

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28327
Docket No. MS-28413
90-3-88-3-211

The Third Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

(Tom M. Cooney, Jr.

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"On July 16, 1987, I was awarded the Agents position 1F (number 102/011) Lexington, Nebraska. On October 5, 1987, I was displaced from that position by Charles E. Malcom (sic). My displacement was in violation of Union and Railroad contracts and rules.

I request that I be reinstated to the Lexington Agent Position."

FINDINGS:

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

The carrier or carriers and the employee 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 were given due notice of hearing thereon.

The pivotal issue in this case is whether or not Claimant was improperly displaced at Lexington, Nebraska, on October 5, 1987. The essential facts are set forth as follows: Claimant was awarded Agent Position 1F at this location on July 16, 1987. Prior to this date, he was furloughed on November 1, 1985, from the Extra Board at Gothenburg, Nebraska. He was later apprised by Carrier that he was being displaced at Lexington, Nebraska, and said position was awarded to another employee on October 5, 1987.

Initially, the Agent's Position at Lexington, Nebraska, became vacant as a result of a voluntary separation and, accordingly, was bulletined pursuant to the applicable bulletining procedures. There were no bids received for the vacancy and the senior furloughed employee within a thirty mile radius

of the location was awarded the position. Since the Carrier's Assignment Center believed at the time, that Claimant was the senior furloughed employee, he was assigned the position per assignment notice dated July 16, 1987. Following this assignment, another employee asserted that he was the senior furloughed Clerk within the thirty mile radius of Lexington, Nebraska. He also filed a Claim requesting payment of the difference between the Agent's rate of \$2912.08 per month and his furloughed rate of \$12.77 per hour commencing August 6, 1987. Based upon a follow-up investigation of his assertions, it was discovered that the Assignment Center had erred when it recalled Claimant and an Agreement to correct the error was signed by Carrier and the Organization on September 28, 1987. In part it read:

"As explained, the Carrier's records indicated Mr. Malcolm was furloughed from Kearney, Nebraska. The Organization has maintained Mr. Malcolm was furloughed from Lexington and not Kearney. Therefore, the Organization has contended Mr. Malcolm should have been recalled to one of the positions at Lexington.

The Carrier has now received information from the North Platte Office which indicates Mr. Malcolm was, in fact, furloughed from Lexington. In order to resolve this issue, the Carrier proposes to allow Mr. Malcolm a displacement to the Lexington Agent's position. Furthermore, Mr. Malcolm will be allowed the difference between his protected rate and the rate of the position. This proposal is in full settlement of any claim on Mr. Malcolm's behalf and with the understanding that no claim will be progressed as a result of his displacement."

On September 30, 1987, Malcolm submitted the proper replacement forms to the Assignment Center and displaced the Claimant effective October 5, 1987.

In response to this action, Claimant filed a continuous Claim on October 15, 1987, wherein he charged Carrier with violating the applicable 1981 Agreement. He sought reinstatement to the Agent's Position at Lexington and commensurable make-whole compensation. As the Claim progressed, Claimant maintained that the Organization's Seniority Roster dated January 29, 1987, showed that Malcolm was furloughed at Kearney, Nebraska, and thus was not the senior furloughed employee within a thirty mile radius of Lexington. He also contended that Malcolm did not file a Rule 18 letter with the Assignment Center indicating that he was furloughed at Lexington and this omission clearly established that Malcolm furloughed at Kearney.

