

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30861
Docket No. MS-31744
95-3-94-3-130

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: (George A. Schiltz
(
(Burlington Northern Railroad Company

STATEMENT OF CLAIM: "Claim of George A. Schiltz and
Burlington Northern Railroad Company
involving the questions:

- I. Whether Mr. Schiltz is entitled to exercise his seniority in Burlington Northern's St. Paul General Office Building, under Article VIII, Section 4(c) of the November 17, 1967 (merger protection) Agreement between The Great Northern Pacific & Burlington Lines, Inc. and The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees.
- II. Whether Mr. Schiltz is entitled to exercise his seniority in Burlington Northern's St. Paul General Office Building, under Appendix L, Paragraph 6 of the June 27, 1968 (collective bargaining) Agreement between Burlington Northern Inc. and That Craft and Class of Employees Represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.
- III. Whether Mr. Schiltz is entitled to exercise his seniority in Burlington Northern's St. Paul General Office Building, under Appendix N, Paragraph 5 of the May, 1980 (collective bargaining) Agreement between Burlington Northern Inc. and That Craft and Class of Employees Represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees."

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 were given due notice of hearing thereon.

By correspondence dated September 16, 1991, the Carrier notified Claimant (who was not currently covered by any collective bargaining agreement) that:

"As a result of careful study and consideration, your position will be eliminated or you will be removed from your present position and will not be placed in another exempt position effective October 31, 1991. BN has provided a separation package designed to assist you in your pursuit of another career or other interests. Below is a summary of your options."

Besides offering him a separation package, the Carrier informed Claimant that he could terminate his employment completely with the Carrier effective October 31, 1991 or opt to exercise his craft seniority rights. Claimant selected the last option.

On October 25, 1991, Claimant sought to exercise his clerical seniority rights to a position in the St. Paul, Minnesota General Office Building which was Seniority District No. 3. The Carrier barred Claimant from exercising his seniority to a position in the St. Paul General Office Building contending that his clerical seniority was operative solely on the Northeastern District (No. 5) which included, among many other points, Chicago and LaCrosse, Wisconsin. The Carrier also informed Claimant that there was not presently any vacant exempt positions at St. Paul for which Claimant was qualified.

Under protest, Claimant exercised his seniority to a position at LaCrosse, which was the nearest position to St. Paul available to the Claimant when exercising his seniority rights on District No. 5 in accord with the applicable collective bargaining agreement between the Transportation Communications International Union (TCU or Organization) and the Carrier. (This Agreement is commonly referred to as the Blue Book.)

In his February 15, 1994 affidavit, Claimant declared that the inability to exercise his seniority to a St. Paul General Office Building position caused him anger, depression and anxiety. More specifically, Claimant attested that he must drive more than two

hours on Monday mornings and Friday evenings and absorb the extra expense of maintaining an apartment in LaCrosse in addition to his residence in St. Paul.

The issue in this case is whether Claimant's seniority lies in District No. 3 (the St. Paul General Office Building) or District No. 5 (the Northeastern District). To answer this issue, the Board must carefully examine Claimant's employment history with the Carrier.

On or about April 26, 1962, the former Chicago, Burlington and Quincy (CB&Q), a former component railroad of the Carrier, hired Claimant as a Clerk at its Chicago General Office. Claimant was covered by the applicable collective bargaining agreement between the CB&Q and the Brotherhood of Railway and Airline Clerks (now TCU).

Claimant established clerical seniority on what was then Chicago General Office Seniority District No. 001. Under the Blue Book, this CB&Q seniority district is now part of Seniority District No. 5, that is, the Northeastern District.

In 1970, the CB&Q combined with three other railroads to form the Carrier. At the time of the merger, Claimant held a Special Accountant-Personnel position at Chicago which was covered by the scope of the applicable clerical agreement. Upon consummation of the merger, Claimant became an employee protected under the Agreement between the Great Northern Pacific Burlington Lines, Inc. and the Brotherhood of Railway and Airline Clerks commonly referred to as the Orange Book. [See Orange Book, Article I, Section 1(a).] Claimant and the Carrier concur that Claimant is an Orange Book protected employee.

In December, 1970, due to a change in operations, the Carrier closed the Chicago, Illinois, and Portland, Oregon, Freight Accounting Departments and transferred the Departments to St. Paul. Claimant's name and the Special Accountant-Personnel position appear among the clerical employees and positions listed in the March 20, 1970 notice of the impending transfer of the Chicago Freight Accounting Department to St. Paul.

At this point, the record contains a variance between the Carrier's factual rendition and Claimant's factual assertions.

