Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7953
SECOND DIVISION Docket No. 7661
2-N&W-CM-' 79

The Second Division consisted of the regular members and in addition Referee Arthur T. Van Wart when award was rendered.

Parties to Dispute: (System Federation No. 16, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That the Norfolk and Western Railway Company violated the controlling Agreement by failing to recall employee from furloughed status in seniority order, thus allowing junior man Dennis Moore to work in lieu of senior man S. A. Hewis at Cleveland, Ohio.

2. That the Norfolk and Western Railway Company violated Article V(a), National Agreement dated August 21, 1954, and Sections 2 and 3(i) of the Railway Labor Act by engaging in procedural defect in the processing of the claim on the property.

3. That the Norfolk and Western Railway Company be ordered to compensate S. A. Hewis for all time lost as follows:

DATE	AMOUNT
2-13-76	Eight Hours at Straight Time Rate
2-14-76	Five Hours at Time and One-Half Rate
2-16-76	Eight Hours at Straight Time Rate
2-17-76	Eight Hours at Straight Time Rate
2-18-76	Eight Hours at Straight Time Rate
2-19-76	Eight Hours at Straight Time Rate
2-20-76	Eight Hours at Straight Time Rate
2-23-76	Eight Hours at Straight Time Rate
2-24-76	Eight Hours at Straight Time Rate
2-25-76	Eight Hours at Straight Time Rate
2-26-76	Eight Hours at Straight Time Rate
2-27-76	Eight Hours at Straight Time Rate
3-1-76	Eight Hours at Straight Time Rate
3-2-76	Eight Hours at Straight Time Rate
3-3-76	Eight Hours at Straight Time Rate
3-4-76	Eight Hours at Straight Time Rate
3-5-76	Eight Hours at Straight Time Rate
3-8-76	Eight Hours at Straight Time Rate
3-9-76	Eight Hours at Straight Time 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 employe 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.

Prior to February 13, 1976, there were two (2) Carmen in a furlough status, Claimant S. A. Hewis and D. Moore. They had been furloughed from Carrier's terminal facility at Campbell Road in Cleveland, Ohio.

Claimant Hewis was notified by telephone on February 13, 1976, by the General Foreman that he was being recalled. This method of recall was the alleged customary manner used to recall a furloughee to service at this location. Claimant, at that time, had allegedly advised the General Foreman that he did not desire to return to work in the Car Department as he believed that he was going to be employed in the Carrier's Freight Claim Department. Claimant allegedly stated that he would come to the office and tender his resignation. When Claimant had not reported to the office by February 19, 1976, he was again contacted. Claimant again asserted, at that time, that he did not desire to return to work as a Carmen Helper. However, he stated that he would not sign a resignation until he was actually employed in the Freight Claim Department.

The General Foreman acted in reliance upon the Claimant's two statements and contacted the next Senior furloughed man, D. Moore, on February 19, 1976. He advised Mr. Moore to return to service. Mr. Moore reported for work on February 20, 1976.

Claimant called the General Foreman on March 1, 1976, and informed the General Foreman that he had not been employed in the Freight Claim Department, as anticipated, and that he desired to return to work in the Car Department. Accordingly, Mr. Moore was given notice by a bulletin, on March 3, 1976, that he would be furloughed effective March 10, 1976. Claimant commenced service on March 10, 1976.

He filed claim for five (5) hours at the overtime rate for February 14, 1976, and eight (8) hours at the straight time rate for February 15 - 27, March 1 - 5, 1976. These claims were filed on March 8, 1976. Further, on March 10th, Claimant also filed claim for eight (8) hours at the straight time rate for March 8 and 9, 1976.

The Car Foreman denied such claims on March 5 and 7, 1976. His decision was rejected in the claim appealed to the General Car Foreman. The record reflects that attached to the rejection was a statement signed by D. Moore indicating that he had begun work on February 13 and worked through March 9, 1976. These claims were denied by the General Foreman on August 17, 1976. The General Foreman, in addition, also advised that Mr. Moore had been given a formal investigation, regarding the signed statement given the Local Chairman, and that Mr. Moore testified at said investigation that he did not work on February 13 - 19, 1976.

The Local Chairman rejected the decision of the General Foreman on October 8, 1976. He alleged a violation of Article V (a) of the August 21, 1954 Agreement and Sections 2 and 3 (i) of the Railway Labor Act, because the General Foreman, rather than the General Car Foreman, to whom the appeal was addressed, had denied the claim.

Rule 7(b) of the controlling schedule Agreement reads:

> "7 (b) An employee resigning from the service...or failing to return to work upon expiration of leave of absence or within a reasonable time after being notified if on furlough will lose all seniority rights... When a written notice to return to work is sent to an employee, a copy of such notice will be given to the local committee or to the President of System Federation No. 23." (Underscoring supplied)

Rule 8(b) in pertinent part, states:

> "8(b) ... An employee who has been furloughed shall return to work when called by the Company, unless at the time when called he is granted leave of absence..."

Article V of the August 21, 1954, National Agreement, in pertinent part, provides:

> "V. All claims and grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurance on which the Claim or grievance is based. Should any such claim or grievance be disallowed the Carrier shall notify whoever filed the claim or grievance ... in writing of the reasons for such disallowance. If not so notified, the Claim or grievance shall be allowed as presented..."

