

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

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

(1) The Carrier violated the Agreement when it recalled and assigned junior cut-back Foreman R. Kehler to fill a temporary vacancy, as foreman on Rail Gang 101 beginning September 12, 1983 instead of using cut-back Foreman J. J. Smith who was senior, available, willing and qualified to fill that vacancy (System Docket CR-599).

(2) The Carrier also violated the Agreement when it failed to bulletin the vacancy in the position of foreman on Rail Gang 101.

(3) Because of the aforesaid violations, cut-back Foreman J. J. Smith shall be allowed the difference between the foreman's rate and what he was paid at the trackman's rate and overtime pay equal to that paid to Mr. R. Kehler beginning September 12, 1983 and continuing until such violations have been corrected or discontinued."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant holds seniority as a Trackman and Foreman. Claimant was regularly assigned as a Foreman to Rail Gang 101 since March 8, 1983. Upon abolishment of that gang on July 22, 1983, Claimant exercised his seniority to obtain a Trackman's position on his home division.

Rail Gang 101 was re-established on September 12, 1983, and, according to the Carrier, worked until approximately October 6, 1983. The Carrier filled vacancies on this gang for this period by recalling furloughed employees. As a result, Foreman R. Kehler, who was junior in seniority to Claimant, was recalled from furlough and assigned to the gang in a Foreman's position. The Organization asserts that Claimant was entitled to the assignment and seeks compensation as set forth in the Claim.

The issue of the propriety of recalling employees from furlough as opposed to assigning more senior employees regarding the abolition and re-establishment of this gang was dealt with in Third Division Award 26709. In that case, we found that the Carrier could not recall employees from furlough in preference to the senior employees because of Rule 3, Section 4(a) which states:

"A position or vacancy may be filled temporarily pending assignment. When new positions or vacancies occur, the senior qualified available employee will be given preference, whether working in a lower rated position or in the same grade or class pending advertisement and award.

When furloughed employees are to be used to fill positions under this Section, the senior qualified furloughed employees in the seniority district shall be offered the opportunity to return to service. Such employees who return and are not awarded a position or assigned to another vacancy shall return to furlough status"

Thus, as in Third Division Award 26709, Claimant was "the senior qualified available employee" and hence, was entitled to preference. The assignment of the Foreman's position to Kehler over Claimant violated the above Rule.

In Third Division Award 26709, we did not grant affirmative relief since the employee therein did not suffer monetary loss due to the fact that he was working as a Trackman and the position on Gang 101 was a Trackman's position at the same rate of pay. This case, however, presents a different set of facts. Here, as a result of the Carrier's contract violation, Claimant was prevented from working in a higher paying classification, i.e., Foreman, as opposed to Trackman. Thus, in this case, Claimant may well have suffered a monetary loss due to the Carrier's failure to properly assign him to Gang 101. We shall therefore require that Claimant be compensated for the total loss of earnings suffered as a result of his not working in the Foreman classification as measured by the number of hours worked by Kehler, including loss of overtime, if any. Since Rail Gang 101 worked from September 12, 1983, until approximately October 6, 1983, compensation under this award shall be limited to that period of time.

Form 1
Page 3

Award No. 27202
Docket No. MW-26530
88-3-85-3-267

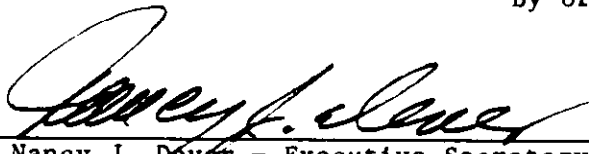
In light of the above, we do not address the Organization's further argument concerning the advertising requirements of Rule 3, Section 3.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of July 1988.