

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 2746

BURLINGTON NORTHERN RAILROAD COMPANY

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 20

AWARD NO. 20

Public Law Board No. 2746 was established pursuant to the provisions of Section 3, Second (Public Law 89-456) of the Railway Labor Act and the applicable rules of the National Mediation Board.

The parties, the Burlington Northern Railroad Company (hereinafter the Carrier) and the Brotherhood of Maintenance of Way Employees (hereinafter the Organization), are duly constituted carrier and labor organization representatives as those terms are defined in Sections 1 and 3 of the Railway Labor Act.

After hearing and upon the record, this Board finds that it has jurisdiction to resolve the following claim:

- "1. The termination of Sectionman Kurt J. Walker's seniority and his removal from service February 26, 1980, is in violation of the effective Agreement and unjustified.
- "2. That Sectionman Kurt J. Walker be allowed pay for all time lost including holiday, straight time and overtime pay he would have earned had his seniority not been terminated."

The Claimant, Kurt J. Walker, was employed as a Section Laborer at Union Yard in Minneapolis, Minnesota. On February 4, 1980, he was advised that as a result of an investigation held January 28, 1980, he was being suspended from the Carrier's service for ten days, February 6 through 15, 1980.

On February 12, during the course of the suspension, the Claimant received a telephone call from Roadmaster's Clerk Jackie Bowatz.

There is an unresolved conflict in the evidence regarding the content of their telephone conversation on February 12, 1980.

The Carrier contends that Mr. Walker was told that he had been displaced by a senior employee, and should "...either file a force reduction form (No. 15364) or exercise his seniority rights when his suspension period was completed on February 15, 1980."

The Claimant asserts that when he received the call from Ms. Bowatz he was told "...I was going to be bumped", and at that time Ms. Bowatz "...didn't state when or why" he was being bumped.

On February 15, 1980 the Claimant went to Roadmaster Nyberg's office to pick up his paycheck. The Carrier and the Organization hold different views regarding what took place during the Claimant's visit to the Roadmaster's office.

According to the Carrier, the Roadmaster "...personally mentioned to the Claimant that he had been displaced by a senior

employee and had ten calendar days to either exercise his seniority or file Form 15364." The Carrier says that the Claimant did neither; he "...picked up his check and left the office without making his intentions known."

The Organization contends that during the Claimant's February 15th visit to the Roadmaster's office the Carrier deliberately failed to advise the claimant of what junior employee he could displace, so as to "...cause Claimant additional loss in pay Monday, February 18, 1980 had he reported to work and found he was properly displaced."

Although uncertainty exists concerning exactly what happened or should have happened on February 15th, no doubt exists regarding the Claimant's failure to report for work on February 18th; he asserts that "over the weekend of the 15th of February, I was notified of a death in my family and had to leave unexpectedly."

Claimant Walker did not return for duty until February 26, 1980, at which time he says that "I was totally confused as to my work status. I still had not received any written communication as to my status." When the Claimant went to the Roadmaster's office on February 26th he was informed that "...because he had not exercised his seniority or filed his Form 15364 within 10 days, he lost his seniority rights under the provisions of Rule 9 of the Schedule Agreement":

"...failure to file his name and address or failure to return to service within ten calendar days, unless prevented by sickness, or unless satisfactory reason is given for not doing so, will result in loss of all seniority rights."

A careful consideration of the record reveals that the Carrier and the Organization have relied on different theories of how and which rules should be applied in analyzing the conflicting factual assertions made in connection with the unusual circumstances involved in this claim.

The Organization urges that Rule 8D was violated when the Carrier failed "...to see that a list showing names and classification and location of employees retained in service in the various crews in the seniority district, is posted in tool houses and outfits, ..." However, this rule controls situations "when forces are reduced or abolished...", which does not appear to be the case here; rather than being "displaced", it seems that the Claimant was "temporarily replaced" while on suspension.

The Carrier contends that the provisions of Rule 9 are applicable and that Rule 8 is not a decisive factor because, prior to the conversation on February 26th, "...on February 12 and 15, 1980, Claimant Walker was advised that he was displaced (not that he would be displaced) and should either exercise his seniority or file a Form 15364 in ten days. This was, then, fully in compliance with the requirements of Rule 8E(3)."

If suspended, employees are barred from exercising their seniority rights during that period of time. It follows logically that the Carrier's obligations under Rule 8 and 9, to give notice to "displaced" employees, would be pointless regarding employees on suspension, until after their suspensions ended.

In accordance with this reasoning, rather than being "displaced" in this Board's view, suspended employees would be permanently or temporarily replaced. Hence, the provisions of Rule 8 and 9 would operate in the determination of their temporary or regular replacements, but would be inoperative with regard to a suspended employee until the suspension ended. Under these circumstances a suspended employee, such as the Claimant, would, as the Organization contends, be "in essence, during such period...not eligible to exercise accumulated seniority"; he could not jeopardize seniority that was dormant, due to his failure to respond to the the Carrier's notice provided under Rule 8 and 9, in that such notice is impotent during his suspension.

Notwithstanding the theories of the parties, and the speculations of the Chairman, it is clear that the disciplinary investigation provisions of Rule 40 are not applicable to this claim. It is equally clear that the Claimant has been in the employ of the Carrier for several years and that during that time he has complied with the requirements for completing Form 15364.

The Claimant did not request or complete Form 15364 at any time after he knew that he would be or had been bumped. The Claimant did not report for work on the 18th of February, when he could have clarified his alleged confusion regarding his employment status, and he could have timely filed Form 15364, if it were necessary to do so. Furthermore, though the circumstances that led to the Claimant's confusion concerning his work status preceded his departure to attend the funeral of a deceased

relative, at no time during the period between the weekend of February 15th and his visit to the Roadmaster's office on February 26th, did he attempt to contact the Carrier by telephone or to otherwise seek clarification of his confusion.

Although the circumstances involved in this claim give reason to believe that the Claimant was understandably confused about his employment status, his confusion does not relieve him of his obligation to either report for duty when scheduled to do so (if he was told he would be bumped, that does not mean no work would be available on February 18th), or exercise the options available to employees for whom no work is currently available (assuming the Claimant was told "he had been displaced", he should have acted to protect his seniority).

However, the unusual, if not unique, nature of this claim, including Mr. Walker's understandable confusion, allow for the consideration of equity in this case. For an employee, based on all the facts in this peculiar, non-precedential case, to lose all of his seniority rights, and hence his employment, is too severe a consequence.

If within a ten calendar day period from the date he is notified of this Award, the Claimant completes the requisite forms and meets the Carrier's rules for reemployment, his seniority shall be re-established.

AWARD: Claim denied.

However, Claimant will be afforded an opportunity to re-establish his seniority, based upon the findings in the above Opinion.

F. H. Funk
F. Funk, Organization Member

W. Hodynsky
W. Hodynsky, Carrier Member

Richard R. Kasher
Richard R. Kasher, Chairman
and Neutral Member

July 21, 1983
Minneapolis, MN