The Carrier submits that, simultaneous with the abolition of Claimant's clerical position in Chicago, the Carrier offered Claimant an exempt position in St. Paul, that is, a position not covered by the applicable clerical agreement. According to the

Carrier, Claimant accepted the offer and transferred to St. Paul under the exempt employees moving benefits package. Although Claimant's name appeared in the March 20, 1970 notice of transfer, neither he nor his position was covered by the Implementing Agreement governing the transfer of work.

In his February 15, 1994 affidavit, Claimant described his transfer as follows:

- "6. I accepted a transfer to the St. Paul General Office and began in my new position on December 1, 1970.
7. Upon accepting the transfer, I became an exempt employee in St. Paul with the job title of Accountant (for the Director of Freight Accounting)."

Thus, Claimant concludes that the exempt position was effective upon his transfer to St. Paul.

Claimant remained on exempt positions at St. Paul, until his removal effective October 31, 1991. During this 20-year span, Claimant retained and accumulated clerical seniority. Claimant's name continued to appear on the District No. 5 Seniority Rosters, but his name never appeared on the District No. 3 Seniority Rosters published annually during the 20-year period. Claimant acknowledges that he occasionally viewed the posted District No. 3 seniority rosters.

To support his contention that his seniority is now operative on District No. 3 instead of District No. 5, Claimant relies on Article VIII, Section 4(c) of the Orange Book which reads:

"When a Protected Employee transfers to another seniority district as a result of changes in operation or transfer of work, his seniority shall be dovetailed into the roster to which transferred and his name shall be removed from the roster from which he transfers."

Although Claimant initiated a grievance challenging the Carrier's decision to deny Claimant's exercise of his seniority on District No. 3, Claimant later filed a discrimination charge with the Minnesota Human Rights Commission (and the Equal Opportunity Commission) alleging that the Carrier's action was illegally predicated on Claimant's age. Claimant is 48 years old and thus, he is within the group protected by the Age Discrimination in Employment Act of 1967. 29 U.S.C. §621, et seq. In his age

discrimination charge, Claimant also alleged that the Carrier unlawfully removed him from his St. Paul exempt position and refused to place him on another St. Paul exempt position because of his age. On May 26, 1992, the Minnesota Human Rights Commission determined that Claimant's charges lacked merit. The Commission issued Claimant a right to sue letter. Claimant thereafter instituted suit in the United States District Court for the District of Minnesota setting forth causes of action for breach of contract and age discrimination.

On March 3, 1994, the District Court granted the Carrier's motion to dismiss and its motion for partial summary judgment. The Court ruled that the contract claim was a minor dispute under the Railway Labor Act, 45 U.S.C. §151, 153, because the Carrier's position that Claimant held seniority solely in District No. 5 was arguably justified under the applicable collective bargaining agreement. In addition, the Court adjudged that Claimant's age discrimination claim was a minor dispute to the extent that the claim alleged that the Carrier prevented Claimant from exercising his contractual seniority rights due to his age.

Claimant thereafter progressed the instant claim on the property and to this Board. His submission herein does not allude to any charge or incidence of alleged age discrimination.

Claimant contends that Orange Book Article VIII, Section 4(c) mandated that his seniority be dovetailed into District No. 3 because, back in 1970, he transferred with the Freight Accounting Department from Chicago to St. Paul while his exempt position was only effective upon his transfer to St. Paul.

Article VIII, Section 4(c) applies to all Orange Book covered employees and not merely to clerical assignments as advocated by the Carrier. Orange Book Article VIII, Section 4(c) does not even mention clerical assignments. The Carrier acknowledges that Claimant is an Orange Book protected employee and thus, Article VIII, Section 4(c) requires that the seniority of protected employees be dovetailed when the protected employee transfers to a new seniority district due to a transfer of work or a change in operations. Claimant was certainly involved in a change in operations as well as a transfer of work. The entire Chicago Freight Accounting Department was closed and 180 employees were transferred to St. Paul. It makes no difference that Claimant was transferred from a contract covered job to an exempt position. Dovetailing Claimant's seniority into the District No. 3 roster is consistent with the Interstate Commerce Commission's ruling that seniority rosters be consolidated on an equitable basis. Great Northern and Burlington Lines Merger, 331

I.C.C. 228, 277-278 (1967). Claimant did not forfeit his rights as a protected employee merely because he took an exempt position after the merger. Landis v. Burlington Northern Railroad, 930 F.2d 748 (9th Cir. 1991).

In 1985 and 1986, the Carrier and Organization permitted three exempt employees to exercise their District No. 5 seniority at the St. Paul General Office Building. Claimant is similarly situated to these three employees.