The Employes contend, simply, that Carman Helper Moore worked on the dates of claim and that he was paid in the amount for which claim is here made, that Mr. Moore had furnished an affidavit confirming such contention, that Claimant was never given notice to return to work from a furlough status, that neither the Claimant nor the Committee, has a record of such notice which is required by Rule 7 (b), that there is no record of any resignation by Claimant, nor was there a record of Claimant's requesting a leave of absence, that Claimant denied that he ever received a call from Carrier to return to work from a furlough status, that Carrier erred procedurally when the General Foreman, rather than the General Car Foreman, to whom the claim was addressed, denied the claims. This latter error, they allege, was a violation of Section 3 (i) of the Railway Labor Act.

The first of the several issues raised herein is whether or not Claimant was notified that he was being recalled to service.

Rule 8 reads:

> "In restoring forces the Company will call furloughed men in the order of their seniority. (Senior men to be called before Junior men) and will return to their former positions if possible; provided, however, that any furloughed employee recalled to service may be granted a leave of absence if the requirements of the service permit."

It is clear that notification, under Rules 8 (d) and 7 (b), is the responsibility of Carrier and in the execution of such responsibility that there is no contractual method for accomplishment thereof established, except that when a written notice to return to work is utilized that a copy thereof must be given to Federation No. 23.

The evidence of record is more supportive of the contention of Carrier that in line with the practice of recalling furloughees by telephone, Claimant was so notified and that the contemporary assertions made on that point were uncontroverted by Claimant until about a month and a half later, when the instant claims were appealed by the Local Chairman. Further, the assertions made that Claimant was desirous of working in the Carrier's Freight Claim Department, rather than to return from furlough, are not set aside merely because Claimant later denied being recalled from furlough.

The record, when read in balance, supports the conclusion that Carmen Helper, D. Moore, did not commence work until February 20th, following his physical examination that day. Hence, there can be no proper basis for claims covering the period between February 13th and 19th.

In view of Claimant's desire to work for Carrier in another department, it was more realistic and practical to honor such desire, rather than to take his seniority away, as required by Rule 7 (b). Yet, at the same time, a constructive leave of absence may be inferred on the basis of Claimant's request as being made under Rule 8 (b).

There is nothing shown in the record that Carrier had either anything to gain by calling the Junior man from furlough, or, that there was bias against the Claimant.

We conclude, on the basis of this record, that Claimant established the situation which he here is complaining against. It is well settled that a party to a contract will not be permitted to recover from any loss or breach of the contract which he has either directly or indirectly induced or could have reasonably avoided. As pointed out in Third Division Award No. 20415 (Lieberman)

> "Carrier has the right to accept an employees statement of unavailability under circumstances such as those of this dispute, and not subsequently be held to have violated the terms of a Rule of practice. (See Awards 14208, 15804, 16098)"

Claimant, in essence, chose to forego his right of recall to work on February 13th in favor of the potential of other more preferrable employment with Carrier, and when it was later determined that he was not acceptable therefor, Claimant, apparently, developed an interest in pursuing the instant claims. We find that Claimant wilfully made himself unavailable for the period of time which he here now seeks to be compensated for. If such unavailability be folly, it is his. Claimant alone must suffer therefor. He cannot benefit from that which he caused.

As to the contention concerning Article V of the August 21, 1954 Agreement, the Employes have eloquently and logically purused the argument that each designated Carrier Officer is a separate and distinct entity within a specific line and level of appeal with whom conference and correspondence is repeatedly and uniformly exchanged. They aver that there is no purpose to the Railway Labor Act, or Article V, if Carrier is permitted to arbitrarily have any of their officers answer various levels of appeals in disputes such as this. Awards in support of such contention were offered.

We conclude that while such argument is persuasive and appealing, the literal language of Article V (a) causes the Board to deny the Employee's contention on this point. Here, the claims were handled in the usual manner with the designated party. Article V, while placing a burden on the Employee to present the grievance or claim to the "officer of the Carrier" authorized to receive same, does not contractually place the same burden on such officer. The Rule contains a contractual requirement pertaining to disallowance, that "the Carrier shall notify whoever filed the claim or grievance..." In this connection see Second Division Awards 4464, 5312 and 6963.

The Carrier's primary burden under Article V is only one of notification. There is no specificity as to "who" or in "whose name" it shall be done. Admittedly, the burden is not contractually equal. However, we are not authorized to change the inequality as such authority remains with the Parties.

In the circumstances this claim will be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of June, 1979.

DISSENT OF LABOR MEMBERS TO AWARD NO. 7953 - DOCKET NO. 7661

Rules of Agreement require that furloughed employes be recalled in order of their seniority. Here, Claimant emphatically denies being recalled by telephone as Carrier alleges.

This Board stated in Second Division Award No. 3690:

> "While it does not specify the method, it does specify the end result, - the employe must be informed. Its purpose is functional, not merely technical; it is to impart notice to the employe so that he can resume work as soon as reasonably possible..."

When Carrier alleges it called Claimant on the phone to notify of his recall, and that allegation is denied, the burden shifts to the Carrier to show that it did indeed impart notice to Claimant. As stated further in Award No. 3690:

> "But the agreement places the burden of notification on the Carrier, which equitable considerations cannot shift."

See also Second Division Awards 5484 and 6892 on affirmative defense.

Award 7953, Docket No. 7661 strays far from the principals established by this Board. The Award is in error and we must dissent.

C. E. Wheeler
Labor Member