Award No. 9564
Docket No. MW-8372

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement beginning on March 8, 1955 and continuing through April 29, 1955 when it assigned Section Laborers to fill temporary vacancies in a position of Welder Helper instead of recalling furloughed Welder Helper Orville D. Smithart;

2. Welder Helper Orville D. Smithart now be allowed pay equal to what he would have been paid by the Carrier had he been recalled from furlough to fill the temporary vacancies in the position of Welder Helper from March 8, 1955 to April 29, 1955, both dates inclusive.

EMPLOYES' STATEMENT OF FACTS: Under date of September 26, 1951, claimant Orval D. Smithart established seniority rights as Welder Helper on Seniority District No. 3. On March 22, 1954 he was cut off account of reduction in force, becoming the senior furloughed employe of that class on his Seniority District. Under date of March 24, 1954, claimant Smithart addressed the following quoted letter jointly to General Chairman E. Jones and District Engineer E. P. Kennedy:

"Atoka, Okla.
Mar. 24, 1954

Mr. Ernest Jones
Mr. E. P. Kennedy

Dear Sir:

I was cut off as welder helper March 22, 1954. This is my file of address.

/s/ Orval D. Smithart
Route 5
Atoka, Okla."

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, deny each and every, all and singular, the allegations of the Organization and Employes in alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, respectfully request the Third Division, National Railroad Adjustment Board, deny said claim, and grant said Railroad Companies, and each of them, such other relief to which they may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: The essential facts on which this claim is based are not disputed. Claimant was furloughed from the position of Welder Helper account force reduction on March 22, 1954. He had established seniority in that classification on Seniority District No. 3 on September 6, 1951, and became the senior furloughed employe of his class on the District.

Beginning March 8, 1955, Welder Taylor laid off sick and Welder Helper Livingston moved up to fill the vacancy. Taylor returned to his Welder position on April 8, 1955, and on that date Livingston laid off sick. He returned to his Welder Helper position on May 2, 1955. During the absences of Taylor and Livingston, the Carrier used Section Laborers to assist the Welder.

Petitioner contends that Carrier's failure to recall Claimant to fill the temporary Welder Helper vacancy and the use of Section Laborers to fill it violated Rules 3 and 4, Article 6, and Rule 25, Article 3 of the applicable Agreement.

Carrier objects to this Division's jurisdiction on the basis that Claimant was not an employe under the Agreement at that time the claim was filed in that he failed to seek placement on the temporary Welder Helper vacancy, and, as required by Rule 25, Article 3, failed to perform Carrier service for twelve months following his furlough. Carrier also contends that in the absence of efforts by Claimant to place himself in the vacancy, it was authorized to use Section Laborers to assist the Welder; that claim for the period after the bulletining of the temporary vacancy must be denied because Claimant failed to bid therefor; that the record establishes Claimant's desire to collect penalty pay rather than actually to work the vacancy; and that Claimant failed to mitigate damages.

The record establishes beyond question that the Carrier assigned Section Laborers to fill the temporary Welder Helper vacancy on specified dates during the claim period. In its Submission dated February 29, 1956 the Carrier states:

> "Robert Johnson, section laborer, assisted I. C. Livingston, as welder helper, eight hours on March 8, 9, 10, 11, 14, 15, 16, 17 and 18 and 6½ hours on April 12.
>
> "Viteo Guest, section laborer, worked as welder helper 8 hours, April 14, 15, 18, 19, 20, 21 and 4 hours April 22, 1955."

The use of Section Laborers to fill the temporary Welder Helper vacancy instead of recalling Claimant to that position violated Rule 4, Article 6. Rule 3 of that Article authorizes the Carrier to fill that vacancy "pending . . . return of assigned individual whose absence creates the vacancy". Rule 4 of the Article required that in filling such vacancy temporarily, the

Carrier "shall" observe the order of preference shown therein and the applicable subdivision thereof establishes such preference for "furloughed employes who holds seniority on the seniority district concerned and in the classification in which the vacancy occurs". Thus, if the temporary vacancy involved was to be filled at all, the Rule obligated the Carrier to effectuate such preference, and performance of that obligation necessarily entailed recall of Claimant who was the furloughed employe with seniority rights on the district and in the Welder Helper classification. Otherwise, the mandatory preference established by the Rule is denied on the filling of the temporary vacancy by the Carrier without regard to the contractually preferred employe.

The obligations assumed by the Carrier under Rule 4, Article 6 remained unchanged during the claim period. We are not referred to any rule of the Agreement which modifies or cancels those obligations because the Carrier bulletined the temporary vacancy on March 23, 1955.

We find no validity in Carrier's objections to this Division's jurisdiction. Concededly, Claimant was not in default under Rule 25, Article 3 in regard to the renewal of address information at the time the violations of Rule 4, Article 6 occurred. Having failed to comply with the last mentioned Rule before March 22, 1955 as well as thereafter, Carrier cannot avoid the consequences of such violations by merely asserting that Claimant failed to perform service during the twelve months following his furlough on March 22, 1954. See Award 5348.

The record shows Carrier's assertions that Claimant was employed outside at a rate higher than the Welder Helper rate and denials of this allegation except that it is admitted that Claimant was self-employed during the claim period. The record does not disclose any factual information for resolution of this conflict as to Claimant's outside earnings. Accordingly, we shall sustain paragraph (2) of the claim subject to the deduction of Claimant's outside earnings during the claim period.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon; and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 21st day of September, 1960.