NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26279

THIRD DIVISION Docket Number MW-26585

James R. Johnson, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Oklahoma, Kansas and Texas Railroad Company

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

(1) The Carrier violated the Agreement when it failed and refused to recall furloughed Trackmen G. K. Gibbens and R. D. Gibbens to service beginning April 2. 1984 (System File OKT-P-803/2579-OKT).

(2) As a consequence of the aforesaid violation, Messrs. G. K. Gibbens and R. D. Gibbens shall be recalled to service in accordance with the provisions of the current Agreement and compensated for all time lost beginning April 2, 1984 and continuing until such time as they are returned to service."

OPINION OF BOARD: Attendant to the bankruptcies of the Rock Island and Milwaukee Railroads, certain legislation was passed, and negotiations held, which provided for the protection and reemployment of employes of those Carriers.

The Claimants in this case were Carmen craft employes of the Rock Island, and were hired by this Carrier in its Maintenance of Way Department. They worked for nearly one year on assignments which were being offered to Maintenance of Way Employes of the bankrupt Carriers pursuant to a special Agreement. On January 1, 1984, they were furloughed, along with many others, in a systemwide force reduction. While certain other employes were recalled at a later date, the Claimants were never recalled.

The Carrier contends that the Claimants were "temporary" employes, and never acquired any seniority or employment rights with the Carrier. The Organization acknowledges that Claimants were hired as "temporary" employes, but that they did acquire seniority and recall rights, particularly in view of the fact that certain other such employes were recalled to service.

It is most unusual for railroad employes to work nearly a year without acquiring and accumulating seniority; however, these were unusual circumstances. The March 4, 1980, Labor Protective Agreement is clear in establishing the provision for "temporary" employes to occupy positions while they are being offered to employes of the bankrupt Carriers. It is equally clear that such employes may be terminated, without the right to recall, if the positions are accepted and occupied by such other employes.

This case is complicated by two factors which are not described by, and may not have bee" anticipated by negotiators of that Agreement. First, it is unlikely that the parties expected the assignment process to take as long as it did, thereby having "temporary" employes, without seniority, for nearly a year. The second factor was the failure of sufficient affected employes to seek and obtain the positions offered, combined with a" unrelated force reduction on Carrier's property.

It is clear that if the assignment process had been completed in a few months, and the positions had been filled by eligible employes, the Claimants would properly have been terminated under the terms of the applicable Agreement. Likewise, if the process had been completed, and the Carrier required more employes than had applied, the Claimants would have been retained on permanent vacancies, acquiring seniority and "permanent" status. Unfortunately, neither of the results anticipated by the Agreement occurred here.

There is nothing in the Implementing Agreement which provides for "temporary" employes to acquire seniority, unless they are able to acquire a permanent position, rather than merely occupying one of those vacancies which was being offered to employes of the bankrupt Carriers. Here, there is no showing that the Claimants ever occupied any position other than those described by the Implementing Agreement and, therefore, the Board finds that they did not acquire seniority or employment rights.

The long delay which led to their lengthy period of employment was not the fault of the Carrier - it was simply the conflux of circumstances. Although there is some basis in equity to support the Organization's position, there is no basis in the contract. We have consistently held that it is not the function of this Board to amend the Agreement to suit our sense of equity, and we will follow that principle here.

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, 1934;

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 24th day of April 1987.