Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28232
Docket No. MW-26867
90-3-85-3-638

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation (Amtrak) -
(Northeast Corridor

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

(1) The Carrier violated the Agreement when it failed and refused to allow Machine Operator R. Cannon holiday pay for Memorial Day (May 28, 1984) (System File NEC-BMWE-SD-1043).

(2) Because of the aforesaid violation, Machine Operator R. Cannon shall be allowed eight (8) hours of pay at his straight time 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 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 established and holds seniority as a Machine Operator in the Track Department. Prior to the time this dispute arose, he was regularly assigned to an hourly rated position on Gang G-182, headquartered at Penn Coach Yard, Philadelphia, Pennsylvania. The assigned workweek of the gang was Monday through Friday.

On Wednesday, May 23, 1984, Claimant was displaced from his position by a senior employee. Claimant thereafter exercised his seniority to displace a junior employee on May 31, 1984, at which time he displaced a Trackman in Gang G-992 in the Penn Coach Yards. The instant Claim is for holiday pay for Memorial Day, May 28, 1984.

There is no dispute in this case concerning the fact that upon displacement, Claimant lost the status of a "regularly assigned employee," as contemplated in section (f) of Rule 48, and that the provisions of section (g) of that Rule are properly governing here. Those provisions are as follows:

"(g) Except as provided in the following paragraph, all others for whom holiday pay is provided in paragraph (a) hereof, shall qualify for such holiday pay if on the day preceding and the day following the holiday they satisfy one or the other of the following conditions:

(i) Compensation for service paid by AMTRAK is credited; or

(ii) Such employe is available for service.

NOTE: 'Available' as used in sub-section (ii) above, is interpreted by the parties to mean that an employe is available unless he lays off of his own accord or does not respond to a call, pursuant to the rules of the applicable agreement, for service."

The sole dispute before the Board is whether Claimant was "available for service" as provided in sub-section (ii) of Rule 48(g) and therefore met the Rule's qualification requirements for an "other than regularly assigned employee." The Organization bases its position on the literal language of the Agreement, arguing that there was no evidence presented during the handling of this dispute on the property that Claimant laid off of his own accord or failed to respond to a call. The Organization maintains that Carrier did not call Claimant to perform temporary work on the dates in question, nor did it identify positions occupied by junior employees on those dates who could have been displaced. Claimant had the contractual right, pursuant to Rule 18, to take ten days to either exercise seniority or furlough following the displacement on May 23, 1984. Claimant should not now be viewed as "unavailable for service" simply because he exercised those contractual rights, the Organization submits.

Carrier does not agree with the contentions advanced by the Organization. It argues that when Claimant decided not to immediately exercise his seniority by displacing a junior employee, he failed to meet the requirements for holiday pay for an "other than regularly assigned employee." By his own actions, Claimant was not "available for service" on May 24, 25, 26, 27, 28, 29 and 30, 1984, Carrier contends.

In the Carrier's view, Claimant alone controlled his availability for service on the dates in question, and Claimant chose to make himself unavailable. This is particularly true when one considers that he was displaced from, and displaced to, Penn Coach Yard, Carrier maintains. Rule 18 pertaining to the exercise of seniority should not be permitted to be used as a "shield" to protect an employee who does not immediately exercise his seniority so as to be available for service in accordance with the holiday pay provisions, Carrier argues, and therefore this Claim should be denied.

Carrier relies in large part upon Third Division Award 23487, a case in which an employee, who was regularly assigned to a position with Monday and Tuesday as rest days, was displaced on Monday, December 31, 1979. The employee thereafter invoked her seniority rights and displaced to another position with Tuesday and Wednesday as rest days. The employee assumed the new position on Thursday, January 3, 1980, and thereafter sought holiday pay for Tuesday, January 1, 1980. The Board in that case denied the Claim, finding that, "by her own actions, claimant was not available for service on December 31, 1979 and January 2, 1980."

While this Board endeavors to avoid, whenever possible, rendering inconsistent and conflicting interpretations of national and local Agreements, we are forced to conclude that a different result must be obtained in the instant case. Unlike Award 23487, which did not discuss or consider the meaning of the term "available" as it is defined in the Agreement, we find that it is that particular language that must be controlling here. As the note in section (g) indicates, " . . . an employe is available unless he lays off of his own accord or does not respond to a call . . . for service." (Emphasis added.) The Claimant in this case was displaced from his regularly assigned position on May 23, 1984. As the Organization aptly pointed out, there is no evidence that he was thereafter called for service either the day before or the day after the holiday. Therefore, the crux of the dispute is whether he laid off "of this own accord" by exercising his seniority on May 31, 1984.

Carrier has argued that by failing to immediately displace to another position, Claimant constructively or, in effect, "laid off." The difficulty with that argument is that Carrier never presented any evidence during the handling of this dispute on the property that Claimant could have displaced a junior employee so as to be available for service on the day preceding and the day succeeding Memorial Day. Absent proof that Claimant constructively laid off, we find that he was "available for service" within the meaning of the Agreement.

The Claimant in this case, although he ultimately displaced a junior employee at the same location, had the contractual right under Rule 18 to exercise his seniority within ten days. We will not find under the holiday pay provisions of this Agreement that an employee has laid off of his own accord while exercising his Rule 18 seniority rights during the ten day period, unless there is convincing and probative evidence during the handling of this dispute on the property that he could in fact have displaced a junior employee on the relevant work days. We believe that it is Carrier's burden to come forward with such evidence, and absent such a showing by the Carrier here, this Claim will be sustained.

A W A R D

Claim sustained.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1990.