

PUBLIC LAW BOARD NO. 6564

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE**

AND

CSX TRANSPORTATION, INC.

Case No. 47

* * * *

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The Carrier violated Rule 26 when it improperly terminated the seniority of Production Foremen S. P. Sclafani on September 16, 2003.
2. The claim as presented on March 30, 2004 by Assistant General Chairman Edward W. Long, III to Division Engineer D. Evers shall be allowed as presented because said claim was not disallowed in accordance with Rule 24(a).
3. As a consequence of the violation referred to in Parts (1) and/or (2) above, Production Foreman S. P. Sclafani ‘...shall now be allowed all loss hours compensation, credits and benefits, including seniority (Trackman), reinstatement and Foreman seniority as of March 17, 2004, as originally requested for the Carrier violations commencing on March 18, 2004 in continuation until resolved of instant issue for not allowing Claimant to work a position he submitted application for and subsequent verbal, via telephone call, award.’

Background

Claimant S. P. Sclafani was hired on May 12, 2003, and he established seniority as a trackman in the Track Department on the Mohawk-Hudson Seniority District, Albany Service Lane. He passed a NORAC Rules examination, and on August 19, 2003, he was awarded a Machine Operator position and was also awarded a Welder-Track position on

that same date, effective August 25, 2003. Both positions were in Selkirk, New York with work hours of 7:00 a.m. to 3:30 p.m. He did not appear for work the week of August 19, 2003, although he allegedly left a phone message for Selkirk Roadmaster E. Tubbs on August 20, 2003 that he would be unable to report until August 25, 2003.

Claimant lived two hours away from Selkirk, and on August 25, he got lost and arrived at work at 7:12 a.m. Roadmaster Tubbs told him he would not be allowed to work that day because "...We start work around here at 7:00 a.m., see you tomorrow." However, Claimant never returned to work and thereafter had no further contact with the Carrier.

Consequently, on September 16, 2003, Division Engineer D. J. Evers notified Claimant of his forfeiture of seniority in accordance with Rule 26(b) of the Collective Bargaining Agreement, which reads as follows:

- (b) Except for sickness or disability, or under circumstances beyond his control, an employee who is absent in excess of fourteen (14) consecutive days without notifying his supervisor or proper carrier official will forfeit all seniority under this Agreement. The employee will be notified by certified mail, return receipt requested, with copy to the General Chairman advising them of such forfeiture of seniority. The employee or his representative may appeal from such action to the carrier's Highest Designated Labor Relations Officer within thirty (30) days under Rule 25, Section 3.

Claimant did not appeal the Carrier's action but continued to submit bids for bulletined positions during the fall and winter of 2003-2004. The carrier accepted his bid for position SLAL-0016 Production Foreman on Force 5X35 dated March 8, 2004 and awarded him the position by bulletin dated March 17, 2004. However, a few hours after notifying Claimant that he had been awarded the job, the Carrier called and advised him that the award was cancelled based on his forfeiture of seniority the preceding September.

The Organization's Assistant General Chairman, Edward W. Long, filed a claim with Mr. Evers on March 30, 2004, appealing CSXT's rescission of Claimant's award.

According to Long, the Carrier never sent a copy of its September 16, 2003 letter to the General Chairman, advising him of Claimant's forfeiture of seniority, as required by Rule 26(b). The claim sought Claimant's reinstatement of seniority and establishment of Foreman seniority as of March 17, 2004. It also sought lost wages at the Foreman's rate, starting March 18, 2004.

Evers declined the claim by letter dated May 25, 2004. But Long refused the letter for lack of sufficient postage. The letter was returned to sender and was forwarded again to Long on June 7, 2004.

On June 15, 2004, Long appealed the claim. He maintained his earlier position and also added that inasmuch as the Carrier had failed to respond to the March 30 claim within 60 days, there was a violation of Rule 24(a) of the Agreement.

The matter was conferenced on August 10, 2004 after which Director Labor Relations J. H. Wilson declined the appeal by letter dated October 10, 2004. The Carrier's decision was rejected by the Organization on November 24, 2004. Thereafter, the parties agreed to present the dispute to this Board for final resolution.

