Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28052
THIRD DIVISION Docket No. MW-28038
89-3-87-3-611

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 Section Laborer M. Decant instead of furloughed Foreman F. W. Watters, Jr. to fill a temporary foreman's vacancy at Lang Yard, Toledo, Ohio on July 14, 15, 16, 17 and 18, 1986 (Carriers File 8365-1-218).

(2) The claim as presented by General Chairman J. L. D'Annibalie on August 4, 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 12, 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 Section Laborer Decant on July 14, 15, 16, 17 and 18, 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.

Claimant, a Foreman, was on furlough on the dates of this Claim due to a general force reduction. The record of this matter indicates that on July 14, 15, 16, 17 and 18, 1986, the regularly assigned Foreman of Section Gang No. 1, headquartered at Toledo, Ohio was on vacation. The vacation absence created a temporary vacancy to which Carrier assigned a Trackman holding no seniority as a Foreman. The Organization argues that Claimant, the senior qualified, available employee should have been recalled from furlough to fill the temporary vacancy.

This Board has considered the identical issues presented in this dispute in a number of other disputes between the same parties. The only difference in this matter is the dates of the vacancies. Based on the reasoning expressed in Third Division Awards 28047 and 28048 the Board is of the opinion that Carrier did not violate the terms of the Agreement by using an on-duty Trackman to fill the temporary vacation vacancy of Foreman.

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