Seniority rosters are just housekeeping bulletins. They do not constitute a substantive interpretation of a contract provision. Furthermore, if there is any conflict between a Blue Book provision and an Orange Book rule, Appendix N, Paragraph 5 of the Blue Book provides that the Orange Book terms control. Therefore, the seniority rosters are not dispositive in this case.

Claimant seeks: 1.) the difference in wages between a St. Paul position (to which he would have exercised seniority) and the LaCrosse job he presently occupies which is approximately \$300 per month; 2.) \$700 per month for leasing an apartment in LaCrosse; 3.) an order directing the Carrier to immediately permit Claimant to exercise his seniority to a position in the St. Paul General Office Building; 4.) \$100,000 in compensatory damages; 5.) \$100,000 in punitive damages because of the Carrier's intentional breach of its promises to Claimant; and, 6.) attorney's fees amounting to approximately \$10,000.

While he was holding a clerical position at Chicago, the Carrier offered and Claimant accepted an exempt position at St. Paul. He transferred to St. Paul as an exempt employee availing himself of the moving benefits for exempt employees. Since Claimant did not transfer under the Implementing Agreement governing the transfer of accounting work from Chicago and Portland into St. Paul, he obviously transferred as an exempt employee. Because Claimant came to St. Paul as an exempt employee, his clerical seniority remained in District No. 5. He never established clerical seniority on District No. 3.

Article VIII, Section 4(c) of the Orange Book only operates to dovetail employees' seniority when they transfer on a position covered by the collective bargaining agreement. Article VIII, Section 4(c) applies only to members of the craft and class of clerical employees and, as stated above, Claimant transferred to St. Paul as an exempt employee in December, 1970. The clear and unambiguous language of Article VIII, Section 4(c) of the Orange Book shows that the provision is inapplicable to exempt employees.

Claimant's seniority did not dovetail into District No. 3 merely because he was an Orange Book protected employee. If Claimant's interpretation had any merit, his name would have been dovetailed onto the District No. 3 roster in 1970. However, Claimant's name never appeared on the District No. 3 roster even though Claimant was aware that such rosters were regularly posted. Claimant should have griped back in 1970. Instead, he stood mute for 20 years. Claimant slept on his rights and thus, the doctrine of laches bars the instant claim.

Pursuant to Letter Agreements dated October 29, 1985 and September 17, 1986, the Carrier and the Organization allowed several exempt employees to exercise their seniority at St. Paul in lieu of their preexisting seniority. In each instance, these agreements were non-precedential. Thus, it is inappropriate for Claimant to cite these special arrangements in this case. Moreover, at the time when those two letter agreements were executed, the Carrier was moving work into the St. Paul General Office Building. During the 1990s, the Carrier has been moving work out of the General Office Building and thus, there is a surplus of protected clerks at St. Paul.

Claimant was not a victim of disparate treatment based upon his age. Because Claimant did not raise the age discrimination issue in his Submission, Claimant has forever waived his claim. Nevertheless, he failed to show a prima facie case for age discrimination because he cannot show that he is qualified for a District No. 3 position inasmuch as he lacks the seniority to displace to any District No. 3 position. Furthermore, the Carrier had a legitimate nondiscriminatory reason for barring Claimant from obtaining a position on District No. 3. The Carrier was simply applying the relevant rules of the applicable collective bargaining agreement. Inasmuch as the Carrier must comply with the Blue Book, Claimant cannot possibly argue that the Carrier's reason constitutes a pretext for unlawful age discrimination.

Last, the Carrier submits that Claimant's requested remedy is excessive and it takes particular exception to Claimant's request for punitive damages, unspecified compensatory damages and attorney's fees.

As an Orange Book covered employee, Claimant was subject to the seniority dovetailing provision of Orange Book Article VIII, Section 4(c) if he was involved in a change of operations wherein either he or his work was transferred from Chicago to St. Paul.

For several reasons, this Board finds that when Claimant transferred from Chicago to St. Paul in December, 1970, he transferred as an exempt employee as opposed to an employee covered

by the applicable clerical contract. Therefore, he was no longer on the Special Accountant position when the Carrier moved the position and the work performed by the position from Chicago to St. Paul as part of the Freight Account Department consolidation.

First, Claimant failed to shoulder his burden of proving that he transferred under the Implementing Agreement covering the transfer of Freight Accounting Department work to St. Paul. The March 20, 1970 notice of transfer listed Claimant and his agreement covered position, but the record is void of any evidence that Claimant ultimately transferred under a clerical Implementing Agreement. The absence of such evidence indicates that Claimant accepted the exempt position before actually going to St. Paul.

