NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26681
THIRD DIVISION Docket Number MW-26409

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union 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 Extra Gang Laborer D. Diaz on and subsequent to February 13, 1984 (System File 5-18-13-14-54/013-210-23).

(2) Because of the aforesaid violation, the claimant shall be allowed one hundred sixty (160) hours of pay at his straight time rate."

OPINION OF BOARD: On February 6, 1984, Carrier received authorization to establish Extra Gang 1908 effective February 13, 1984, to consist of nine laborers. Nine employees were sent certified letters of recall in accordance with the rules. By February 10, 1984, only five of the employees had responded indicating that they would report on February 13, 1984. Carrier was required, therefore, to find four extra gang laborers who would be willing to work on the Gang on a temporary basis. Carrier found the employees by telephone calls on February 10. One of the employees recalled to the temporary assignment was junior to Claimant herein.

The Organization relies in part on the provisions of Rule 23 (b) which provides as follows:

"RULE 23. RESTORATION OF FORCE

(a) Employes laid off by reason of force reduction or working in a lower seniority class or group will be recalled to service or to fill positions in the higher seniority class in the order of their seniority, except as provided in Rule 20(a).

(b) Furloughed employes must return to service in the seniority class in which recalled within ten (10) calendar days after being recalled by certified mail at the last address of record. Failure to report will result in forfeiture of seniority rights in such class and all lower classes of groups in which seniority is held, unless satisfactory reason for not reporting in a timely manner is given. Satisfactory reason for failing to report has reference to sickness or other reasons over which the employe has no control."

The Organization argues that the Rule cited requires written notification of the vacancy, which in this instance was not provided by Carrier. Further, even if a telephone call was sufficient to recall for the vacancy, it is argued that Claimant never received a call on the day in question, although available.

Carrier maintains that the formal written recall procedure was not applicable for filling these temporary vacancies, and on its face would have been absurd to use. In addition, it is urged that Carrier complied with the requirements of Rule 23 (b) in the written recall of the nine laborers for the permanent vacancies. Carrier disputes Claimant's alleged availability to receive a phone call on February 10, 1984, and points out that its clerk attempted to reach Claimant by telephone three times on that date, unsuccessfully.

The Board must observe initially that the procedure for permanent vacancy recalls cannot be applied sensibly for temporary vacancies. It would be improper and inequitable to force employes to forgo other interim employment to secure a temporary position, at the risk of forfeiting their seniority. Thus, Rule 23(b) is inapplicable to this situation. In the instant dispute, however, a more significant problem has emerged: a dispute with respect to critical facts.

The Parties are at odds as to whether or not Carrier placed a phone call to Claimant on February 10, 1984. Both parties contend that the other has not offered probative evidence in support of its position with regard to the alleged attempted phone calls. This Board has held consistently over many years that when such conflicts arise with respect to essential elements of the Claim, it has no alternative but to dismiss the matter, having no competence or basis for resolving the disputed facts (See for instance, Third Division Awards 23834 and 22759). Consequently, this Claim must be dismissed.

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 Claim must be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 23rd day of November 1987.