NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25155

THIRD DIVISION

Docket Number MW-25256

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation
(Former Penn Central Transportation Company)

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

(1) The Carrier violated the Agreement when it closed the service records of Trackmen A. L. Blackwell and G. M. Bradley and deleted their names from the 1981 seniority roster (System Docket 755).

(2)Trackmen A. L. Blackwell and G. M. Bradley shall be reinstated to all seniority rosters wherein their names were previously listed and they shall be compensated for all wage loss suffered.

OPINION OF BOARD: The record shows that Claimants were furloughed as Trackmen on November 19, 1979. On October 1, 1980, each of the Claimants was notified by the Carrier's Supervisor of Track:

> "Our records indicate that you are presently on furlough. We are increasing forces and have permanent positions available. This letter is to recall you to service.
>
> Please contact this office, Phone Number 398-8322, or by U.S. Mail, to W. W. Biles, Supvr. Track #8, Box 59 Harrington, Delaware 19952, as soon as possible, but no later than ten (10) Days from postmark date, to make arrangements for your return to duty physical examination.
>
> In accordance with Rule 3-D-4 of the B.M.W.E. Schedule A Agreement, failure to return to service within 10 days from date of notification, will result in the forfeiture of all seniority, under the B.M.W.E. Agreement:

Neither of the Claimants responded to the recall notice within the ten days specified. The record does not contain any evidence that either Claimant contacted any Carrier supervisory personnel, or Union representatives, within the ten-day period specified in the letter of recall. Neither did either Claimant report as instructed in the letters of October 1, 1980. The Carrier contends that as a result of Claimants' failure to return to service within ten days from date of notice, their seniority was forfeited effective October 13, 1980, in accordance with Rule 3-D-4 of the applicable Agreement which provides:

=3-D-4. Failure to return to service after notification. An employe who fails to return to service within ten days from date notification has been mailed to his last recorded address (in accordance with Rules 3-D-2 and 3-D-3) for a position or vacancy of thirty days or more duration will forfeit all seniority under this Agreement. Forfeiture of seniority under this rule will not apply:

(1) When an employe, within thirty days from date of notification of recall, furnished evidence satisfactory to the officer signatory to notification that failure to respond within ten days was due to conditions beyond his control. Such evidence will be made available to the District Chairman.

(2) To an employe when the position or vacancy to be filled is in a working zone other than the one from which such employe was laid off and a qualified employe is available in the working zone in which the vacancy exists.

(3)(a) (Effective 4-7-48.1 To an employe who has seniority only on one roster and who elected to take furlough under the provisions of Rule 3-D-l (a). Such an employe will forfeit seniority in the class from which he elected to take furlough and in all higher classes appearing on the same roster.

(b) (Effective 4-7-48.) To an employe who possesses seniority on two or more rosters and who elected to take furlough under the provisions of Rule 3-D-l(a). Such employe will forfeit seniority in the class to which he fails to accept recall and all higher classes appearing on the same roster but will return seniority on all other rosters on which he possesses seniority.'

On February 19, 1981, Claimants protested their seniority forfeiture, contending they did not have to accept recall to a position allegedly outside the working zone from which furloughed.

The Board finds that Claimants misconstrued their rights. All employes are required to comply with the instructions of their supervisors, and if they consider that their Agreement rights have been violated, to then handle under the grievance provisions of the Agreement. No employe is permitted to decide for himself what instructions he will comply with and those that he will not comply with. This principle is well settled and is described briefly as "Comply and then complain." As the Claimants took no action within the ten days specified in the Supervisor's letters of October 1, 1980, the Carrier was correct in considering that they had forfeited their seniority. This in itself is sufficient reason for denial of the claim.

The Board further finds that the burden of proving the exceptions contained in Section 2 of Rule 3-D-4 is upon the Petitioner. We find that the Petitioner has failed to prove with probative evidence that the positions for which Claimants were recalled were in a working zone other than the one from which Claimants were laid off or that qualified employes were available in the working zone in which the vacancies existed, even if the working zone for which Claimants were recalled were different from the zone where Claimants were laid off.

The claim will be denied.

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 Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 2934;

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

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day Of November 1984