Second, the Carrier asserted, and Claimant did not refute, that Claimant availed himself of the exempt employees moving benefits when he transferred to St. Paul. Claimant would not have access to such benefits unless he had become an exempt employee while still situated in Chicago. Therefore, Claimant accepted the St. Paul exempt position before his move and, as a consequence, he was able to receive exempt employees moving benefits in lieu of those benefits specified in the applicable agreements covering rank and file employees.

Third, Claimant last performed clerical service as an agreement covered employee in a Chicago position. He never performed any compensable service as an employee fully covered by the Agreement in St. Paul. Again, the fact that Claimant last performed fully covered clerical work in Chicago shows that he did not participate in the transfer of work. Rather, he was promoted to an exempt position immediately prior to his transfer.

Fourth, in Paragraph 7 of his February 15, 1994 affidavit, Claimant states: "Upon accepting the transfer, I became an exempt employee in St. Paul...." While Claimant is clearly trying to demonstrate that he first became an exempt employee at St. Paul, his introductory phrase strongly suggests that he knew he became exempt when he accepted the transfer. To accept the transfer, he must still have been in Chicago because he could not accept a transfer to St. Paul after already being relocated to St. Paul.

Fifth and last, the District No. 3 Seniority Rosters which were regularly published and posted did not list Claimant's name during the 20 years that Claimant filled exempt positions in St. Paul. Since Claimant did not object to the omission of his name on these rosters, a reasonable inference can be drawn that Claimant sincerely realized that his seniority remained on District No. 5. Knowing that he could be released from an exempt position at any time, Claimant, if he truly believed that he had a valid claim,

would have complained when the District No. 3 Seniority Rosters were published without his name.

The above discussed five reasons show that Claimant transferred to St. Paul solely to be placed on an exempt position and thus he did not transfer as a result of a change in operations or a transfer of work within the meaning of Orange Book Article VIII, Section 4(c). His transfer was relegated to his acceptance of a fully exempt position. Since he did not fall within the conditions found in Article VIII, Section 4(c), his seniority was not dovetailed. In summary, the Carrier properly applied Article VIII, Section 4(c) by forbidding Claimant from exercising his seniority onto a position in the St. Paul General Office Building.

Even though this Board is denying the claim on its merits, we must concurrently dismiss this claim because it is barred under the equitable doctrine of laches. The Board decided the case on its merits because the facts underlying laches support our ruling on the merits. As discussed above, Claimant did not utter any protest for more than 20 years even though District No. 3 Seniority Rosters omitted his name. Concomitantly, his seniority continued to accrue on District No. 5. Even though he was an exempt employee no longer working in the class or craft of Clerks, Claimant was still accumulating and retaining a valuable employment benefit, that is, seniority. Since he knew that he retained his seniority, Claimant was implicitly obligated to object to the supposedly inaccurate seniority records as soon as feasible to protect his valuable employment benefit.

Rule 6 of the Blue Book provides that, each year, seniority rosters can be contested for 60 calendar days from the date of posting. If no protest arises within 60 days, the roster is deemed correct. Stated differently, no corrections are allowed unless a protest is initiated during the 60 day period. Regardless of whether or not the 60 day protest period is enforceable against exempt employees, laches bars this claim since Claimant unreasonably delayed in instituting this claim and the delay substantially or unduly prejudiced the Carrier. Claimant sat silently on his rights for 20 years which is a patently unreasonable delay. Moreover, the delay was clearly unreasonable because Claimant did not protest the omission of his name from the District No. 3 Rosters for not just one year but for 20 consecutive years.

More importantly, Claimant's failure to timely contest the District No. 3 Seniority Rosters prejudiced the Carrier as well as other clerical employees on the roster. To now dovetail Claimant's seniority onto the District No. 3 roster would create great

upheaval for all the workers junior to Claimant on the roster and would prejudice the Carrier which relies on rules, like Rule 6 of the Blue Book, to guarantee the accuracy of seniority rosters.

In conclusion, Claimant's contract claim is denied on the merits, but it is also barred under the doctrine of laches.

The United States District Court for the District of Minnesota ruled that Claimant's age discrimination claim, to the extent it pertained to his allegation that he could displace to a contract position on District No. 3, was within this Board's jurisdiction. Claimant had ample opportunity to raise his age discrimination claim in this proceeding. He failed to do so. This Board perused Claimant's submission and we do not find any allegation that the Carrier impermissibly used Claimant's age when it prohibited him from exercising his seniority on District No. 3.

Since the United States District Court adjudged that the issue was arbitrable and since Claimant failed to raise the issue in this proceeding, this Board dismisses Claimant's age discrimination claim, with prejudice, for want of prosecution.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of May 1995.