Contentions of the Carrier

The Carrier contends that Claimant's forfeiture of seniority on September 16, 2003 conformed to Rule 26 of the Agreement. Rule 26(b) states that an employee or his representative may appeal the employee's forfeiture of seniority to CSXT's highest designated officer within thirty days. While there is no evidence that BMW General Chairman P.K. Geller ever received the September 16, 2003 letter, the Record contains a

conflict as to whether BMW Second Vice Chairman Giblin was provided a copy of the correspondence. But in any event, neither Claimant nor the Organization offered a reason for Claimant's absence from work beginning August 19, 2003. Nor did they contest the forfeiture of seniority within thirty days. The self-executing nature of Rule 26 compelled the Carrier to issue the September 16, 2003 letter, and it follows that as a result of his own behavior, Claimant forfeited his status as an employee. The Carrier argues that inasmuch as Claimant lost his seniority, he cannot be considered an "employee" within the meaning of Rule 24(a) of the Agreement, which provides:

A claim or grievance must be presented, in writing, by an employee or on his behalf by his union representative to the Designated Officer, or other designated official within sixty (60) days from the date of the occurrence on which the claim is based....

In the Carrier's view, the claim initiated on March 30, 2004 was *void ab initio*, and the Board lacks jurisdiction because the claim was not legitimately filed. Hence, there is no valid basis upon which this Board can address the Carrier's alleged failure to provide the BMW General Chairman with a copy of the September 16, 2003 letter or its alleged failure to reply within sixty days to the claim filed on March 30, 2004.

The Carrier further contends that even assuming *arguendo* that this Board has jurisdiction, it remains undisputed that Claimant failed to protect his job as of August 19, 2003 and continuing thereafter. Moreover, there was no showing that his absence was due to sickness, disability, or circumstances beyond his control. He knew he had submitted a successful bid for the Machine Operator position, effective August 19, 2003, and that he was due at work. Additionally, when he reported to work late on August 25, 2003, he was told to come back the following morning. Instead, he abandoned his position and, other than for his submission of job bids occasionally, he never again

contacted the Carrier. Given Claimant's conduct, the Carrier submits that Rule 26(b) was legitimately applied in this case, and there is nothing in the Record to support the reinstatement of Claimant's seniority, the establishment of Foreman seniority, or the granting of any monetary relief.

Contentions of the Organization

The Organization contends that the Carrier failed to provide the General Chairman with a copy of the September 16, 2003 forfeiture letter, which meant that the Organization was denied the stipulated thirty days from which to appeal CSXT's action under Rule 25, Section 3. Given this serious contractual violation, the Carrier cannot rely upon Rule 26(b) as the basis on which to strip Claimant of his seniority.

The Organization further argues that the Carrier compounded its procedural error by failing to give a timely response to the initial claim submitted by Assistant General Chairman Edward Long. The Carrier had sixty days within which to render a written decision. The fact that it failed to use proper postage to insure the timely delivery of its response did not operate to extend the time limits for issuing its answer to the claim. In the Organization's view, the affixing of insufficient postage on the denial letter allegedly written on May 25, 2004, which caused it to be returned to the sender, was a circumstance under the Carrier's control. Therefore, the Carrier's mistake should not be construed to extend the time limit for claims handling. In this regard, the Organization cites numerous arbitration decisions holding that delays under a carrier's control do not operate to extend time limits for "rendering" notice to the Organization.

As to the merits of the case, the Organization emphasizes that Claimant lived a long distance from Selkirk, New York, and that his reporting to work 12 minutes late on

August 25, 2003 was attributable to his getting lost on his way to the job. While there is no doubt that Claimant failed to contact the Carrier at any time after August 25, 2003, that was probably due to Claimant's belief that he had lost only his machine operator and welder track seniority. That is why he did not appeal the September 16, 2003 letter and instead continued to submit bids for bulletined positions. This is a plausible explanation, argues the Organization, in light of the fact that Claimant was hired on May 12, 2003 and might have been somewhat naive as to how Rule 26(b) operated. Furthermore, the Carrier fostered Claimant's confusion in that the bids he submitted after September 16, 2003 were not rejected based on an alleged forfeiture of seniority. Indeed, he was the successful bidder for the SLAL-0016 Production Foreman position in March 2004, and it was only after he was awarded the position that the Carrier rescinded the award. For these reasons, the Organization asserts that Claimant is entitled to reinstatement of seniority and back pay.

