

In accordance with the terms of an Agreement dated May 25, 1981, Kalfas would forfeit his seniority as an engineer 60 days after he assumed an official position, and he was so informed by the Carrier. As the Agreement is self-executing, the Company removed his name from the seniority list after 60 days.

The relevant language in the May 15, 1981 rule reads as follows:

(b) Employees who begin accumulating seniority on an enginemen's roster, then accept a position in an official capacity will automatically forfeit all seniority if they fail to return to an enginemen roster after a period of sixty (60) days.

In 2003, a new agreement negotiated by United States Steel (USS) and the United Steelworkers of America consolidated crafts and reduced the number of job classifications from 34 to five. When USS implemented the new agreement, there was a reduction in force in both hourly and management ranks. URR, a wholly-owned subsidiary of USS, made a similar reduction in force of its non-represented employees in November 2003, including Mr. Kalfas, and he reverted to train service.

Sometime thereafter, Carrier's Labor Relations Department determined that Mr. Kalfas had never been promoted to official management status in the first place because, when his position was eliminated in November 2003, the Carrier's HR Department advised that Mr. Kalfas was not entitled to any of the substantial benefits, including Supplemental Unemployment Benefits, that he would otherwise have received had he been a true management official. Mr. Kalfas had been only an "acting" supervisor. Accordingly, in an effort to correct its error, the Carrier reinstated Mr. Kalfas to his original place on the engineers' seniority roster.

Three of the six engineers who once again found themselves below Mr. Kalfas in seniority submitted claims for a basic day's pay for each day that Mr. Kalfas was, in their view, improperly on

the engineers' seniority roster and working as an engineer. Other than the general claim that Kalfas' placement was in violation of Article 18 (e), there is no claim of any lost wages or benefits by any of the claimants.

In September 2005, the Carrier offered Mr. Kalfas a full-time "official" position and he accepted. After he had served 60 days in his new official position, the Carrier removed his name from the engineers' seniority roster, in accordance with the May 15, 1981 rule. .

The claims were all handled in the usual manner on the property. A representative case on behalf of Mr. Ruby has been placed before this Board for final determination.

CONTENTIONS OF THE PARTIES:

Position of the Organization:

The Organization points out that seniority is vitally important to rail employees, particularly where, as here, the restructuring of basic steel has greatly diminished work opportunities. So many facets of an employee's daily work life are a function of relative seniority that proper administration of the seniority provisions of the Agreement is essential and the vindication of this important principle calls for significant remediation. For that reason, the complaining employees are entitled to the remedy sought, says the Organization, which is a basic day's pay for each day the violation continued.

The Organization contends that any position not covered by a collective bargaining agreement is an "official position", citing an Award of the First Division that says "...positions covered by a collective bargaining agreement are not official positions..."

The Organization asserts that the Board should award the remedy requested to ensure future compliance should another officer be removed from the ranks of management. The Organization references Award No. 1 of PLB 6776 as support for this contention.

Position of the Carrier:

As its threshold position, the Carrier states that Mr. Kalfas was not employed in an "official" capacity from 2001 to 2003; he was an acting supervisor. Therefore, he was not subject to the May 15, 1981 rule. It argues that as Kalfas was not a true official and not entitled to an official's benefits, the Carrier should not have removed his name from the seniority list in the first place. Thus, fairness required that Kalfas be reinstated to his status on the engineers' seniority list.

The Carrier does not dispute that positions covered by a collective bargaining agreement are not official positions, but counters that just because a position is not covered by a collective bargaining agreement, that does not make it an "official" position. In the Carrier's view, an "acting supervisor" is not an "official", but neither is he covered by a CBA in that position.

The Carrier contends that there is no rule to support the punitive damages Claimants seek here. In fact, it points out, the record contains no evidence of any loss suffered by Claimants who, in fact, earned more than Kalfas for the period complained of when he was on the engineers' seniority list after having been furloughed from management. The Company argues that the restoration of Mr. Kalfas's seniority did not harm the employees junior to him on the seniority list in any way. But, the requested remedy would be excessive even if Claimants were seeking some sort of equity damages, says the Carrier.

The Carrier distinguishes the Ondrey and Stanek cases cited by the Organization as not relevant to the instant case. It notes that both Claimants in those cases were true "officials" whose seniority pre-dated the May 15, 1981 Agreement. Therefore, they were entitled to retain seniority

earned by them before they accepted official positions, but were not entitled to accumulate further seniority during the time they were not protecting engineer work but were working instead as officers of the Carrier.

The Carrier contends that the claims are without merit and requests that the Board deny them in their entirety.

FINDINGS:

The facts in the case are essentially undisputed. What is in dispute is whether Mr. Kalfas's reinstatement to his prior relative position on the engineers' seniority list was a violation of Article 18 - (e)(b) of the parties' Agreement and, if so, what should the remedy be?

As stated by the Organization, an "official position" is not covered by a collective bargaining agreement. In the Organization's view, it follows that any position not covered by a collective bargaining agreement is an official position. It derives this conclusion from an Award of the First Division that says "...positions covered by a collective bargaining agreement are not official positions...". There is no dispute that Mr. Kalfas was not covered by the parties' collective bargaining agreement during the period he worked as Assistant Supervisor of Transportation.. However, the Carrier now maintains that Mr. Kalfas was not an "official", as that term is used in Article 18 (e), and, because he was an "acting supervisor", he should not have had to forfeit his seniority as an engineer.

Whatever the real, true nature of Mr. Kalfas's position was, it was treated like an official position by all parties, including Mr. Kalfas, who relied on what the Carrier told him when the position was offered and performed duties in an "official capacity" as required. For that reason, the

Carrier cannot now be permitted to recharacterize the nature of Mr. Kalfas's position as something other than an "official capacity" to justify returning Mr. Kalfas to his prior position on the engineers' seniority list.

