

Award No. 484

Case No. MW-23-SE

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO THE) and
DISPUTE) CSX TRANSPORTATION, INC.

QUESTIONS AT ISSUE

1. Did C. E. Gill lose his protection under the February 7, 1965 Mediation Agreement when he was assigned a Cook's position effective February 1, 1965 while holding seniority as a Bridge and Building Subdepartment Laborer?
2. If the answer to the first question is in the affirmative, is C. E. Gill entitled to compensation for the period he was furloughed from November 11, 1985 through March 3, 1986?

OPINION OF THE BOARD:

Claimant entered the service of the Louisville and Nashville Railroad Company ("LN") on October 2, 1944 and established seniority in the Bridge and Building Subdepartment. Claimant was furloughed on May 29, 1964 from the Maintenance of Way and Structures Department where he had been working as a laborer. On January 22, 1965, Claimant applied for and was awarded a position as a cook in the same department. This new position was effective February 1, 1965. Claimant retained his seniority in the B&B Subdepartment, subject to recall. The letter advising Claimant to report to work as a cook was as follows:

"Dear Sir:

"This has reference to your letter of the 22nd to Mr. Henneberger, wanting to know if we have an opening for a Cook's position.

"We have a vacancy on B&B Foreman H. L. Woods's gang, whose camp outfit is now located at Worthville, Ky. While our records show that you were cut off in force reduction as a B&B Laborer on May 29, 1964 and stand for recall in accordance with your seniority, you may fill the vacancy since it is claimed that you had experience as a cook in 1961 on the CV Division.

"It is to be understood that, if you accept the position, such will be on a trial basis until you have proved satisfactory in performing a cook's duties.

"I would like for you to report to your new assignment Monday, February 1, if you can make arrangements to do so.

"Please advise if you will report as requested above."

In December 1981, Claimant was furloughed from the cook's classification and received protective benefits throughout the period of furlough. In 1982 and 1983, Claimant was again furloughed and again received protective benefits.

This Board's opinion in Award No. 411 (Neutral O'Brien) held:

"QUESTION AT ISSUE:

"(1) Did the Carrier violate the provisions of the February 7, 1965 Agreement, particularly Article II, Section 1 and Article IV thereof when it denied C. N. Brown, Claimant, the protected employee pursuant to Article IV, Section 1, for the period subsequent to July 7, 1975?

"(2) Shall the Carrier be required to compensate Claimant C. N. Brown for each day subsequent to July 7, 1975, that he was denied the full benefit and allowance prescribed in the February 7, 1965 Agreement by restoring to him the protected status that he held on that date?"

"OPINION OF BOARD

"The essential facts giving rise to the instant claim are uncontroverted. Claimant held a regular assignment as a Messenger in the Carrier's Mechanical Department on October 1, 1964 thereby establishing his protective status as provided by the February 7, 1965 Job Stabilization Agreement. On October 5, 1967 he transferred to the Mail and Baggage Department as a Mail Handler where he remained until June 10, 1975 when he was affected by a force reduction. Claimant then displaced on a position in the Purchasing and Stores Department on June 12, 1975 but was displaced on June 16, 1975. He subsequently displaced on a Mill Street Yard Clerk position but was disqualified consistent with the requirements of the Clerks Schedule Rule 12. Claimant thereafter entered bids on six bulletined positions open to him but was denied any of the positions account he was not qualified. He was thus placed in a furloughed status though he made himself available for any work that was available to him in his craft. On August 21, 1975 Claimant accepted a full time position under the Fireman and Oiler Agreement where he has been continuously employed.

"This Board further holds that the Awards of this Board relied on by the Employes, viz. Award Nos. 53, 183 and 234, are inapposite to the dispute before us. In those Awards the Carriers recognized that the Claimants were entitled to the protective benefits, but they then sought an offset against the guarantee for compensation earned by them elsewhere. Yet in the instant case, Carrier has denied that Claimant was entitled to protective benefits while he was not working under the Clerks Agreement. More in point, we hold, is Award No. 362 of this Board, and we subscribe to the reasoning therein.

