

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Consolidated Rail Corporation

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

(1) The Carrier violated the Agreement when it failed to recall Mr. J. Brooks to service on and subsequent to October 20, 1987 (System Docket CR-3672).

(2) Because of the aforesaid violation, the Claimant shall be allowed all straight time and overtime hours worked by junior employee T. Petty from October 20, 1987 through November 30, 1987 at the applicable trackman's rate of pay."

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 waived right of appearance at hearing thereon.

Under date of December 16, 1987, the Organization submitted the following Claim:

"This claim and/or grievance is being submitted in behalf of J. Brooks employee #285804 in accordance with Rule 26 of the February 1, 1982 Agreement between Conrail and the Brotherhood of Maintenance of Way Employees.

Conrail violated Rule 4 section 1 and 3 of the Agreement when it failed in its attempt to contact

for recall senior employee J. Brooks (trk date 4/28/78) to the CAT Gang in Loudonville, Ohio in the month of September 15, 1987. Instead Conrail recalled T. Petty (trk date 7/27/78) whom is a junior employee to J. Brooks.

Mr. Petty worked from September 15, 1987 through November 30, 1987 on the CAT Gang. Conrail made no attempt whatsoever to contact the senior employee. Mr. Brooks is claiming eight (8) hours for each date and any overtime that T. Petty earned for the period of October 20, 1987 through November 30, 1987 at the applicable trackman rate."

The Organization presented during the Claim handling procedure a statement from the employee junior to the Claimant that he "worked from September 15, 1987 to November 30, 1987 on the CAT Gang in Loudonville, Ohio."

The Organization relies on Rule 3, Section 4, which reads as follows:

"Section 4. Filling temporary vacancies.

(a) A position or vacancy may be filled temporarily pending assignment. When new positions or vacancies occur, the senior qualified available employees will be given preference, whether working in a lower rated position or in the same grade or class pending advertisement and award.

When furloughed employees are to be used to fill positions under this Section, the senior qualified furloughed employees in the seniority district shall be offered the opportunity to return to service. Such employees who return and are not awarded a position or assigned to another vacancy shall return to furlough status."

The Carrier states, among other arguments, that the Claim is improper, since it refers to an occurrence allegedly commencing on September 15, 1987, and the Claim was not filed until December 16, 1987, thus exceeding the 60-day time limit provided in Rule 26. The Board perceives the Claim as a continuing one and notes that the Organization seeks remedy only from the period commencing October 20, 1987, within 60 days of the Claim filing.

The difficulty comes, however, from the facts as to the junior employee's assignment during the period in question. In its responses on the property, the Carrier stated, contrary to the Organization's contention, as follows:

"Mr. Petty was neither recalled to, nor worked in, the Loudonville, Ohio, CAT Gang during the involved period of time. During the period claimed, i.e., from October 20 through November 30, 1987, Mr. Petty worked in the DATS (Depreciated Accounts Track Structures) Gang at Youngstown, Ohio, until he was furloughed on November 2, 1987. He remained furloughed until April 25, 1988, when he was recalled to Rail Gang 101 in Philadelphia, PA."

In a later reply, the Carrier noted:

"Our records indicate Mr. Petty displaced a trackman's position on the surfacing gang in Youngstown, OH, on September 28, 1987."

The information as provided by the Carrier is at complete variance with the Organization's contention. The Carrier supported its contention by supplying applicable payroll records in its submission to the Board. As the Organization properly notes, such was not provided on the property, but it nevertheless remains the case that the Carrier did allege these circumstances in its replies to the Organization's appeal letters.

As a result, the Organization has failed to establish clearly that the Claimant was denied the right to be returned from furlough, at least in reference to the named junior employee. As stated in Third Division Award 28401:

"This uncertainty as to the facts of the matter have led to irreconcilable differences between the parties' positions which the Board, in its appellate capacity, cannot resolve. Based on such differences, the Board is without sufficient factual information to take any action."

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.