Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29142
THIRD DIVISION Docket No. MW-29053
92-3-89-3-485

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Duluth, Missabe and Iron Range Railway Company

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

(1) The Agreement was violated when the Carrier forced Track Laborer J. Sawyer to perform service instead of allowing him to accept furlough on June 2, 3, 20, 21, 22, 23, July 11, 12, 13, 14 and 15, 1988 (Claim No. 18-88).

(2) As a consequence of the violation referred to in Part (1) hereof, the Claimant shall be allowed compensation for seven (7) hours and fifty (50) minutes at his straight time rate of pay and mileage expenses for three hundred four (304) miles traveled in connection therewith."

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.

Carrier posted a notice entitled "Subject: Reduction in Force" informing Claimant his position was abolished and that he was laid off effective May 18, 1988. Concurrently, Carrier made additional positions available to Claimant. Claimant filed a Form 1345 electing to waive his rights to displace a junior employee and remain on furlough status. Carrier promptly notified Claimant that its forces had not been reduced but, rather, rearranged. Carrier also advised Claimant his actions to remain on furlough status were invalid and that he should immediately report for work. Claimant did report under protest. This Claim seeks compensation for mileage costs and commuting time incurred by Claimant in connection with eleven days service he was, in the Organization's view, forced to perform in violation of the Agreement.

In its Submission, the Organization made contractual arguments based on several Rules of the Agreement. On the property, however, only Rules 5 and 6 were cited, together with an incidental reference to Rules 3 and 20, in support of the Claim. Therefore, we have confined our analysis and opinion, as we must, to the provisions, evidence and argument made on the property.

Distilled to its essence, the Organization position is that Rules 5 and 6 clearly and unambiguously give Claimant the right to elect furlough under the facts at hand. Accordingly, Claimant should be reimbursed for the commuting time and expenses he was improperly forced to incur.

Carrier, to the contrary, contends that Rules 5 and 6 do not apply where, as here, no actual reduction in force took place. Carrier contends a past practice exists which makes the furlough election unavailable to employees when forces are merely rearranged despite the wording of the notice entitled "Subject: Reduction in Force." Carrier says the practice has been to use such wording for force rearrangement as well as force reduction, and any misunderstanding that might have resulted from the notice was cleared up immediately by written directions to Claimant.

Pertinent portions of Rules 5 and 6 are excerpted as follows:

"RULE 5

Force Reduction

(a) When forces are reduced, the senior employees in the respective groups and gangs will be retained, and those affected either by being laid off or displaced will have the right of exercising their seniority rights under the following conditions.

* * *

(e) Seniority rights when exercised in displacing other employes under this rule must be exercised within ten (10) calendar days after the employees are laid off, or they will forfeit all rights to displace other employees under such force reduction.

* * *

RULE 6

Retaining Seniority

(a) Employees laid off account reduction in force will retain full seniority under the provisions of paragraph (b) and (c) of this rule.

> (b) When an employee laid off by reason of force reduction desires to retain his seniority rights without displacing a junior employee, he must within ten calendar days file his name and address through his foreman . . . ."

The Organization has not refuted Carrier's contention that no net reduction in force occurred. Nor does it challenge Carrier's assertion that positions were concurrently made available for Claimant to assume. While the Organization says in its Submission that Claimant was forced to return to service by displacing a junior employee, there is no evidence to support this assertion. Not even Claimant's handwritten statements contend that a displacement occurred. In addition, the headcount evidence furnished by Carrier shows an increase upon Claimant's return to service, a change which would normally not occur in the event of a displacement. Finally, we have discovered no assertion or evidence in the record to establish that the concurrently created positions were outside of the boundaries of the service area in which Claimant normally worked.

The pivotal issue, therefore, is to determine, on the instant record, whether Rules 5 and 6 apply as the Organization contends they do.

Carrier says it has no other means available to it to redistribute its work forces. It says it has followed this practice in the past and that the Organization has acquiesced in it. Carrier says no grievances have been filed to contest the past application. Moreover, it provided the following record of a past telephone conversation between the General Chairman and the Director of Personnel and Labor Relations:

> "On September 27, 1984 I advised Gerry Jones that an employee whose position is abolished is not entitled to take ten days in which to decide whether to exercise his seniority in the case where the abolishment is part of a rearrangement in force. If it were a reduction in force I told him that the ten-day would apply, but since it's only a rearrangement in force he is not entitled to take ten days."

The Organization did not challenge the fact or content of this conversation record on the property. In addition, it did not dispute the assertion that there have been no past claims contesting the Carrier's declared past practice. The Organization did, however, assert that the absence of claims was due to threats of termination and insubordination. It also offered the names of two employees as examples of past situations contrary to Carrier's claimed past practice. However when Carrier challenged the accuracy of the two examples and the allegation of threats, no further details were provided. Moreover, we have found no proof in the record, beyond the Organization's assertion, that there were past threats that suppressed other claims.

On the record before us, we find that no actual reduction in force occurred in Claimant's service area. This finding is in harmony with prior Third Division Award 14701 of this Board which involved a similar situation where positions were abolished and a like number were concurrently established in the same general work area.

Given the specific language of the Rules relied on by the Organization and the essentially unchallenged assertions of past practice by Carrier, we are not persuaded, on this record, that Rules 5 and 6 apply to the situation in dispute. The Organization had the burden of proving its Claim in this regard. On the record before us, we do not find that it has satisfied its burden.

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 28th day of February 1992.