

Public Law Board No. 2267

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees

and

Union Pacific Railroad Company

STATEMENT
OF CLAIM:

1. That the Carrier improperly and in violation of the Parties' Agreement, effective January 1, 1973, deprived Section Foreman D. C. Garcia of his seniority rights as Section Foreman on May 13, 1977.
2. That D. C. Garcia shall be reinstated to his former position as Section Foreman with his seniority date of February 2, 1976 restored and be compensated for the difference in earnings between that of Section Foreman and Section Laborer subsequent to May 13, 1977.

FINDINGS:

On May 13, 1977, Grievant D. C. Garcia was notified by the Carrier that he had forfeited his seniority in the class of Track Foreman (with seniority date of February 2, 1976) and that his name was being removed from Roster 40080, Group 8. According to the Carrier, on April 25, 1977 Grievant had elected to return to work as Sectionman following sick leave of absence from previous Section Foreman position at Blackrock, Nevada, and elected to work as Sectionman despite being instructed that he could displace junior relief foreman R. Q. Sosa at Tintic effective April 25, 1977. Citing Rule 22, Retention of Seniority, of the Schedule Agreement, the Carrier found that Grievant's failure to exercise his seniority resulted in forfeiture of his seniority.

Rule 22 reads in pertinent part:

"(e) An employee who accepts a lower paid position in another seniority group except in the Foreman's Classification for reasons other than the exercise of seniority as a result of displacement or reduction in force will forfeit seniority in all classes of his group."

The logic and compulsion of Rule 22 are clear and inescapable. The Organization and the Carrier together negotiated their Agreement and they must be jointly responsible for the application and interpretation of the Agreement as negotiated. The Referee is without authority to modify the Agreement of the Parties, and he must strive to avoid the havoc which would result from failure to give effect to the Agreement.

Rule 22, of course, must be given a reasonable interpretation in keeping with the manifest purpose and intention of the Parties. The words, "An employee who accepts", obviously contemplates an employee who elects, opts for, chooses, or otherwise consents to, "a lower paid position in another seniority group....". The element of free choice and the absence of command or compulsion in denial of free choice are necessary conditions defining "An employee who accepts" in Rule 22.

According to Grievant, on May 2, 1977, in response to Assistant Chairman Joseph V. Larsen's question why he was not working as a foreman, he said, "there is no place to go, Sosa is working as a Gandie and so am I." (Carrier's Exhibit B). The record shows that Mr. Sosa made out a request for leave of absence from the Tintic position with date of April 26, 1977 (Carrier's Exhibit J), and although the facts establish that Mr. Sosa was still employed at Tintic through April 28, 1977 (Carrier's Exhibit J) and therefore subject to displacement by Grievant, there exists a factual basis for Grievant's alleged understanding that Mr. Sosa was not subject to displacement on April 25, but was "working as a Gandie" at the time. Chief Engineer R. M. Brown's letter of April 10, 1978 (Carrier's Exhibit J), in next to final paragraph, page 3, observes, in part, "In any event, it appears this entire dispute has arisen due either to a misunderstanding on Mr. Garcia's part or an insufficient investigation....". The evidence of record supports the view that Mr. Garcia was the victim of misunderstanding about displacement opportunity, although it must be stated that he was not without some fault in such misunderstanding.

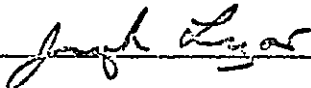
In letter of December 20, 1977 (Carrier's Exhibit "I"), page 2, Chief Engineer R. M. Brown enumerates five positions in addition to Mr. Sosa's on which Grievant might have displaced: Section 4107, 4281, 4141, 4155, 4165. Failure of Grievant to displace on any one of these positions occupied by a junior would be fatal to his grievance in this case, assuming, of course, that he was informed of his displacement rights to such positions under the Agreement. The Organization and Grievant have alleged that "Claimant Garcia advised Representative that he had not received bids on any of the positions held by junior employees, which resulted in Mr. Larsen directing a verbal inquiry to the Division Offices as to why positions were not being bulletined and assignments made in accordance with Rule 20 of the Agreement" (Employees' Submission, p. 3). Although the Carrier was confronted with the allegations that Grievant was not informed of the enumerated vacancies, and even though such allegations were discussed in Conference, at no time in any of the extensive correspondence in this matter does the Carrier expressly state that Grievant was informed of the enumerated vacancies or any one of them, although "there is no doubt that claimant was properly advised that he had to bump a foreman, and yet he failed to do so." (Carrier's Exhibit "J", page 3). The evidence of record fails to show that Grievant was informed of his displacement rights to the enumerated positions.

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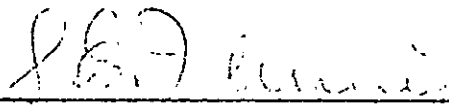
Grievant D. C. Garcia shall be restored Section Foreman seniority date of February 2, 1976.

The claim of D. C. Garcia that he be compensated for the difference in earnings between that of Section Foreman and Section Laborer subsequent to May 13, 1977 is denied.

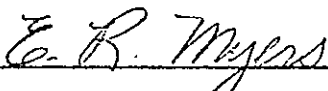
PUBLIC LAW BOARD NO. 2267



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DATED: 2-28-79