NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29890
Docket No. MW-28919
93-3-89-3-322

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
((Eastern Lines)

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

(1) The Carrier violated the Agreement when it assigned junior employe Mr. E. A. Alexander instead of Mr. R. A. Morales to perform relief work as a track laborer on various System Gangs and San Antonio Division Gangs from July 27, 1988 through August 19, 1988 (System File MW-88-157/474-65-A).

(2) As a consequence of the aforesaid violation, Claimant R. A. Morales shall be allowed one hundred forty-four (144) hours of pay at his track laborer's straight time rate."

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.

The Organization contends that the Carrier violated the Agreement when it assigned a junior instead of Claimant to perform relief work as a track laborer on various System Gangs and San Antonio Division Gangs from July 27, 1988, through August 19, 1988.

On March 25, 1988, the Claimant's Gang (No. 372) was abolished. He was instructed to call the Clerk on March 28, at which time he would be advised where relief work was available. He was sent a recall letter dated March 29, 1988, stating his proper address for recall purposes. The Organization argues principally that Claimant followed the procedure for recall under the Agreement and should have been afforded the opportunity to perform the relief work, prior to a junior employee being called. The Carrier argues that since Claimant did not call the Clerk as instructed, he lost the opportunity to perform the work.

The relevant provisions to this dispute read as follows:

"Article 3, Force Reductions

SECTION 1 - When force is reduced the senior men in the sub-department, on the seniority district, capable of doing the work, shall be retained. Such employees affected, either by position being abolished or being displaced, may displace junior employees of their own rank or class on their seniority district or on system positions.

* * *

SECTION 8 - When forces are increased, or in filling temporary vacancies, senior laid off employees in their respective rank, seniority group and seniority district will be given preference in employment. Employees desiring to avail themselves of this privilege and retain their seniority rights must file their name and address in writing with the appropriate division officer, with copy to General Chairman, within fifteen (15) calendar days of the date laid off, and renew same if address is changed during the period laid off. Failure to return to the service within ten (10) calendar days after being notified (by mail or telegram to last known address) will forfeit all seniority rights. Extension of seniority rights under this rule will expire unless returned to active service within four (4) years, except as provided in Article IV, Termination of Seniority,

National Agreement dated October 17, 1986."

There is no dispute that the junior employee was assigned to perform the work and that the Claimant is the senior of the two employees. There is also no dispute that the Claimant filed his name and address with the Carrier as required by the Agreement.

The Carrier argues that historically it has recalled employees by telephone and if the employee does not have a telephone it is incumbent upon him/her to contact the Carrier to inquire into relief work opportunities. Claimant was instructed to call the Clerk which he never did.

The Carrier contends that it has had a long practice of calling employees, in seniority order, by phone in lieu of the normal process dictated by Article 3, Section 8 in filling vacancies of short duration. It argues that if the Carrier had to resort to recalling employees by certified mail and giving each 10 days to report, the short-term vacancy would no longer exist. This would create a hardship on the Carrier by delays in filling short-term or temporary vacancies and deprive furloughed employees the opportunity of short-term employment.

The Organization has objected to the Carrier's argument that it has a practice of calling employees in filling vacancies of short duration and that employees without a telephone are required to call in. It maintains that this argument was not raised during the handling of the dispute on the property. The Board disagrees. The Carrier did raise this issue in the handling of the dispute on the property when it submitted the Clerk's letter. The evidence is proper and will be considered in resolving this dispute.

The Organization correctly points out that neither Article 3, nor any other Agreement provision establishes a procedure for telephoning employees eligible for recall or obligating employees to be available to answer their telephones to protect their seniority rights. Article 3 clearly contemplates the use of mail service for establishing eligibility for recall and constituting proper notice by the Carrier.

As the Organization argues, while the Carrier may use the telephone for recall, it is not relieved of its obligations under Article 3. If the senior employee cannot be reached by telephone, the Carrier is obligated to notify the employee by mail.

The Board must agree with the Organization. The Carrier was required, under the Agreement, to notify the Claimant by mail of the vacancy. The problem with the Carrier's argument as well as

the Awards it cites, is that the language in the Agreement at issue specifically provides for a mail procedure in filling temporary vacancies. While the Awards cited by the Carrier stated that notification by mail in filling temporary vacancies would be unreasonable, none of the agreements at issue specifically provided that notification by mail was to be used to fill temporary vacancies. The Agreements at issue in these Awards had provisions requiring mail notification in clearly defined circumstances which involved vacancies of thirty days or more.

The Carrier has not pointed to any section of the Agreement which either modifies or offers an alternative procedure to the mail provision. The Carrier has presented evidence of a past practice of notifying employees by telephone, and those without telephones being required to call in. However, as the Board has repeatedly found, past practice cannot offset clear and unambiguous language to the contrary. Third Division Awards 23130 and 25310 are particularly instructive in this respect. In 23130 the Agreement at issue required furloughed employees to submit a name and address in writing for recall eligibility. The Carrier had asserted a longstanding practice of contacting furloughed employees by telephone. The Board stated that "it is well-established that even where a past practice is proven, it cannot offset clear and unambiguous language drafted by parties to the contrary. In this case, while it may have been the Carrier's practice to contact furloughed employees by telephone - and obviously it is more convenient, this does not relieve the Carrier or its contractual responsibility to do so formally." If a position needs to be filled pending mail notification to an employee without a telephone, a junior employee may be used until the senior employee returns.

For the foregoing reasons, the Claim must be allowed.

A W A R D

Claim sustained.

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.