In response, the Carrier argued that Malcolm held a position in the Lexington area which was abolished in July, 1986. It acknowledged however, that the computer records showed employee Malcolm furloughed at North Platte, but asserted that such showing was an error. It observed that at a conference hearing afforded Claimant on April 19, 1988, all the parties had agreed that Malcolm's last point of employment on a regular assigned position was at Lexington, Nebraska, and also agreed there was no written agreement or arrangement whereby Malcolm changed his point of furlough other than Lexington. Further, it noted that when Carrier's Senior Director of Labor Relations reminded Claimant via letter dated May 2, 1988, of the main points discussed at the April 19, 1988 Conference Meeting, the Senior Director emphasized that it was jointly agreed by all concerned that Malcolm's last point of employment on a regular assigned position was at Lexington, Nebraska, as an Extra Board Clerk. The pertinent portions of this letter are referenced as follows:

"There has been numerous letters, meetings and telephone conversations on this dispute, for which myself, Mr. Matter and Ms. Hawkins of my office, as well as TCU General Chairman Willey and his Assistants have all, on occasion, been involved. In each and every one of these conversations and/or meetings, the issue of Mr. Malcolm's point of furlough keeps the topic, and as a result of this question, the latest meeting was held at Lexington, Nebraska, which included yourself, myself, as well as Messrs. Malcolm, St. John, Willey and McCall. In that meeting, taking all other irrelevant matters aside, it was jointly agreed by all concerned that Mr. Malcolm's last point of employment on a regular assigned position was at Lexington, Nebraska as an Extra Board Clerk. Additionally, it was also acknowledged that there was no written agreement or arrangement wherein Mr. Malcolm changed his point of furlough other than Lexington, Nebraska. Therefore, irrespective of what the TCU Assignment Center indicated as Mr. Malcolm's furlough point, or the views or any other Carrier official or clerical employee, Mr. Malcolm was contractually entitled to the position of Agent under the applicable rules of the UP/TCU Agreement.

The numerous points of question that you have also raised regarding the proper record keeping of the TCU Assignment Center and the personal views of the TCU Organization are irrelevant to the Schedule Agreement. Mr. Malcolm was furloughed at Lexington, Nebraska,

and the Union Pacific Railroad was obligated under the Agreement to recall and assign him to the position in light of the fact that he was the senior qualified furloughed employee at that location. Therefore, your claim identified as Case 871622 must remain denied. Further, your complaints to Mr. Kaufman and Mr. Watts have, in my opinion, reached the same conclusion with respect to the contractual obligations of the Carrier."

This line of reasoning was further developed by the General Chairman in his May 6, 1988, letter to Claimant. He wrote in part:

"In fact, in several meetings wherein others were present, you readily admitted the last bulletined position held by Malcolm was at Lexington, Nebraska. The latest meeting in which you made such an admission was at Lexington, Nebraska on April 19, 1988, in the presence of Mr. L. A. Lambert, Mr. Gary McCall, Messrs. Malcolm and St. John and myself.

If you will recall, the Agreement made in which Mr. Malcolm was subsequently placed on the Agent's position, was based on records maintained by the Carrier. This information they furnished to this office during the handling of this dispute revealed that Mr. Malcolm was entitled to and should have been recalled to the vacancy because he was the senior furloughed protected employee at Lexington."

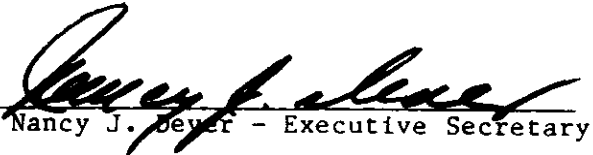
In considering this case, the Board concurs with Carrier's position. Firstly, there is no indication that Malcolm was not furloughed at Lexington, Nebraska. Secondly, there is no evidence that Malcolm changed his point of furlough at this location. To be sure, the January 29, 1987 Organization Roster showed that Malcolm was furloughed at Kearney, but there is no exact indication when he was so furloughed. More important, Carrier's records established that he was furloughed at Lexington, and Claimant by his inaction did not rebut or contest the factual assertions made by the Senior Director of Labor Relations or the General Chairman in their letters of May 2, 1988, and May 6, 1988, respectively. In effect, what we have before us is an error in personnel records which show another displacement location. Since there is indeed a possibility for error, and since Carrier's records show that Malcolm was displaced at Lexington, Nebraska, and since there is no indication of bias or personal animus or any indication of collusive arrangement among any of the parties herein, the Board cannot conclude that the Agreement was violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1990.