

CORRECTED

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28048
Docket No. MW-27329
89-3-86-3-541

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 Carrier violated the Agreement when it assigned section laborers to fill a temporary vacancy as foreman of Section 1 on February 4, 5, 6, 7 and 8, 1985 and a foreman of Section 4 from March 1 through March 18, 1985 instead of assigning and using Foreman F. Watters who was available and qualified to fill those vacancies (Carrier's Files 8365-1-191 and 8365-1-192).

(2) The Agreement was violated when the Carrier assigned and used Extra Gang Foreman Venier to perform overtime service on Section 1 on February 9, 1985 instead of Foreman F. Watters who was available and qualified to perform that service (Carrier's File 8365-1-191).

(3) Because of the violation referred to in Part (1) hereof, Foreman F. Watters shall be compensated for all time worked by section laborers, including overtime, in filling the positions referred to therein.

(4) Because of the violation referred to in Parts (1) and (2) hereof, Foreman F. Watters shall be allowed two (2) hours and forty (40) minutes of pay at his time and one-half rate."

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 employees 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.

At the time of the incidents involved in this matter, Claimant, a Foreman, was on furlough due to a general force reduction. The record reveals that on February 4, 1985, a five day temporary vacancy was created on Section Gang No. 1 due to the regular Foreman being on sick leave. A Trackman was assigned to the temporary vacancy, and he had no seniority as a Foreman. Also, there was overtime for that Trackman on the Foreman's job on February 6, 1985. In addition, from March 1 through March 18, 1985, a temporary vacancy was created on Section Gang No. 4 for a Foreman due to the incumbent having been injured. A Trackman, holding no seniority as a Foreman, was assigned to the vacancy on Gang No. 4. In all these instances the Organization insists that Claimant should have been called to fill the temporary vacancies on the two gangs.

The issue of the use of furloughed employees to fill short term temporary vacancies (of less than thirty days duration) has been raised between these same parties and resolved in Third Division Award 28047. In that Award it must also be noted that Article 24 also supports Carrier's use of an on-duty employee to fill the temporary intermittent vacancies. That Article provides:

"(a) An employee assigned to temporary service shall, when released, return to his rank without loss of seniority.

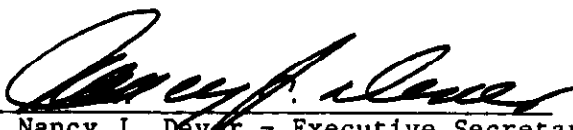
(b) Employees, completing a temporary assignment, may displace junior employees on temporary assignments under the same roster, providing it is the same class and type of work, before being required to return to the regular position to which assigned when they went on temporary service."

For the reason expressed above as well as the reasoning contained in Third Division Award 28047, it must be concluded that the Claims herein are without merit.

A W A R D

Claims 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:

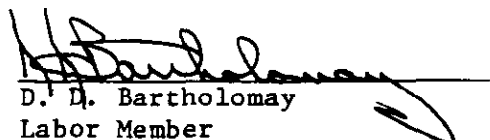
"The claim was denied on October 30, 1974 not by the Division Manager to whom the General Chairman had presented the claim but by the Assistant Division Manager. Subsequently on January 14, 1975 the General Chairman appealed the claim to the highest level on the property on the alternative grounds of 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 employees' 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