Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31153
Docket No. MW-30373
95-3-92-3-112

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former
(Chesapeake and Ohio Railway Company)

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

(1) The Carrier violated the Agreement when it deducted and then failed and refused to allow Mr. R. Reed pay for the Thanksgiving holidays (November 22 and 23, 1990) [System File C-M-7249/12(91-322) CON].

(2) As a consequence of the violation referred to in Part (1) above, Mr. R. Reed shall be allowed sixteen (16) hours' pay at his pro rata rate, account the aforementioned Agreement violation."

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.

This dispute concerns a familiar subject which does not seem to yield to final disposition in view of slightly varying circumstances involving different facts applying to individual employees.

Here, the Claimant was given five-day notice of the abolishment of his position at the end of the business day on November 21, 1990, the day before the two Thanksgiving Day holidays on November 22-23. The next two days, November 24-25, were Saturday-Sunday and are not considered as significant here. According to the Organization, the Claimant was "available" for work on Monday, November 26 (the first work day following the holidays and the weekend) but he was not called for work by the Carrier.

In the sequence of events, the Carrier denied the Claimant pay for the two Thanksgiving Day holidays, because he did not work (by exercising his seniority) on November 26. The Organization contends that he in fact met the criteria for such holiday pay.

Rule 30 reads in pertinent part as follows:

> "(e) A regularly assigned employee shall qualify for . . . holiday pay . . . if compensation paid him by the carrier is credited to the workdays immediately preceding and following such holiday or if the employee is not assigned to work but is available for service on such days. . . .
>
> All others for whom holiday pay is provided in Section (d) hereof shall qualify for such holiday pay if on the workday preceding and the workday following the holiday they satisfy one or the other of the following conditions:
>
> (i) Compensation for service paid by the carrier is credited; or
>
> (ii) Such employee is available for service.
>
> NOTE: 'Available' as used in subsection (ii) above is interpreted by the parties to mean that an employee is available unless he lays off of his own accord or does not respond to a call, pursuant to the rules of the applicable agreement, for service."

Numerous previous Awards, often with the stated concurrence of the Organization and/or the Carrier, have established that an employee in the situation such as surrounding the Claimant is in fact in the category of "all others," as described above, rather than a "regularly assigned employee." There is no doubt that the Claimant met the general Holiday Rule criteria (not at issue here) and also was compensated for service on the workday preceding the holidays.

The argument boils down as to whether the Claimant was "available for service" on November 26, the first applicable workday after the holidays. The Organization contends that he was available on November 26. According to the Organization, the Claimant did not fail to respond to a call for work. Further, as to displacing another less senior employee, the Organization argues as follows:

> ". . . the Carrier . . . failed to identify any junior employe who the Claimant could have displaced on November 26, 1990. In essence, the Carrier is alleging that the Claimant laid off on his own accord on the day following the subject holidays, but it has failed to proffer any evidence that there were identifiable positions available to the Claimant on November 26, 1990."

The Carrier's position is that the Claimant had the time from his original notice of abolishment of his previous position up to November 26 to select a position on which to exercise displacements rights. By failing to do so on November 26, he was not "available" for work and thus was disqualified from receiving pay for the two previous holidays.

One other aspect requires mention. Rule 7 permits employees to exercise displacement rights within ten calendar days. While this right is not challenged here by either party, it remains the fact, as held in numerous other Awards, that this right is quite separate from obligations to meet the holiday pay requirement as to work following a holiday. The ten-day rule, by itself, cannot be used as a means to insure eligibility for pay for holidays occurring prior to the displacement period.

Returning to the Claimant herein, there is no showing that he was not "available" or that he "laid off" on November 26. There is no showing that he was assisted or directed in any way to a position occupied by a less senior employee or that he failed to seek such information himself.

The issue is a narrow one. If there were proof of the Claimant's advance awareness of the availability of a position on November 26, and he failed to claim it, the results may have been different. Denial Third Division Award 27657 concerned a situation in which the availability of a position was readily known. That Award concludes:

> "Claimant did not work on January 2, 1985, and there is a lack of substantial evidence to support the conclusion that his failure to work was due to anything other than his own decision and inaction."

Another series of Awards, however, provides guidance closer to the situation here under review. Sustaining Third Division Award 28232 states:

> "Carrier has argued that by failing to immediately displace to another position, Claimant constructively or, in effect, 'laid off'. The difficulty with that argument is that Carrier never presented any evidence during the handling of this dispute on the property that Claimant could have displaced a junior employee so as to be available for service on the day preceding and the day succeeding Memorial Day. Absent proof that Claimant constructively laid off, we find that he was 'available for service' within the meaning of the Agreement."

Likewise, companion Third Division Award 28235 states:

> "The crucial factor in determining availability is whether there were in fact junior employees who Claimant could have displaced on January 3, 1984. . . . The Carrier in the instant case never offered any factual evidence on this point until its Submission before the Board [when it was too late to be considered]."

For November 26, 1990, the Carrier failed to show that the Claimant was not "available" for work. It follows that the Claimant should not be deprived of pay for the preceding holidays.

In its Submission, the Carrier asserted that the Claimant did not actually commence work until November 30. Depending on the circumstances, this might or might not have had an effect on the Board's reasoning. The Organization points out that this was not raised on the property, and the claim handling correspondence so reflects. The Board is without authority, therefore, to consider this assertion in reaching its decision.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of September 1995.