

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29606
Docket No. MW-29972
93-3-91-3-366

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employees
(
(CSX Transportation, Inc. (former
(Louisville and Nashville Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to recall Track Repairman D. W. Priddy to work a position to which his seniority entitled him beginning on September 20, 1989 [System File 6(23)(89)/12(89-816) LNR].

(2) As a consequence of the violation above, Claimant D. W. Priddy shall be recalled to work with seniority and vacation rights unimpaired and paid all straight time and overtime wage loss suffered from September 20, 1989 and continuous until recalled to work."

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 employe 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.

This dispute concerns Carrier's failure to recall Claimant from furlough to fill a Track Repairman position on Extra Gang 5C81. Agreement provisions pertinent to this issue state:

"RULE 21. FORCE REDUCTION

21(g) When employees laid off by reason of force reduction desire to retain their seniority rights they must file their address, in writing, not later than 10 days from time cut off. This notice from the employee must be sent in duplicate to the Division Engineer, who will return one copy, receipted, to the employee. Periodic renewal of address is not thereafter required, but the employee is required to advise promptly in similar manner of any change in address. When his time comes for recall to the service, handling will be given in line with Rule 22(f). Employees protecting their seniority under this rule will not be required to renew their address because of being used on temporary or extra work."

"RULE 14. BULLETINING POSITIONS

14(a) New positions or vacancies that are expected to last 50 or more working days will be considered permanent and shall be bulletined within 10 calendar days prior to or after the date of creating the new position or vacancy, subject to the following exceptions:

* * *

14(c) When a vacancy is not to be filled, bulletin notices shall be given to the employees affected that the position is abolished.

* * *

14(f) Bulletins advertising positions, as well as those giving names of appointees or abolishing jobs, shall be posted at places accessible to all employees concerned, except that such bulletins need not be made accessible to:

* * *

(4) Cut-off employees; except a sufficient number of senior cut-off employees needed to fill existing vacancies will be notified. (See Rule 16(d).)"

"RULE 16. ASSIGNMENT

16(d) When making assignments, the senior applicants in the ranks bulletined (due regard being given rights of cut-off employees) shall be given the positions except that when filling positions of engineers, assistant engineers, or operators of pile drivers, cranes, ditchers and other power-driven machines, drawbridge tenders, and pumpers, the senior qualified applicant on the date of advertising shall be assigned."

"RULE 22. RETURN AFTER FORCE REDUCTION

22(b) Cut-off employees will be required to return to the service in their seniority order to fill bulletined positions in the rank in which they were last in permanent service, on which no employee senior to them bids. Senior employees of the rank bulletined but serving in a lower rank and who bid on bulletined positions will be assigned in accordance with Rule 16(d)....

* * *

22(f) Employees will forfeit all seniority rights if they fail to return to work, or give satisfactory reason for not returning, within 10 calendar days from date of notification by mail or telegraph sent to the address last given."

Claimant has established and holds seniority as a Track Repairman in the Track Sub-department. Prior to this dispute, he had been furloughed from the Carrier's service due to a force reduction, and having filed his name and address to protect his seniority, was awaiting recall to Carrier's service.

On July 7, 1988, Claimant was notified that he was recalled to Carrier service to fill a new position as Track Repairman on Extra Gang 5076 as advertised in bulletin T-1233. However, before the advertised positions were awarded, Carrier canceled the bulletin. Thus, Claimant remained furloughed.

On August 4, 1989, Carrier bulletined new positions of an Extra Gang which was to be headquartered at Bowling Green, Kentucky. The Bulletin included twenty-five new Track Repairman positions. Twenty-one of the twenty-five Track Repairman positions went "no bid", therefore, the Carrier began sending recall notices to furloughed employees in accordance with Rule 22(b).

Claimant did not receive a recall notice, and when he contacted the Carrier's Corbin Division office to find out the reason, he was informed that he had "forfeited his seniority" when he allegedly failed to respond to a previous recall to service in September 1988. Claimant denied ever receiving said recall notice, and the Organization filed a claim alleging that the Carrier was in violation of Rules 22(b) and 22(f).

For its part, the Carrier maintains that the Chief Clerk called Claimant's home on July 26, 1988, to see if he was available to work a temporary vacancy. Allegedly, Claimant's wife promised to have Claimant return the call, although Carrier stated that the call was never returned. Additionally, the Carrier asserts that the Chief Clerk also sent Claimant a recall notice dated September 6, 1988, to fill another advertised vacancy. Again, according to the Carrier, Claimant did not respond within the ten day time limit in accordance with Rule 22(f) of the Agreement. Therefore, Carrier maintains that Claimant "forfeited" his seniority.

The Organization emphasizes that Claimant denies ever receiving either the phone call or the recall notice as the Carrier has alleged. Further, the Organization points to Rule 22(f) of the Agreement which states that the Carrier will recall employees from furlough in accordance with their seniority by telegraph or by mail--normally certified mail--return receipt requested. Finally, the Organization stated that if the Carrier did send a recall notice to the Claimant in September 1988, it was not sent certified mail--return receipt requested, and therefore Carrier cannot establish that the Claimant actually received the notice at issue.

A review of the record indicates it is devoid of probative evidence proving that the Carrier did, in fact, contact Claimant in September 1988 to recall him from furlough. In order to retain seniority rights, Carrier employees are required to file their name and address no later than ten days following lay-off. There is no indication in the record that Claimant failed to do so.

Carrier is required by Rule 22 to contact furloughed employees by mail or telegraph. The Organization has argued persuasively that the Carrier "routinely" recalls furloughed employees via certified mail-return receipt requested. This logically serves as a "safety" for both the Carrier and its employees. In the instant case, Carrier plainly did neither.

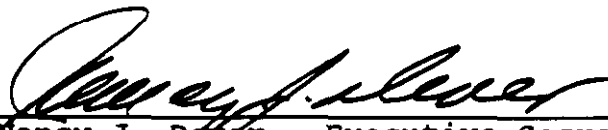
From the evidence presented to this Board, there is no basis to support Carrier's allegation that Claimant purposely ignored earlier recall notices, thereby forfeiting his seniority rights. Accordingly, the claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1993.