

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 30158  
Docket No. MW-29101  
94-3-89-3-540

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(St. Louis Southwestern Railway Company

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

1. The Agreement was violated when the Carrier called and assigned junior Track Laborer C. R. Cooper instead of senior Track Laborer C. Campbell to perform track laborer's work at Armourdale Yard in Kansas City, Kansas beginning October 31, 1988 (System File MW-89-8-CB/477-28-A).
2. As a consequence of the aforesaid violation, Mr. C. Campbell shall be compensated for all straight time and overtime wage loss suffered beginning October 31, 1988, and continuing until such time as 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 employee or employees involved in this dispute are respectively carrier and employee 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.

At the relevant time, Claimant held a Track Laborer's position with a seniority date of November 21, 1979. C. R. Cooper held the same position but was junior to Claimant having a seniority date of August 15, 1981.

The evidence developed through the exchange of correspondence on the property shows that on October 19, 1988, the parties agreed to establish up to four system gangs to work at Armourdale Yard, Kansas City, Kansas, and Herington, Kansas. Furloughed gangs were to be recalled in seniority order from Districts 3 and 4 to fill vacancies on the established gangs.

According to the Organization, Cooper was recalled to work and began working October 31, 1988, and worked continuously thereafter. The Carrier agrees that Cooper was recalled to work, but asserts that he began working November 8, 1988.

The Carrier further asserts that Claimant was recalled and contacted the Carrier's office on December 12, 1988, and declined to return to service. The Organization refuted those assertions made by the Carrier. By statement dated October 30, 1989, (which was forwarded to the Carrier), Claimant disputes the Carrier's factual assertions concerning the circumstances surrounding his recall. According to Claimant:

"...I called Debbie in Texas on November 8, 1988. She said my letter is already in the mail. I said alright I'll wait for it. I waited, the letter never came. Two weeks later I called again. I was told she was on vacation for two weeks and no one else could help me or knew what I was talking about. I called again on December 12, 1988, and they said they had a job I could work for two weeks for someone who was ill. I said ok. I waited for the letter to come and or a call to get a physical exam. No one called or sent a letter. By the rules I must receive a letter by mail to return. The Company is saying that they contacted me!! They never once contacted me. I did all the calling..."

It is not disputed that Claimant's seniority entitled him to recall before the junior employee. The dispute is a factual one over whether Claimant was recalled.

Article 3, Section 8 states:

"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 (10) calendar days after being notified (by mail or telegram to last known address) will forfeit all seniority rights."

The factual content of Claimant's statement has not been refuted by similar factual showings made by the Carrier. The evidence in this record demonstrated by Claimant's statement therefore shows that Claimant never received notification "by mail or telegram" that he was recalled. Nor is there any probative evidence that Claimant was sent a recall notification to his last known address as required by the Rule. Claimant's statement also shows that he did not decline to return to work. Therefore, by recalling the junior employee over Claimant, the Carrier violated Claimant's seniority entitlement and specifically violated the seniority recall provisions of the October 19, 1988, Agreement.

As a remedy, Claimant shall be made whole from the point the junior employee was recalled. Claimant's backpay entitlement shall be measured by the amount of hours worked by the junior employee for purposes of computing gross wages, overtime and other benefit entitlement. The Carrier's records concerning when the junior employee first began to work shall govern the date on which Claimant's backpay entitlement commences. Claimant's backpay entitlement shall run for a time that his seniority would have allowed him to work. However, Claimant's backpay entitlement shall be less any outside earnings he received during the relevant period. Further, we find that the Carrier's backpay liability shall be tolled for a two week period commencing December 12, 1988, when Claimant acknowledged that he would work the temporary two week job for the ill employee, but waited until he received formal notification for that temporary position.

#### A W A R D

Claim sustained in accordance with the Findings.

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NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Linda Woods  
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 26th day of April 1994.