

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

(The Brotherhood Railway Carmen of the United States
(and Canada

Parties to Dispute: (

(The Baltimore and Ohio Railroad Company

Dispute: Claim of Employees:

1. That Carrier violated the terms and/or provisions of the controlling Agreement, when on the date of September 18, 1979 they arbitrarily allowed Carman A. Browning, Jr., a junior employe, at Cumberland, Maryland, to perform compensated service for the Baltimore and Ohio Railroad Company. Carman Browning, in furlough status at the time of this incident, was allowed to work on the above mentioned date, out of seniority order, superseding senior employes, also in furlough status.
2. That Carrier is in violation of Article V, Time Limit on Claims or Grievances, effective January 1, 1955, with regard to the handling of this claim on the property.
3. That Carrier be ordered to compensate Carman W. J. Robertson, Jr., (Claimant), for all time lost account this violation, eight (8) hours pay at the regular carmen's rate.

Findings:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The instant claim arises as a result of a recall from furlough which was initiated by Carrier on September 17, 1979, at its Cumberland Locomotive Shop, Cumberland, Maryland. In the implementation of said recall, it was properly agreed by Carrier and Organization representatives that the four (4) senior Carmen in the Car Department of the Cumberland Locomotive Shop would be recalled --- J. E. Bierman, J. E. Rodeheaver, J. E. Pyles and L. J. Harris.

Each of these employees were contacted and were told to report to the Chief Clerk at 9 A.M. on the following day, September 18, 1979, for their assignments. Upon reporting, three (3) of these employees were assigned to work the 3 P.M. to 11 P.M. shift on that same day; and the remaining employee was assigned to the following 11 P.M. to 7 A.M. shift. When the 3 P.M. to 11 P.M. shift started, however, the record shows that Carman A. Browning, Jr., who was also furloughed but who as a junior employee and who had not been recalled, reported for work, and, thereafter, he worked the entire shift of eight (8) hours and he was paid for same.

The next most senior employee on the seniority list (after the four (4) Carmen who had been recalled) was W. J. Robertson, Jr.; and the parties concur that Mr. Robertson would have been the next in line to be recalled had Carrier recalled five (5) instead of four (4) Carmen.

A claim was filed on behalf of Mr. Robertson contending that Carrier violated Rule 24 (G) of the applicable Agreement by allowing Carman A. L. Browning, an employee who was junior to Claimant, to work on the 3 P.M. to 11 P.M. shift on September 18, 1979. In addition, Organization also contends that Carrier violated Article V, Time Limit on Claims or Grievances, of the Agreement when Carrier's Manager of Labor Relations failed to respond to Organization General Chairman's appeal within the sixty (60) days contractual time limit but instead exceeded the specified time limit by one (1) day.

Regarding Organization's timeliness claim, a careful review of the record convinces the Board that Carrier's response letter dated March 14, 1980, which was received at Organization address, postmarked March 17, 1980, was issued within sixty (60) days from the date on which Carrier received Organization's preceding appeal letter on January 17, 1980. Insofar as numerous Board decisions on this and other Divisions of the National Railroad Adjustment Board have determined that the sixty (60) days time limit tolls from Carrier's receipt of Organization's appeal letter, this Board is constrained to find that Carrier's action in the instant case is not in violation of Article V of the controlling Agreement. (See: Second Division Awards No. 3545, 8678 and 8725).

Turning next to the merits portion of this dispute, the Board notes that there are a number of glowing deficiencies and inconsistencies in the record which, in and of themselves, because of Organization's position as the moving party in such matters, are sufficient to warrant a rejection of the claim as presented. Perhaps a major significance in this regard is that it is unsettled in the record who was responsible for contacting the four (4) Carmen who were recalled to work on September 18, 1979, and who, in fact, contacted Carman Browning. At one point, Organization maintains that the Local Chairman was responsible for the notification. At another point, however, Organization strenuously argues that "...it has never been the practice on this property for the Local Chairman to recall furloughed employees, this responsibility lies with the management".

Obviously, if Organization was responsible for notifying employees of their recall (as Organization clearly implies in its Submission), then how could Organization fault Carrier for an error which resulted as a consequence thereof? As the record now stands, there is no way to determine who contacted the four (4) employees, or who contacted Mr. Browning, or if, in fact, he was ever contacted at all. The record does establish, however, that Mr. Browning should not have been contacted and should not have reported for work on September 18, 1979, since Carrier had consented only to the recalling of four (4) Carmen, not five (5); and Mr. Browning was a junior employee to all of those employees who were recalled. Therefore, he had no proper authorization to report for work on said date.

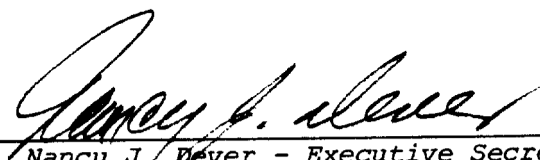
The next issue for consideration in this analysis is Organization's contention that once it was deduced that Mr. Browning was not recalled, Carrier then erred by permitting him to remain at work for eight (8) hours on September 18, 1979. In this regard, it has not been proven to the satisfaction of this Board that Carrier Supervisors did, in fact, make such a determination on the date in question. Moreover, even if such a determination had been made, the Board is of the opinion that since Carrier was not responsible for the causation of the incident in the first place (indeed, the evidence of record places the major portion of the blame on Mr. Browning and perhaps even on the Organization as well), then it would be totally improper to penalize Carrier in any amount at this point. While Organization argues that Mr. Browning's performance of eight (8) hours of work on the date in question is tacit admission that sufficient work was available for Claimant Robertson to perform and that he (Robertson), therefore, should have been recalled at the same time as the other four (4) senior Carmen, the Board can only note that it is within Carrier's managerial right to schedule work and to make assignments of its employees, and that on September 17, 1979, Carrier had only committed to the recalling of four (4) furloughed Carmen. Carrier's retention of Carman Browning for the entire eight (8) hours shift on September 18, 1979, was neither a contractual violation nor an abuse of managerial discretion; nor was it improper.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 10th day of July 1985.