

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26486
Docket Number MW-25979

Irwin M. Lieberman, Referee

(Brotherhood of Maintenance of Way **Employes**

PARTIES TO DISPUTE: (

(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 failed to recall Mr. H. **Merriweather** to service on and subsequent to February 17, 1981 (System Docket CR-204).

(2) Because of the aforesaid violation, the claimant shall be allowed two hundred ninety-two (292) hours of pay at the trackman's straight time rate and thirteen and one-half (13 1/2) hours of pay at the **trackman's** time **and** one-half rate."

OPINION OF BOARD: Claimant, with a seniority date of July 17, 1974, was assigned as a Truck Driver at Carrier's Hawthorne Yards when he sustained an on-duty injury and was placed on the disabled list on December 31, 1980. On February 9, 1981, Claimant was medically qualified for service and was then placed on the furloughed list, filing his name and address with Carrier in accordance with the provisions of Rules 3-D-5 and 3-D-1. After a bulletin advertising the position, a **Trackman** with less seniority than Claimant (J. M. Basso) was awarded a position as **Trackman** with the Belt Shop Section Gang effective April 6, 1981. Basso had been furloughed from the Belt Shop Section Gang, which is in the same sub-division as the Hawthorne Yard. Claimant was recalled to service as a Machine Operator subsequently.

Petitioner insists that Carrier ignored Claimant's seniority rights and the clear provisions of Rule 3-D-3. It is argued that Claimant should have been recalled on February 17, 1981, when **Trackmen** forces were increased. Carrier, on the other hand maintains that the vacancy in dispute was on the Belt Gang and Claimant had been furloughed from the Hawthorne Gang. Mr. Basso, however, had been previously employed in the Belt Gang and was properly recalled to that Gang. Carrier also alleges that Claimant also failed to bid on the job posted (by Bulletin P-19) on March 16, 1981, and also chose not to exercise his seniority to displace Mr. Basso within fifteen days as provided in Rule **3-D-3(c)**.

Rule 3-D-3 provides as follows:

"3-D-3. Increase in force--Trackmen.

(a) When the number of **trackmen** in a section gang is increased, furloughed **trackmen** previously employed in such gang, who have complied with Rule 3-D-1, will be recalled for service in such gang in seniority **order**.

(b) When the number of **trackmen** in an existing extra gang is increased, an extra gang is established, or additional **trackmen** are required in a section gang, after compliance with paragraph (a) of this rule, **trackmen** furloughed from the Supervisor's Sub-Division on which the increase in force is being made, who have complied with Rule 3-D-1, will be recalled to service in seniority order.

(c) (Effective 6-1-58.) **Trackmen** in active service and furloughed **trackmen** may exercise seniority to displace junior **trackmen** within fifteen (15) days from the date **such junior trackmen** start to **work**. **Trackmen** desiring to exercise seniority as set forth in this Rule (3-D-3) must notify the Foreman or other supervisory officer in charge not less than twenty-four hours in advance of the starting time of the gang in which they desire to make displacement."

The key to this dispute are the facts with respect to the original pre-furlough positions of Basso and the Claimant and the application of those facts to Rule 3-D-3. Carrier has maintained that Basso was furloughed from a Section Gang (**the Belt Gang**) whereas Claimant was furloughed from the Hawthorne Gang. Organization has produced no evidence to the contrary. Neither party has introduced any documentary evidence to support their respective contentions with regard to the type of gangs involved (Section Gangs or Extra Gangs). The Board is unable to resolve that factual impasse. Since the terms of Rule **3-D-3(a)** are in conflict with those in 3-D-3(b) the application has to depend on the facts; with the facts being indeterminate, the Board has no alternative but to dismiss the Claim. Neither party has submitted any factual backup for mere **assertions**, which are in conflict.

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;

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

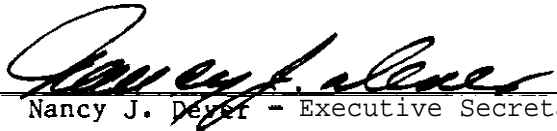
That the facts are in conflict.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 9th day of September 1987.