Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28047
THIRD DIVISION Docket No. MW-27990
89-3-87-3-608

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Grand Trunk Western Railroad Company (formerly The Detroit and Toledo Shore Line Railroad Company)

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

(1) The Agreement was violated when the Carrier assigned Laborer J. Watson instead of furloughed Foreman F. W. Watters, Jr. to fill a temporary foreman's vacancy at Trenton, Michigan on September 12, 1986 (Carrier's File 8365-1-220).

(2) The claim presented by General Chairman J. L. D'Anniballe on October 14, 1986 to Division Engineer R. O. Papa shall be allowed as presented because said claim was not disallowed by Assistant Director-Labor Relations R. J. O'Brien (appealed to him on January 22, 1987) in accordance with Article 41(a)(1), (2) and (3).

(3) As a consequence of either or both (1) and/or (2) above, the claimant shall be allowed compensation for all straight time and overtime hours worked by Laborer Watson on September 12, 1986."

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 employes 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.

On the date of the Claim herein, Claimant was on furlough as a result of a general force reduction. On September 12, 1986, the regularly assigned Foreman of Section Gang No. 1 (headquartered at Trenton, Michigan) was on vacation. Carrier up-graded a Trackman to fill the temporary one day vacancy; he held no seniority as a Foreman. It was this action which triggered the dispute herein.

As a threshold issue, the Organization notes that Carrier violated Rule 41 when Labor Relations Officer Wright responded at the third level to the Organization's appeal which had been addressed to the Assistant Labor Relations Director. The Organization insists that this action by Carrier in permitting the improper officer to disallow the appeal is grounds for sustaining the Claim. It must be noted that on October 17, 1986, Carrier addressed a letter to all General Chairmen, including the General Chairman in this dispute, which provided in part:

> "All Labor Relations Officers are delegated full authority to settle claims and grievances including signing declination letters and settlement letters. Appeals of all claims and grievances should be made to R. J. O'Brien (non-operating) and D.C. Bates (operating). All Labor Relations Officers may also be given authority to handle other matters in specific instances."

In addition to the letter above, the Board can find no rule support for the Organization's position. There is no restriction provided in Rule 41 with respect to the identity of the officer who is authorized to disallow a claim (see Third Division Award 20790). The dispute must be decided on its merits.

The Organization makes a series of arguments in support of the Claim and has supplied various Awards relating to its arguments. First it is alleged that Article 20 provides that seniority is confined to specific classifications, including Section Foremen and Trackmen. Further, it is maintained that under the provisions of Article 21(a) Claimant was entitled to perform the work as a Foreman in preference to an employee with no seniority in that class, whether the work was regular, temporary or overtime service. It is also avered that the National Vacation Agreement supports the claim inasmuch as it provides that: "When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority." The Organization also argues that under Article 21(b)(1) Claimant should have been recalled from furlough and permitted to fill the temporary vacancy in recognition of his seniority. The Organization also notes that its failure to progress a similar claim in the past does not constitute a precedent.

Carrier insists that its actions in filling the one-day vacancy at issue in this dispute were proper under the terms of the Agreement. The Carrier argues that a number of provisions of the Agreement support its position. For example, Article 44, Composite Services Rule, contemplates that Carrier may use on-duty employees in different classes of service at its discretion. Carrier also cites Article 24, Temporary Service, as supportive of its arguments. Carrier also notes that Article 21(b) permits it to fill temporary assignments of less than thirty days duration at its discretion with either on-duty forces without regard to seniority or furloughed employees such as Claimant herein. Carrier maintains that there are no rules which require it to use any furloughed employees for any temporary non-bulletined vacancy.

Initially the Board notes that the Organization's failure to progress an earlier claim analogous to that herein does not constitute a precedent controlling the issue herein. Dropping a claim, which might occur for various reasons, does not per se result in any establishment of a principle for future disputes.

A careful evaluation of the Organization's arguments does not reveal any Rule support for its position. Article 22(e) is the Rule which applies to returning employees from furlough. It provides:

> "(e) Whenever force is again increased, or a vacancy known to be of more than thirty (30) days occurs, providing the position is not filled as provided by paragraph (d), furloughed employees in the order of their seniority will be notified by the company by United States mail that their services are needed at their home location, or in the gang in which working at the time force reduction became effective, and they must return to the service within ten (10) days from date notice is mailed, unless prevented by sickness or other reasons acceptable to the Management, in which event appropriate leave of absence will be granted."

