

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38200
Docket No. MW-38596
07-3-04-3-607

The Third Division consisted of the regular members and in addition Referee Danielle L. Hargrove when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier terminated Mr. J. Costello's seniority rights on all seniority rosters (Seniority District T-2, Seniority District T-4 and Consolidated System Gangs 9026) on August 27, 2003 in connection with his not responding to a force recall to a trackman position at Des Moines, Iowa on Seniority District T-2 (System File 4RM-9484T/1380809 CNW).
- (2) As a consequence of the violation referenced to in Part (1) above, Claimant J. Costello shall “*** have his seniority restored on district T-4 and the Consolidated System Gangs roster 9026 and be compensated for all lost hours of work at the applicable trackman or system laborers rate of pay.”

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.

Upon review of the parties' Submissions, the pertinent issues for the Board's consideration are: (1) whether the claim was handled timely as prescribed by Rule 21; (2) whether the Claimant was displaced or furloughed at the time the Claimant bid to District T-2; and (3) whether the Organization met its burden of proof in showing the Carrier violated any C&NW Rules when it removed the Claimant's C&NW T-4 seniority and UP System Gang seniority.

First, addressing the timeliness of the claim, we find that it is timely. Rule 21 of the November 1, 2001 Chicago & North Western (C&NW) Transportation Company/Union Pacific Railroad Company Collective Bargaining Agreement ("the Agreement") requires that a claim be brought within 60 days from the date of the occurrence on which the claim or grievance is based. The Claimant was unaware that his seniority on District T-4 had been removed until he received notice on or about August 27, 2003. The Claimant grieved by letter on September 29, 2003. The Carrier's position that the Claimant should know what the Agreement says is disingenuous considering the Agreement is silent regarding the removal of seniority when an employee bids from one district to another. Previous Awards recognize the propriety of evaluating compliance with the timely filing of claims based upon when a claimant knew or should have known a claim arose. It is undisputed that the Claimant filed his claim within 60 days of notice of the loss of seniority. We find the notice date to be controlling in this case.

The Claimant had established and held seniority as a Trackman in the Track Subdepartment on Seniority Districts T-4 and T-2 and as a System Gang Laborer since June 11, 1997. On June 19, 2003, the Carrier abolished the Claimant's T-4 position. Pursuant to Rule 13, the Claimant had 15 calendar days from the date his position was abolished to either displace a junior employee or be furloughed. According to the Carrier, the Claimant did neither by choosing to bid completely out of District T-4 and bidding to District T-2 on June 20, 2003, one day into his 15-day displacement period. The Claimant worked his position on T-2 until being displaced

on July 7, 2003. Because he could hold no other position on T-2 at that time, he reverted to furlough status on T-2. Subsequently, the Claimant received a recall notice pursuant to Rule 14A to a position on T-2 as a Trackman on Gang 2970 at Des Moines, Iowa. Because the Claimant thought he was furloughed on T-4, he elected not to accept the recall on T-2, knowing he would lose his T-2 seniority. He waited from July 7 until August 27, 2003 to be recalled on T-4 when he received a letter from the Carrier informing him that he was terminated because he had failed to respond to a recall on T-2. This was his first notice that his T-4 seniority had previously been removed. To its credit, the Organization has no grievance with the forfeiture of the Claimant's seniority on T-2; however, the Claimant alleges that his C&NW District T-4 and UP system seniority rights were wrongly removed. The Organization asserts the Claimant was furloughed on T-4 concurrently while he was established, replaced, and recalled on T-2. The Carrier's position is that because the Claimant was in displaced status, not furlough status, the Claimant could not bid to District T-2 without forfeiting seniority in District T-4. The Claimant presented his claim protesting the removal of his T-4 seniority on September 29, 2003.

The Carrier asserts that it is common knowledge and past practice that an employee with displacement rights, yet not yet furloughed, who voluntarily bids, displaces and establishes seniority in a new district, forfeits seniority in the former district. The Carrier also asserts that its interpretation has been accepted without objection for years by the Organization. The Claimant claims to have had no such knowledge of this practice. The Organization disputes this assertion claiming that the Claimant did not lose his seniority on T-4 when he bid to T-2 because he had not been recalled. However, the Organization's position begs the question: How is the Claimant to be recalled if he is not yet furloughed? To further confuse matters, in support of its position, the Carrier relies on Rule 14 of the Agreement. The Carrier's argument is troublesome because, by its own language, Rule 14 applies to furloughed employees. Yet, the Carrier vigorously argued that the Claimant was not furloughed at the time he bid to T-2; therefore, the Carrier's reliance on Rule 14 appears to be misplaced.

The Carrier has taken the position that an employee loses seniority in one district when he voluntarily bids and establishes seniority elsewhere before being furloughed. None of the Rules cited by either party speak directly to the issue of whether the Carrier's practice is permitted or prohibited. For this reason, the

Board finds that the Organization failed to demonstrate that the Carrier violated any provision of the Agreement. The Claimant was not furloughed at the time he bid to T-2. Therefore, the Carrier's practice of removing seniority in one district when an employee bids and establishes seniority in another district, absent any prohibition under the Agreement, must stand subject to negotiation by the parties at the appropriate time.

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 18th day of May 2007.