

PROCEEDINGS BEFORE PUBLIC LAW BOARD NO. 3781

AWARD NO. 21

Case No. 98

Referee Fred Blackwell

Carrier Member: R. O'Neill

Labor Member: W. E. LaRue

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

Claim of the Brotherhood (CR-2575) that:

- (a) The dismissal of Claimant Abdul Q. Shahid was arbitrary and capricious, wholly unwarranted, and a violation of Rule 3 of the Scheduled Agreement.
- (b) Claimant Shahid shall be reinstated into Carrier's service with all seniority rights restored.

FINDINGS:

Upon the whole record and all the evidence, after January 18, 1988 hearing in Washington, D. C., the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter, and that the Claimant, who was duly notified of said hearing and of his right to be present and participate in same, did not attend said hearing.

OPINION

This case arises from the Claimant's appeal and protest of the Carrier's action of April 16, 1986, whereby the Carrier notified the Claimant that his seniority had been forfeited under Rule 4, Section 2, of the applicable Agreement due to his failure

to exercise seniority within ten (10) days after his disqualification from a position.

The record reflects that the Claimant, with service date in February 1976, was awarded a bid position as a Machine Operator/Tie Handler in TK-351 Tie Gang, effective March 31, 1986. The Claimant's seniority date for this job classification is July 5, 1977.

On April 3, 1986, prior to the start of his tour on that date, the Claimant was advised that he had failed to qualify for the position and should arrange to exercise seniority. The Claimant failed to exercise seniority within ten (10) days after the date of disqualification from the Machine Operator position, whereupon, by letter dated April 16, 1986, the Carrier's Division Engineer, Mr. John Palloni, Jr., advised the Claimant that he had forfeited his seniority with the Maintenance of Way Department under Rule 3, Section 5 of the Agreement due to his failure to exercise his seniority as required.

The Agreement provisions pertinent to this dispute are found in Rule 3, Section 5, and Rule 4, Section 2 of the February 1, 1982 Agreement as follows:

"RULE 3 - SELECTION OF POSITIONS

Section 5. Failure to qualify--Advertised position.

An employee failing to qualify for a position within thirty (30) days will not acquire seniority dating on the position for which he failed to qualify and will, within five (5) working days, return to his former position unless it has been abolished or filled by a senior employee, in which event he may exercise seniority.

RULE 4

Section 2. Exercise of seniority.

(a) Except as otherwise provided, an employee may exercise seniority to a position for which he is disqualified:

* * *

8. When disqualified.

(b) An employee entitled to exercise seniority must exercise seniority within ten (10) days after the date affected. Failure to exercise seniority to any position within his working zone (either divisional or Inter-Regional) shall result in forfeiture of all seniority under this Agreement, except employees who decline to exercise Inter-Regional seniority shall only forfeit all Inter-Regional seniority. If he presents evidence to his supervisor that extenuating circumstances prevented the exercise of seniority, the ten (10) days specified above shall be extended proportionately to the extent of his absence on account of such circumstances. An employee who is unable to so exercise seniority and who elects not to exercise other seniority, shall be furloughed."

After due study of the foregoing and of the record as a whole, inclusive of the submissions presented by the parties in support of their positions in the case, the Board concludes and finds that the record at hand does not provide satisfactory support for the disputed forfeiture of seniority. Accordingly, the Claimant will be reinstated to service with seniority unimpaired, but without any back pay.

Specifically, the record fails to establish that, following his April 3, 1986 disqualification from the position of Machine Operator, the Claimant could not have returned to his former position as permitted by Rule 3, Section 5. Further, the record reflects that the Claimant lacked sufficient seniority to displace to three (3) of the six (6) positions said by the Carrier to be available to him by the exercise of his seniority, and as well leaves doubt regarding his qualifications for the three remaining positions.

Finally, as regards the Claimant's statement that he had the impression from his contact with the Division Engineer's Office that he had ten (10) working days, rather than ten calendar days, to exercise his seniority after disqualification from the Machine Operator position, the Board notes that the Division Engineer produced no written record of his advice to the Claimant of his displacement rights when the disqualification arose. Accordingly, the Board deems it appropriate to give the Claimant the benefit of the doubt in regard to this facet of the case and to treat the Claimant's misunderstanding of the ten day provision in the rule as a mitigating consideration to be weighed in his behalf.

Accordingly, in view of the foregoing and based on the record as a whole, the Board will direct the reinstatement of the Claimant to service with seniority unimpaired. The record reflects that the claim does not include a request for compensation and therefore, the question of compensation cannot be considered.

AWARD:

The Carrier shall restore the Claimant to his former position on the seniority roster with seniority unimpaired, but Claimant shall not receive any compensation for time out of service.

The Carrier shall comply with this Award within thirty (30) days from the date of March 11, 1988.

BY ORDER OF PUBLIC LAW BOARD NO. 3781.

Fred Blackwell

Fred Blackwell, Neutral Member

R. O'Neill

R. O'Neill, Carrier Member

W. E. LaRue

W. E. LaRue, Labor Member

Executed on May 14, 1988

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