Opinion

There is no doubt that Claimant ceased reporting to work as of August 19, 2003 and that he never advised the Carrier that his unexcused absence was due to illness, disability or circumstances beyond his control. It is also clear, however, that the Carrier failed to provide a copy of the September 16, 2003 letter of forfeiture to the BMW General Chairman, as explicitly required by Rule 26(b). The Carrier argues that Vice Chairman Giblin was provided a copy of the correspondence, but Giblin insisted that he did not receive the letter and could not find a copy of it in his files. In any event, however, the forfeiture letter should have been sent to General Chairman Geller, and the Carrier has conceded that the letter was not sent to him.

The Carrier's failure to send the September 16, 2003 letter to the General Chairman was a serious error. Claimant was a relatively new employee and, whether or not he realized it, the letter meant that he was losing all seniority with the Carrier – and not merely his seniority as a machine operator and welder-track. By not providing the General Chairman with a copy of the correspondence, the Carrier denied the Organization the stipulated thirty days from which to appeal the forfeiture action.

It is not enough for the Carrier to say that under Rule 26(b), “the employee *or* his representative” could have filed the appeal. Claimant suffered a denial of due process because a high ranking union official had no knowledge of the forfeiture of seniority and no opportunity to process an appeal on Claimant's behalf. In short, the Carrier cannot rely on the literal wording of Rule 26(b) to support the action it took regarding forfeiture of Claimant's seniority and, at the same time, seek to disregard the literal contractual language as it relates to the procedure that should have been followed.

This is not to say, however, that Claimant is automatically entitled to a restoration of seniority based solely on CSXT's procedural error. The Record does not contain any evidence of Claimant's illness or disability on the days that he absented himself from work. Nor did he or the Organization ever assert that there were extraordinary circumstances that made it impossible for Claimant to accept his successful job bid. Moreover, there is arbitral case law which holds that seniority may not be established through a clerical or procedural error. As was stated in *NRAB, Third Division*, Award No. 31208 (Hicks): “Seniority status can be enhanced or achieved in any number of ways, but not through a procedural default in claim handling.” Admittedly, the Carrier's error in failing to send the forfeiture letter to the General Chairman preceded the filing of

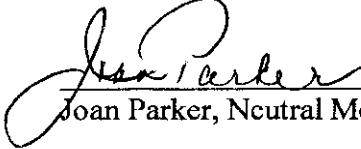
any claim, but the principle still applies. Clearly, arbitrators frown upon conveying substantive rights as a result of a procedural or clerical mistake. The preferred remedy in such situations is to correct the procedural mistake by allowing the appeal to go forward as it would have in the absence of a procedural violation.


It is this principle which the Board will follow in the instant case. The opportunity to appeal the forfeiture of seniority with the advice and assistance of the Organization's General Chairman is a significant contractual right. Here, Claimant was denied that right as a result of the Carrier's failure to notify the General Chairman of the forfeiture action. The proper remedy is to grant Claimant and the BMW another opportunity to appeal the Carrier's action, consistent with the terms of Rule 26(b). With respect to monetary issues, given that there is no evidence in the Record that Claimant was ready, willing or capable of working during any time for which a monetary remedy is sought, there is no basis to grant that requested relief. Claimant and/or the Organization may pursue monetary issues when and if an appeal is filed following the reissuance of the letter of forfeiture, consistent with the terms of this Award.

Award

The claim is sustained in part. Within ten (10) days of execution of this Award, the Carrier shall send the letter of September 16, 2003 to Claimant, by certified mail, return receipt requested, with a copy to the General Chairman, advising them of Claimant's forfeiture of seniority as a result of his absence without notifying his supervisor in excess of fourteen (14) consecutive days subsequent to August 19, 2003. Pursuant to Rule 26(b), Claimant or his representative may appeal from such action to the Carrier's Highest Designated Labor Relations Officer within thirty (30) days under Rule 25, Section 3.

PLB 6564
Awd 47


Joan Parker, Neutral Member


Carrier Member

Dated: 01-23-06


Organization Member

Dated: 1-23-06