

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

Award No. 25399  
Docket No. 45578  
03-1-01-1-M-2094

The First Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: ( (Brotherhood of Locomotive Engineers  
(Northeast Illinois Regional Commuter Railroad  
( Corporation (NIRC/Metra)

STATEMENT OF CLAIM:

"It is the claim and request of the petitioning Organization that Engineer Ronald S. Hurley be paid the earnings of Job #901 for each date claimed between March 19, 2001 and April 13, 2001, account the Carrier restricted his seniority by not allowing claimant to qualify on Southwest Service District in a timely manner."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was working as a Locomotive Engineer on the Carrier's Rock Island District the week of March 5, 2001 when he was notified that he had been displaced from that assignment by a senior Engineer. The Claimant sought to exercise his seniority to Southwest Service District Job No. 901, which operates to and from Union Station in Chicago, under Amtrak Rules. The Claimant's qualifications under Amtrak Rules were not current and therefore he worked the Engineers' extra board until such time as he could meet the qualification requirement by passing an examination on Amtrak Rules.

The Carrier's January 26, 2001 Rock Island Bulletin Notice No. 19 states that the Carrier would be holding rules classes and examinations covering operating and safety Rules and, in addition, the Amtrak Rules on March 10, 2001. The Claimant enrolled in the class but was informed that he could not take the Amtrak exam because there had been insufficient time to cover the Amtrak Rules in class.

The Claimant filed time claims for 20 days beginning March 19, 2001, seeking compensation for those days equal to the daily pay for Job No. 901 on the Carrier's Southwestern Service line. The claims allege that the Carrier restricted the Claimant's seniority by not allowing him to qualify on the Southwest Service line.

On April 12, 2001, the Claimant was permitted to take the Amtrak Rules test, despite the fact that it had not been formally scheduled. He successfully passed the test and was permitted to exercise his seniority to Job No. 901 on April 14, 2001.

The Carrier thereafter declined payment of his claims and the Organization appealed the declination in a letter dated July 12, 2001, asserting that the Carrier violated Rule 33(f) by not giving the Claimant an opportunity to remain qualified. In subsequent correspondence on the property, the Carrier defended its position by arguing that: 1) other employees had been given the opportunity to take the required Rules examination on March 10 and the Claimant simply decided to not take the examination at that time; 2) Rule 33(f) was inapplicable to the instant case; and 3) the Claimant was working on another assignment during the time period claimed and therefore did not lose compensation.

These defenses to the claim are not well-founded. First, the Claimant produced a signed statement during the handling on the property in which he stated that he was denied the opportunity to take the March 10, 2001 Rules test as scheduled. The Carrier failed to adequately rebut this statement, choosing to rely entirely on hearsay statements through the labor relations official handling the claim. The Carrier's unsupported assertions cannot be accorded probative weight nor do they create an irreconcilable conflict of fact. On the contrary, the Claimant's statement must be regarded as the operative facts in this dispute.

Second, while we would agree that Rule 33(f) has little bearing upon the facts of this case, the Carrier's focus on that point ignores the central thrust of the instant claim. The Claimant and the Organization have sufficiently apprised the Carrier during on-property handling of their position that the Claimant's seniority was improperly restricted when he

was not permitted to take the Amtrak Rules test on March 10, 2001 and that issue is properly before the Board for determination.

On that crucial point, no persuasive explanation was forthcoming from the Carrier as to why the Claimant was refused permission to take the Amtrak Rules examination on that date when there had been published notice that the exam would be given. Certainly, the fact that he was subsequently permitted to take the examination without the necessity of attending a formal class undercuts any argument by the Carrier that its action was rational or reasonable. Under these facts, the Organization's contention that the Carrier restricted the Claimant's exercise of seniority when it arbitrarily denied the Claimant the opportunity to qualify on the Amtrak Rules becomes persuasive.

The remaining question is one of remedy. There is considerable precedent on the First Division for paying the basic day as the usual and customary measure of damages in cases involving a restriction of seniority. See, First Division Awards 24883, 24884, 24938, 24939 and 20122. Cases contrary to this majority view engage in a balancing test of various factors which, in our view, results in a slippery analytical slope upon which we decline to embark. Compare, First Division Award 24177 and First Division Award 24178. Accordingly, this claim is sustained in its entirety.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of First Division

Dated at Chicago, Illinois, this 3rd day of February 2003.

**CARRIER MEMBER'S DISSENT  
TO FIRST DIVISION DOCKET 45578,  
AWARD 25399  
(Referee Kenis)**

With respect to the remedy, the Majority cites precedent which upholds paying the basic day as the usual and customary measure of damages involving a restriction of seniority. It rejects First Division Awards 24177, 24178 which it describe as requiring a balancing test of various factors. The latter Awards were found to result "in a slippery analytical slope upon which we decline to embark."

