

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41644
Docket No. MW-41604
13-3-NRAB-00003-110241**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(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 improperly removed the foreman seniority from Mr. G. Baez, Jr. on or about December 24, 2009. (System File UP200-WF10/1531911 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now reinstate Claimant G. Baez, Jr.’s original foreman seniority date.”**

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.

This dispute arises from the Carrier's removal of the Claimant's Foreman seniority for allegedly failing recall under Rule 2(h) which provides, in pertinent part:

"A furloughed employee is one who is unable to hold a regular assignment in any classification. In order to avoid any forfeiture of seniority, employees must have on file at all times a current address with the Director of Non-Ops Personnel Service. In conjunction with the seniority information letter transmitted to each employee retaining seniority on rosters subject to this Agreement, such employees will be asked to advise of any changes in their current mailing address. Advice of any change in address must be transmitted via U.S. mail within ten (10) days of the change to the Director of Non-Ops Personnel Service with a copy to the General Chairman. All notices of recall will be transmitted to the last address of record. Employees failing to respond to recall letters transmitted via certified mail to the last address of record will forfeit seniority in accordance with the forfeiture provisions of this Agreement. . . ."

The record reveals that the Claimant was on furlough status when he was sent a certified letter dated December 15, 2009 to his current address on file with the Carrier recalling him to a Track Foreman position on Gang 4199 effective December 24, 2009. It was apparently mailed from Headquarters on December 28, 2009. The U.S. Postal Service Track & Confirm documentation indicates that the letter was delivered and a notice left on December 30, 2009; it was subsequently returned to the sender as unclaimed on January 20, 2010. The letter also informs the Claimant that his failure to report to the position within seven calendar days of receipt of the letter would result in the loss of his seniority. The Carrier's records indicate that the Claimant was qualified to be assigned to a Foreman position at this time, and that its DOT Department did not receive notice that he had been decertified until January 26, 2010. It appears that the Claimant voluntarily bid to a

Trackman position on January 15, 2010. This claim seeks the restoration of the Claimant's Foreman seniority.

The Organization argues that the Claimant was not qualified for recall to a Foreman's position because his CDL was suspended at the time, so that the recall to such position was null and void and his failure to respond to the recall notice was immaterial. It maintains that the Carrier's DOT Department was aware of such fact at the time of the recall. The Organization also asserts that the Claimant never received the recall notice, so he could not act upon it, and notes that the Carrier never proved that it was validly sent or received. Finally, the Organization contends that self-executing forfeiture of seniority provisions are intended to be applied only to employees who willfully abandon their employment, which is not the case with the Claimant, who worked as an extra and then bid onto a position that he was qualified for in January 2010 during the period when he was temporarily disqualified from working as a Foreman, citing Third Division Awards 31908, 33153, 35926 and 36038.

The Carrier contends that it had no notice that the Claimant's driver status had changed prior to his recall, and that it followed the proper procedure for issuing his recall letter by certified mail to his address of record. It argues that it was within its rights to apply the clear forfeiture provision negotiated in Article 2(h) to the Claimant when he failed to report to the assignment or respond indicating a valid reason why he could not report, citing Third Division Awards 28413 and 24836. The Carrier notes that the Claimant's willful failure to pick up his certified letter does not excuse his responsibility to timely respond to the notice of recall or face forfeiture of his seniority. In any event, the Carrier points out that, pursuant to the Agreement, the Claimant's voluntary bid to a lower position on January 15, 2010 similarly resulted in the forfeiture of his Foreman seniority.

A careful review of the record convinces the Board that the Organization failed to meet its burden of proving a violation of the Agreement. The on-property correspondence reveals only two written statements submitted in support of the parties' positions, both of which came from Carrier employees who confirm that the Claimant did not notify the Carrier's DOT Department of his suspended CDL until January 26, 2010. The Claimant was sent a certified letter of recall to a Foreman's position in December 2009, which was returned to Headquarters unclaimed.

Furthermore, the Claimant bid down to a Trackman position on January 15, 2010. There is no first hand evidence from the Claimant indicating that he informed the Carrier of his disqualification and decertification prior to the recall, or any facts surrounding his receipt of the certified recall letter. Under such circumstances, the Board is unable to conclude that the Carrier was prevented from invoking the self-executing provision of Article 2(h) with respect to the forfeiture of the Claimant's Foreman seniority. There is no dispute that the Claimant did not protect his seniority within seven days after recall. In fact, the Organization's argument is that the Claimant could not protect his Foreman seniority after recall in December 2009 because he was disqualified from performing work on that position. Unfortunately, the Claimant failed to timely inform the Carrier of this fact, so his attempted recall in December 2009 was valid. The Board is unable to accept the Organization's theory that the Claimant did not actually "bid down" to a Trackman position from a Foreman position because he was not qualified to be in such position. There appears to be no dispute that such action in and of itself forfeits the Claimant's Foreman seniority. Thus, the Organization failed to establish any Agreement basis for reinstating the Claimant's Foreman seniority.

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 24th day of April 2013.