Part (1) above, the welder helper seniority of Mr. M. W. Cottingham shall be restored unimpaired and his name shall be immediately returned to the welder helper seniority roster.
- (4) As a consequence of the violation referred to in Part (2) above, Mr. M. W. Cottingham shall be allowed eighty (80) hours' straight time and four (4) hours' overtime pay at the welder helper rate and he shall be allowed nine dollars (\$9.00) per day meal allowance for each day in the claim period."

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.

Claimant, who was first employed on February 9, 1981, established seniority as a Welder Helper on November 30, 1984. Prior to May, 1986, Claimant was in a furloughed status as a Welder Helper.

On April 24, 1986, a Welder Helper position in bunk cars was advertised for bid on Bulletin Number 16 to be headquartered at Memphis, Tennessee. On May 9, 1986, Claimant was called to fill the vacancy at Memphis as an extra employee until the permanent assignment was made. Claimant was told by a Maintenance of Way Clerk in response to an inquiry by Claimant that if Claimant did not report to Memphis on May 12, Claimant would lose his seniority as a Welder Helper. Claimant responded that he would report to Memphis on May 12.

On May 12, 1986, Claimant reported to work but Claimant left the jobsite early without authorization and did not return. As a result, on June 24, 1986, Claimant was given a 15 day suspension ending July 9, 1986.

Further, on May 12, 1986 (in two separate conversations), Claimant was given the same information by another Maintenance of Way Clerk as Claimant was previously told on May 9 by Clerk Hollis. Each time, Claimant asked if he had to report to Memphis. Both times, Claimant was told that failure to do so would result in the loss of his Welder Helper seniority rights. Claimant was told to report the following morning. However, Claimant did not do so. As a result, Claimant's name was removed from the Welder Helper seniority roster.

On May 14, 1986, Claimant filed a waiver with the Carrier over working extra or temporary positions as a Welder Helper.

On November 14, 1986, the Carrier required a Welder Helper to work with Welding Gang 7242 at Hope, Arkansas, until December 1, 1986. Claimant was not allowed to fill the position. Instead, the Carrier assigned a junior employee to that position. In this claim, Claimant seeks the wages earned by the junior employee as a result of the November 1986 assignment.

Rule 2(h) states:

"An employee who returns to a lower classification and retains seniority in a higher classification as provided in paragraph (g) of this rule may if he so desires waive right to work extra or temporary vacancies other than assignment by bulletin per Rule 11 to temporary vacancies bulletined as such by filing written notice with the carrier officers authorized to issue bulletins and assignments in all seniority districts where seniority rights are held with copies to the local chairman. However, they may after an elapse of 30 days after such waiver countermand this waiver with another letter stating they desire to be used for such extra or temporary work. Employees who do not waive their right to such extra or temporary work or who countermand such waiver must report when called and the same shall be considered an exercise of seniority. Employees called for extra work as required herein must report promptly, due consideration to be given to the time necessary to travel if not at the work location. If unavoidably detained he will be required to notify his employing officer by phone or wire with advice as to the day he will report."

The Organization correctly argues that Rule 2(h) does not specifically provide that when an employee fails to protect an extra or temporary assignment the employee automatically forfeits his seniority rights in the classification for which called. Where the parties intended the result of forfeiture of seniority, they specifically provided for that condition. See e.g., Rule 2(j) with respect to regular assignments where the parties stated that "[f]ailure to return to service within seven (7) calendar days after recall for a regular assignment ... after being notified ... will forfeit seniority in the class for which called" [emphasis added].

Given that the parties did not provide in Rule 2(h) for forfeiture of seniority for extra or temporary assignments as they did in Rule 2(j) for regular assignments, it therefore follows that the parties did not intend such a forfeiture for extra or temporary assignments such as the one involved in this case arising at Memphis in May, 1986. This Board does not have the authority to add language like that found in Rule 2(j) to the provisions of Rule 2(h). The Carrier's relief against the employee who fails to cover a temporary or extra position under Rule 2(h) is to take disciplinary action against the employee for violating the obligation imposed by that rule that the employee "must report when called ... [and] must report promptly".

Therefore, Claimant's name was not automatically removed from the Welder Helper seniority roster because he did not protect the temporary assignment in Memphis in May, 1986. However, as the record discloses, on May 14, 1986, Claimant filed a waiver with the Carrier over working extra or temporary positions as a Welder Helper. Because that waiver was filed late for the Memphis assignment, it was not applicable to that assignment (the end result being that if timely filed, no disciplinary action could have been taken, had the Carrier chosen to discipline Claimant for the failure to cover the Memphis assignment). Rule 2(h) specifically states that employees can "countermand this waiver with another letter stating they desire to be used for such extra or temporary work." This record fails to sufficiently show that Claimant countermanded his May, 1986 waiver. As such, we therefore cannot find that Claimant was entitled to work the November, 1986 two week assignment at Hope, Arkansas so as to require that he be compensated for the Carrier's failure to permit him to work that position instead of the junior employee. In summary, the Claimant is entitled to restoration of his seniority as a Welder Helper, but he is not entitled to compensation for the temporary assignment.

Given the above, we need not address the Organization's argument (which amounts to a double jeopardy contention) that the Carrier could not remove Claimant's name from the Welder Helper Seniority Roster because it had already disciplined Claimant for the May 1986 events and the Carrier's counter argument that the suspension was for leaving the jobsite without authorization on May 12, 1986, and the loss of seniority was a separate incident arising from Claimant's failure to report on May 13, 1986, for which Claimant was not disciplined.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of September 1994.