Awards 24177 and 24178 did not have similar trepidation. Award 24117 is a thorough analysis of prior Awards such as the ones relied upon by the Majority. It found that an examination of the earliest Awards which established the precedents relied upon by the majority did not contain any rationale and it could find none in any of the subsequent Awards on the subject. The Awards relied upon by the majority continued the tradition of providing no rationale.

The Majority in Award 24177 concluded:

"While there are strong arguments for giving precedential weight to decisions which interpret Agreement provisions, to apply the principle of stare decisis to decisions which establish particular remedies where none has been agreed upon would have the effect of writing or changing Agreements, and this would be improper."

The guidelines suggested in Award 24177 are logical and simple. They create no "slippery slope." We have no doubt that this experienced referee could have analyzed the facts of this case in the light of the guidelines without falling, even once.

We dissent.



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Martin W. Fingerhut - Carrier Member

# NATIONAL RAILROAD ADJUSTMENT BOARD FIRST DIVISION

## LABOR MEMBERS' CONCURRING OPINION & RESPONSE TO CARRIER MEMBER'S DISSENT

Award No. 25399 -- Docket No. 45578  
Referee Ann. M. Kenis

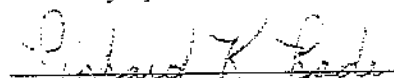
The Majority in this Docket correctly concluded that the Carrier's denial of the Claimant's seniority warranted the remedy sought, which was the earnings of the assignment he was wrongfully denied. The Majority correctly determined that "*...the Carrier restricted the Claimant's exercise of seniority when it arbitrarily denied the Claimant the opportunity to qualify on the Amtrak Rules...*"

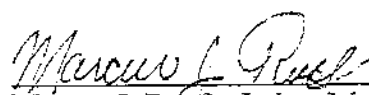
The Minority chastises the Majority for declining to utilize the balancing test set forth by Referee Fletcher in Award 24177, and used again in Award 24178. The Minority speculates that the Majority would have had no difficulty in using this test, and must feel that had the test been applied, the claim would have been denied.

Award 24177 suggested that in cases involving a proven denial of seniority, the remedy should reflect several factors, both monetary and non-monetary. In that Award, the claimant had been denied his seniority preference to the foreman's position on his yard assignment. He worked the same assignment as a helper. In view of the fact that the claimant worked the exact same assignment as if he had been assigned as foreman, the Referee in that case awarded the claimant the difference in pay between the foreman's rate and the helper's rate. In Award 24178, the claimant in that case was required to work on both a different assignment and a different starting time due to the Carrier's denial of his seniority preference. Referee Fletcher awarded that claimant the full remedy requested (a days pay for each date at the rate of the service denied) in view of the differences between the assignments he was required to protect and the assignments he should have been allowed to work had his seniority preference been honored.

In the instant Docket, the Claimant was required to work the extra board instead of the regular assignment he was improperly denied. Anybody even remotely familiar with the operating crafts in this industry knows that the difference between the extra board and a regular assignment is about the starkest that can exist. If any denial of seniority would call for an award of lost earnings under Referee Fletcher's test in Award 24177, this would be it. Since the Referee in this case achieved the same result, we fail to understand the purpose of the Minority's Dissent.

This Award is soundly based on the principles that have evolved to maintain the integrity of the seniority system.

  
Richard K. Radek -- Labor Member

  
Marcus J. Ruef -- Labor Member

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NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

Award No. 25400

Docket No. 45827

03-1-02-1-M-2099

The First Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(Brotherhood of Locomotive Engineers  
PARTIES TO DISPUTE: (  
(Northeast Illinois Regional Commuter Railroad  
( Corporation (NIRC/Metra)

STATEMENT OF CLAIM:

"Claim of Metra/Electric Engineer Jeffrey D. Butler for the removal of six (6) days actual suspension issued on July 12, 2001 (this included one (1) day activated that was assessed on February 21, 2001) for allegedly failing to properly protect his assignment as Engineer on Combination No. 9 due on duty at University Park at 6:14 a.m. on Friday, June 22, 2001 when he allegedly failed to report for duty at the required time."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Carrier convened an Investigation on July 6, 2001 to determine if the Claimant failed to report for duty at the required time on June 22, 2001. The Claimant was the regular assigned Engineer on train 106 (Combination No. 9) on that date. This assignment started out of University Park to depart at 6:34 A.M. The crew is scheduled to report at 6:14 A.M. to prepare the train for departure.