

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29853
Docket No. MW-29603
93-3-90-3-578

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen 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 Agreement was violated when the Carrier failed to properly advertise a foreman's position on the Retirement Gang headquartered at Wellsboro, PA and subsequently assigned junior employee R. Johnson instead of Mr. P. T. Tammaro to fill said position (System Docket MW-735).

(2) Mr. P. T. Tammaro shall be compensated at the foreman's rate for all straight time and overtime wage loss suffered beginning sixty (60) days retroactive from March 15, 1989 and continuing until the violation is corrected."

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 waived right of appearance at hearing thereon.

This dispute involves the Carrier's alleged failure to properly advertise a foreman's position on the Retirement Gang headquartered at Wellsboro, Pennsylvania, and, Carrier's subsequent assignment of a junior employee to fill said position in lieu of the Claimant.

Agreement rules pertinent to this dispute, are as follows:

"Section 3. Advertisement and award.

(a) All positions and vacancies will be advertised within thirty (30) days previous to or within twenty (20) days following the dates they occur. The Advertisement shall show position title, rate of pay, headquarters, tour of duty, rest days and designated meal period.

* * *

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."

"(f) A claim may be filed at any time for an alleged continuing violation and all rights of the claimant(s) involved shall be protected by the filing of one (1) claim or grievance based thereon so long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than sixty (60) days prior to the filing thereof."

Rule 3, Section 1 reads:

"Section 1. Assignment to position.

In the assignment of employees to positions under this Agreement, qualification being sufficient, seniority shall govern.

The word 'seniority' as used in this Rule means, first, seniority in the class in which the assignment is to be made, and thereafter, in the lower classes, respectively, in the same group in the order in which they appear on the seniority roster."

"Section 2. Exercise of seniority.

(a) Except as otherwise provided, an employee may exercise seniority to a position for which he is qualified:

1. when his position is abolished;
2. when the senior employee displacing him physically assumes the duties of the position;
- *3. when the starting time of his position is changed more than one (1) hour except changes caused by Daylight Saving Time;
4. when the rest days of his position are changed;
5. when returning from a supervisory or official position;
6. when returning from leave of absence, sickness, jury duty, disability, special duty, vacation or suspension and his former position has been abolished or filled in the exercise of seniority;/
7. when headquarters are changed; or
8. when disqualified.

*Does not apply to divisional or interdivisional production gangs.

(b) An employee entitled to exercise seniority must exercise seniority within ten (10) days after the date affected. Failure to exercise seniority to any position within his working zone (either divisional or Inter-Regional) shall result in forfeiture of all seniority under this Agreement, except employees who decline to exercise Inter-Regional seniority shall only forfeit all Inter-Regional seniority. If he presents evidence to his supervisor that extenuating circumstances prevented the exercise of seniority, the ten (10) days specified above shall be extended proportionately to the extent of his absence on account of such circumstances. An employee who is unable to so exercise seniority and who elects not to exercise other seniority, shall be furloughed."

Claimant worked as a foreman with a seniority date of June 1, 1976. Carrier states that Claimant accrued seniority as a foreman in Zone 4, while Organization stated that Claimant "was and is a Zone 3 employee." Claimant was furloughed on December 22 or 30, 1988, there being some question between the parties as to the exact date.

The junior employee also worked as a track foreman, seniority date September 27, 1976. There is no dispute that the junior foreman held a position in Hornell, New York, Zone 3 commencing December 7, 1988, and remained in a foreman's position in Zone 3 through May 16, 1989.

When Claimant became furloughed in December 1988, he chose not to displace the junior foreman per Claimant's contractual right under Rule 4, Section 2(b).

On February 1, 1989, Claimant was recalled from furlough to fill a position on a crew performing work of building panels. Claimant worked until job was completed on February 18, 1989. On February 20, 1989, the Claimant and the District Chairman were informed that there were nine additional vacancies on the Retirement Gang. It is not disputed that Carrier had neglected to announce those additional vacancies when they became available in the second week of January 1989.

On February 27, 1989, Claimant reported to the Retirement Gang to fill the temporary trackman vacancy pending assignment by bulletin. The Carrier did not allow the Claimant to fill the position, stating that "Claimant chose not to exercise his seniority in December 1988, and he cannot contractually change his mind two months later."

In letter dated December 20, 1989, the Organization appealed the claim also alleging a timeliness violation in accordance with Rule 26(f) quoted above. Carrier denied the claim, stating that Rule 26(f) clearly requires a conference before denial. As no such meeting had taken place for May, June, July, August or September to discuss this grievance, timeliness was not at issue. The timeliness objection was not furnished in writing before the Board and therefore we dismiss this issue.

Carrier's position is predicated on the following: Claimant did not opt to displace a junior track foreman in December because he did not choose to displace out of Zone 4, his home zone. Carrier asserts that Claimant cannot "contractually change his mind two months later." Further, Carrier relies on Rule 3, Section 4(a), to argue that at the completion of Claimant's temporary assignment on February 18, 1989, he was not awarded or assigned to another vacancy, and in compliance with the Agreement, he was returned to

furlough status. Additionally, Carrier stated that the claim submitted by the Organization lacks specificity in that the Organization failed to "present or identify the names, seniority dates, or work that was performed on the alleged vacancies/positions." Finally, Carrier asserts that even if it had advertised the Zone 3 positions, Claimant would not have been the automatic bidder, nor is there any showing that he would have been senior to all other bidders in Zone 3.

For its part, the Organization asserts that the Carrier violated the Agreement when it failed to advertise the vacancy of foreman on the Retirement Gang, and that Carrier further violated the agreement when it failed to assign the Claimant to fill the vacancy beginning the second week in January 1989, and on February 27, 1989. The Organization states that the Claimant was confronted with a different situation in February than had existed on "December 23 or 28, 1988" when he was furloughed in Zone 3. The Claimant, according to the Carrier, was not required to displace the junior foreman in Zone 4. However, on February 27, 1989, the junior foreman, was "being used to fill a position in Zone 3, the Claimant's home zone, and the Claimant should have been allowed to fill the position on February 27, 1989."

The Board finds that certain initial facts concerning this dispute are in sharp conflict on this record. Carrier states that the Claimant was furloughed on December 22 or 30, depending upon whether one reads the Carrier's letter of April 26, 1989, or Carrier's Submission. The Organization maintains that the Claimant was furloughed on December 30, 1988. Carrier asserts that the Claimant worked as a Foreman through December 22, 1988, in Zone 4. The Organization asserts that Claimant "was and is an employee in Zone 3." These evidentiary discrepancies and conflicts in material facts prevent an informed decision by the Board and require a dismissal of the claim for failure of proof.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.