

NICKEL PLATE, LAKE ERIE AND WESTERN,  
AND CLOVER LEAF DISTRICTS

PUBLIC LAW BOARD 1837

(MW-MUN-78-21)  
(MW-MUN-78-15)  
(MW-CIN-78-1)  
(MW-EVE-78-29)  
(MW-EVE-78-27)

Case No. 41

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees  
VS  
Norfolk and Western Railway Company

STATEMENT OF CLAIM:

Forfeiture of seniority - claim on behalf of B. E. Gunn, et al.  
Maintenance of Way employees account forfeiture of seniority  
under Rule 5(a) of the current working agreement - "Request  
that their failure now be overlooked and they now be retained  
as employees of the Carrier."

FINDINGS:

This Board upon the whole record and all the evidence finds  
that:

The Carrier and the employees involved in this dispute are  
respectively Carrier and employees within the meaning of the Railway  
Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

OPINION:

The claims in this case have been combined due to the identical  
nature of the dispute.

The record shows that the Claimant-of-Record and one hundred  
and one (101) other claimants were hired as seasonal maintenance of  
way employees on the Carrier's Muncie and Lake Erie Divisions, Initia-  
tion of such employment occurred between June and October, 1976.

They were subsequently furloughed in either November or December of 1976, due in part to seasonal force reductions and otherwise because of a strike among coal miners in conjunction with unsuccessful contract negotiations. Rule 5(a) of the "Working Agreement" requires that furloughed employees notify the Carrier in writing, within ten (10) days, of their interest in being recalled and thus retain their seniority rights, none of the Claimants did so. Rule 5(a) states that:

"(a) Employees laid off by reason of force reduction desiring to retain their seniority, must file with their superior officer, a written statement indicating their desire, and setting out their address. This statement must be filed within ten days after being laid off. They must immediately notify their superior officer of any change of address. Employees failing to comply with these provisions or to return to service within ten days, for a regular bulletined position after having been notified in writing by their superior officer will forfeit all seniority unless a leave of absence is obtained under the provisions of the agreement."

Since this is a "self-executing" provision, the Claimants were considered as to have forfeited all seniority.

According to the Organization, Rule 5(a) can only apply when it can be demonstrated that the Claimants are aware of this provision and the requirement for notification set forth therein. Per the Organization, none of the Claimants were furnished copies of the Working Agreement and thus cannot be held liable here. Essentially, it asks that their seniority rights be restored and the Claimants be subject to recall.

According to the Carrier, all of the Claimants received copies of the Working Agreement and merely failed to comply with Rule 5(a),

assuming they bothered to take note of the requirements of that provision in the first place. In that regard, the Carrier asserts that the Organization bears a responsibility to alert or remind employees of such a provision, particularly at time of work force reduction.

While it may have been that some of the Claimants may not have been aware of their obligations, others should have and most likely were. We realize that it is substantially more reasonable to expect the Carrier to prove employees were properly apprised of their obligation, i.e. by requiring signatory affirmation of receipt of the Working Rules, than to require an employee to prove they did not receive such information. It is simply not comprehensible that some such employees would not have been aware of this obligation -- even had they not been aware of Rule 5(a) -- via their contacts with veteran employees.

We must raise a question of reasonableness in this regard: if an employee was being furloughed and desired re-employment, how reasonable is it to believe he/she would not inquire how they might be recalled? There is nothing evidenced nor a contention raised that such information was withheld.

Considering all factors here, we shall not affirm the Claims as set out. However, we shall order the Carrier to treat a request for re-employment by any and all of the Claimants with consideration.

AWARD:

Claims as set out are denied; however, the parties are referred to the Opinion for further guidance and direction.

James F. Searce  
James F. Searce  
Neutral Member

G. C. Edwards  
G. C. Edwards  
Carrier Member

W. E. LaRue  
W. E. LaRue  
Organization Member

Dated at Washington DC this 1st day of June 1981.