When the Carrier reevaluated the true nature of Mr. Kalfas's position, Mr. Kalfas, who was in all ways innocent of any mistakes or wrongdoing and who is not a Claimant here, wanted to be restored to his status as an engineer and to the seniority roster. But reinstatement properly could only be in keeping with Article 18(e)(b) as Kalfas was not yet employed when paragraph (a) permitting the freezing of seniority was effectuated. Paragraph (b) does not permit the retention of seniority by an employee who accepts an official position. Prior Awards cited by the Organization indicate that an engineer must forfeit engineer seniority during a period when the individual is not protecting assignments as an engineer but is instead working in an official capacity. NRAB First Division Award No. 24557 (Fletcher) and NRAB First Division Award No. 25128 (LaRocco). Therefore, under the Board's view of the facts here, Mr. Kalfas could not be credited with Engineer seniority for time spent working in an official capacity as something other than an engineer except under special circumstances not relevant here.

Probably Mr. Kalfas should have been returned to the bottom of the engineers' seniority list when he returned to work as an engineer, but that is not the issue here. The question is whether the Carrier's placement of him in his prior relative position violated Article 18 (e) of the Agreement. This Board finds that it did.

The more difficult issue is the question of remedy which normally is based on the equities of the case. As there is no provision in the parties' Agreement for remedies, the Public Law Board is given broad discretion to fashion a remedy that is appropriate to the circumstances. Here, a monetary

remedy is requested by the Organization. The purposes of a monetary remedy include (1) making Claimants whole for wages, benefits or opportunities lost as a consequence of the violation of an Agreement by the Carrier or (2) deterring the Carrier from repeating the violation even when there is no monetary loss to Claimants. Such was the purpose of the remedy in PLB 6776, Award No. 1 involving the International Longshoremen's Association and the Pittsburgh & Conneaut Dock Co.

In that case, the Board found that there had been a deliberate and flagrant abuse of management authority when the Company furloughed employees belonging to one seniority division and then forced them to work temporarily in a different division where they had neither seniority rights nor any contractual obligation to protect the work. Relying on precedent in cases of such a nature, the Board awarded a basic day's pay to each complaining employee for each day the violation continued. This remedy was intended to compensate Claimants for being forced to work and to deter the Carrier from repeating the infraction.

The instant case must be distinguished in a most important way. There is absolutely no basis here for concluding that the circumstances giving rise to this violation were anything but inadvertent, ~~a mistake, and not the product of management's desperate and deliberate search for manpower. It~~ was simply the Carrier's effort to make Mr. Kalfas whole after inadvertently harming him that resulted in violation of Article 18-(e). Therefore, no remedy designed to serve as a deterrent is needed, appropriate or just under these unique circumstances. Furthermore, there is no demonstrable loss to any junior employee on the seniority list and there can be no loss to any senior employee occasioned by Kalfas's placement on the list in his former position. The remedy sought by the Organization is grossly excessive and therefore arbitrary.

The Organization argues that Mr. Kalfas worked 170 shifts in engine service to which he was not entitled after he was improperly placed on the engineers' seniority roster. It is undisputed that

the six engineers junior to Kalfas did work fewer shifts in engine service than he did during the period in question, but they also worked substantially more shifts in train service. The Organization suggests that Kalfas's presence on the roster had an adverse impact on the junior engineers' opportunities for call out for extra work because Kalfas would have been called out ahead of them. It may be that his placement on the roster had some effect on the earning opportunities of engineers below him, but it is almost impossible to know because his presence there is but one of several variables that impacted those engineers' earnings opportunities. Important also were the number of days off for personal or health reasons which, in one case, were almost equal to the total shifts worked by that engineer. Significantly, he was the only more-junior engineer whose gross earnings were less than those of Mr. Kalfas. Certainly his absence from the workplace had the dominant effect on his total earnings.

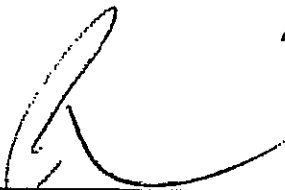
But the hard fact is that no claimant made any detailed showing of demonstrable loss caused by Mr. Kalfas's placement on the seniority roster. The Organization has offered nothing but speculation to show individual losses. Consequently, the parties had no opportunity to explore that remedial issue during the processing of the claims on the property. The Organization's focus was on a punitive award, not a make-whole remedy.

Clearly, argument at the Board level is not a substitute for the development of facts in the record. And nothing short of mischief would result if this or any Board assumed responsibility for building either party's record. Hence, the Board declines to consider a make-whole remedy for the Claimants here or any other Claimant whose claim has been held in abeyance.

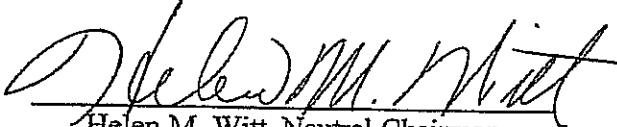
Consequently, the Board finds that an appropriate remedy in this case is the award of a single day's pay to each of the six engineers below Mr. Kalfas in seniority during the period in question. Payment shall be made within 60 days of the issuance of this Award.

AWARD

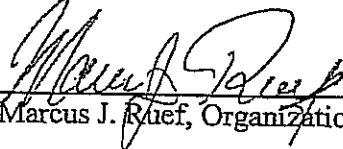
The claim is sustained solely to the extent set forth in the Findings.



John F. Ingham, Carrier Member



Helen M. Witt, Neutral Chairman



Marcus J. Ruef, Organization Member

Dated at Pittsburgh, Pennsylvania, September 14, 2007.

