

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22672
Docket Number MW-22468

James F. **Scearce**, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employes**
(
(Chicago, Milwaukee, St. Paul and Pacific
(Railroad Company

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

(1) The Carrier violated the Agreement when it failed to recall furloughed Laborer A. **M. Lemrise** to service on July 5, 1976 (System File **C#69** - Illinois/Case No. D-1989),

(2) The **claim*** as presented by the General Chairman on August 9, 1976 to **Roadmaster J. D. Burshiem** shall be allowed as presented because said claim was not disallowed by **Roadmaster J. D. Burshiem** in accordance with **Rule 47 1(a)**.

(3) For the reasons set forth in either or both (1) and (2) above, Laborer A. **M. Lemrise** be compensated at his applicable rate for all time lost from July 5, 1976 through August 6, 1976.

***The** letter of claim will be reproduced within our initial submission."

OPINION OF BOARD: Claimant was a track laborer with in excess of three years service when he was furloughed on November 25, 1975. The record shows that, **pursuant** to the provisions of Rule 10, the Claimant submitted a notice to the Carrier on that date and again on May 20, 1976, so as to maintain his name on the seniority roster for recall. According to the Claimant's section foreman, he contacted the Claimant **prior** to June 1, 1976 and advised him of a vacancy to be covered during a vacation absence. According to this supervisor, the Claimant declined, indicating an interest only if such job opportunity were of a **permanent** nature. This same supervisor asserts he endeavored to contact the Claimant on July 3 relative to a **machine** operator position; the Claimant was not there and the **foreman** talked, instead, to his aunt who indicated that the Claimant was working, was not at home and was doubtful that the Claimant would be interested. Per the foreman, he advised the Claimant's aunt to have the **Claimant** contact him before July 5, at which time he would go on vacation himself. Failure of the Claimant

to do so before that time was the basis, according to the foreman, for the hiring of a new employee to fill the machine operator post.

According to the Claimant, he had **taken** a job after being furloughed when he found unemployment compensation was insufficient. While affirming that he preferred a permanent job, the Claimant asserts he never had the opportunity to decline the offer to cover the vacation vacancy because - in direct contrast with the foreman - he was never contacted by him in **May**. As to the July **3 call**, the Claimant was advised of the foreman's call upon his return after the holiday and, after trying unsuccessfully to reach him, contacted the agent at the depot instead. Only upon the foreman's return did he learn of the hiring of the new employee. By subsequent agreement the Claimant was returned to work, but denied pay for the period of the Claim herein.

We are obliged to try to determine the **validity of** this claim where there is substantial differences in the accounts of the facts of the Claimant and the foreman. It is beyond this Board's ability to divine which account is correct; indeed, it is not our obligation to do so. The case in its entirety turns on certain events prior to June 1, when the foreman asserts contact with the Claimant took place relative to coverage of the vacation vacancy, a conversation which the Claimant disavows ever happened. Per the Carrier, failure of the Claimant to accept this assignment negated any official obligation for further employment offerings. It is noted **from** statements by the Claimant that he and the foreman purportedly spoke periodically when the **Claimant** would call inquiring about the job situation. It is feasible that *the two misinterpreted* the purpose of a call prior to June 1, but that is speculative in nature. What is clear, however, is that the Claimant filed a notice required under **Rule 10** to maintain his seniority rights as recently as May 20, 1976. Essentially, we look to the Claimant's letter of May 20, 1976 as the last measurable event; thereafter the actions of both the Claimant and foreman are beyond substantiation.

We shall not, however, afford the Claimant an opportunity to reap any windfall; the Carrier is directed to compensate the Claimant at the appropriate rate for regular hours during the period in question, less any and all **compensation** he may have received from any other **sources** during that period.

As we have decided the case on its merits, it is not necessary to pass upon the procedural **issues** raised.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** 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

The Agreement was violated to the extent indicated **in** the Opinion.

A W A R D

The Claim is sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *AW. Paulos*
Executive Secretary

Dated at **Chicago**, Illinois, this 14th day of December 1979.