Thus, the Rule indicates that employes on furlough will be notified in order of seniority of vacancies of more than thirty days' duration. That Rule also contemplates a ten day period of grace for furloughed employees to return from furlough. Obviously, this Rule does not require Carrier to use furloughed employees in order of seniority for short term vacancies, such as that in dispute in this matter.

Of equal importance to the Board's conclusion is the language of Article 21(b) dealing with seniority:

> "(b) Except as provided in paragraph (c) of this Article, employees will be permitted to exercise their seniority rights only when:
>
> (1) Their position is abolished,
> (2) They are displaced by a senior employee,
> (3) They apply for a new position or vacancy of not less than thirty (30) days' duration, or
> (4) They return to service under the conditions specified in Articles 22, 24, 19 or 42;
>
> provided same is done in accordance with the provisions of this agreement."

It is apparent that under the provisions cited above seniority can be exercised for vacancies of not less than thirty days duration. The one-day vacancy at issue herein is not covered by this important seniority provision.

For the reasons indicated, the Board concludes that Carrier is not required to recall employees from furlough for vacancies of less than thirty days' duration (although it has the option to do so).

The Organization has not borne its burden of proof; the Claim must be denied.

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 10th day of August 1989.

LABOR MEMBER'S DISSENT
TO
AWARDS 28047, 28048, 28050, 28051,
28052, 28053, 28054 and 28056
Dockets MW-27990, MW-27329, MW-28033, MW-28036
MW-28038, MW-28039, MW-28041 and 28113
(Referee Lieberman)

With the exception of Award 28050 which dealt only with the interpretation of the applicable rules, the Majority ruled on a procedural defect by the Carrier and on the merits of the dispute. Unfortunately, the Majorities' ruling on both issues is without foundation from the record and is certainly erroneous.

The Organization appealed this claim to the Assistant Director-Labor Relation who was designated by the Carrier to receive same. The designated officer did not respond. However, another Carrier officer responded and the Organization rightly contended that the Carrier was in default and the claim should be allowed as presented. Conversely, the Majority held that, "There is no restriction provided in Rule 41 with respect to the identity of the officer who is authorized to disallow a claim (see Third Division Award 20790)." Without explanation, the Majority relied on an award that has been shown to be palpably erroneous thusly in Award 14 of Public Law Board 1844:

> "The claim was denied on October 30, 1974 not by the Division Manager to whom the General Chairman had presented the claim but by the Assistant Division Manager. Subsequently on January 14, 1975 the General Chairman appealed the claim to the highest level on the property on the alternative grounds of a violation of Rule 21 as well as the merits of the Scope Rule claim. Carrier does not deny that the Division Manager did not respond to the claim submitted locally but contends that the response of the Assistant Division Manager is sufficient for compliance with Rule 21. Thus, Carrier maintains that the case should be decided on its merits, if any. In support of its contention Carrier cites Third Division Award 20790. The fact that Award 20790 involves these same parties and Agreement would carry more weight if Rule 21 were a local rule but in fact that Agree-

ment provision flows from the August 21, 1954 National Agreement. The question presented herein is not one of first impression and the great weight of authority on this subject is contra to Award 20790. In the most recent of these controlling precedents which has been brought to our attention, the Third Division sustained a similar claim and stated as follows:

* * *

For other cases with similar results see Awards 11374, 14031, and 16508. We find that Carrier failed to comply with Rule 21 and by its express terms that Rule requires that the claim or grievance shall be allowed as presented. We have no need or authority in the circumstances to review the merits of the claim. The claim must be sustained and paid as presented." (Underlining in original)

Following an alleged review of the appropriate rules of the Agreement, the Board, "concludes that Carrier is not required to recall employees from furlough for vacancies of less than thirty days' duration (although it has the option to do so)." The Majority has in effect negated a furloughed employes' seniority and his right to be recalled to service in recognition of that seniority. By leaving the Carrier the option to apply the seniority provisions of the Agreement does nothing more than remove those provisions from the Agreement. Such was not the intent of the parties when the Agreement was consummated and this Board does not have the authority to rewrite or change the Agreement or its intent. I, therefor, dissent.

D. D. Bartholomay
Labor Member