"It should be noted, parenthetically, that when Claimant accepted a position under the Fireman and Oiler Agreement his protective status was not permanently terminated. Rather it is merely suspended for the period of time in which he works under that Agreement.

"AWARD

"The Questions at Issue are disposed of as per Opinion."

Article II, Section 1 of the February 7 Agreement provides:

"An employe shall cease to be a protected employe in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, or failure to accept employment as provided in this Article. A protected

furloughed employe who fails to respond to extra work when called shall cease to be a protected employe. If an employe dismissed for cause is reinstated to service, he will be restored to the status of a protected employe as of the date of his reinstatement."

The position of the Organization is that Claimant is entitled to compensation for the period he was furloughed because he retained his protection under the February 7 Agreement while assigned a cook's position and holding B&B Subdepartment seniority. The Organization contends Claimant established seniority at the time the February 7 Agreement was consummated according to the terms of the Agreement. The Organization maintains that Claimant continued to protect that seniority and rejects the Carrier's argument that Claimant was recalled to service to protect any other seniority. The Organization points out that the facts in the record show that Claimant never relinquished seniority under the Maintenance of Way and Structures Department Agreement and that he has always worked under that Agreement. The Organization cites Award No. 411, quoted above, for the apparent proposition that continued employment under the same Agreement constitutes a maintenance of seniority.

The Organization also rejects that Carrier's argument that Claimant lost his protection by failure to respond to recall. The Organization contends that the Carrier has not presented sufficient evidence to show that recall occurred or that the statements by Claimant in the record constitute refusal of recall.

The position of the Carrier is that Claimant is not entitled to compensation because he lost his protection under the February 7 Agreement

by his forfeiture of seniority as a B&B laborer when he became a cook. However, the Carrier concedes that Claimant was a protected employe as described in the February 7 Agreement in his cook's position on February 1, 1965. The Carrier further concedes that "so long as [Claimant] retained his status as a B&B Laborer and met the requirements placed on him by the February 7, 1965 Agreement, he retained his protective status."

The Carrier contends that Claimant had an obligation to obtain a position available in the B&B Subdepartment and exercise his seniority rights in order to retain his protection under the February 7 Agreement. The Carrier contends that Claimant's request and acceptance of a transfer to the cook's position "severed any rights to job opportunities in [the laborer's] classification and defaulted on his obligations under the February 7, 1965 Agreement." As a furloughed cook, therefore, Claimant had no seniority rights to exercise in the B&B Subdepartment and no meaningful seniority rights in the Maintenance of Way General Subdepartment.

After considering the entire record, the Board finds that the instant claim must be sustained.

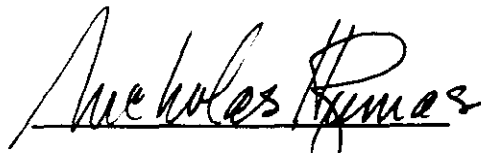
Claimant was clearly a protected employe under the February 7 Agreement. Likewise, the Carrier correctly maintains that he retained certain obligations as to recall. What this entire matter comes down to is whether Claimant received a valid recall notice to his position. It is well settled that if an employe receives a valid recall letter, he must return to service as directed in order to retain his protection. However, in this case, the evidence of recall is insufficient. The Carrier has simply not

demonstrated the existence of a valid notice of recall. There are all sorts of communications in the record which show many different things, but nothing that unequivocally provides the necessary evidence of recall. In the absence of that evidence, this Board cannot find that Claimant relinquished his protection. Rather, Claimant was a protected employee entitled to the benefits claimed.

AWARD

The answer to Question 1 is "No."

The answer to Question 2 is "Yes."

A handwritten signature in cursive script, reading "Nicholas H. Zumas". The signature is written in dark ink and is positioned above the printed name.

Nicholas H. Zumas, Neutral Member

Date: 5-8-90