Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32980
Docket No. MW-32339
98-3-95-3-125

The Third Division consisted of the regular members and in addition Referee James E. Conway 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 Agreement was violated when, on January 3, 4 and 5, 1994, the Carrier recalled and allowed Track Laborers W. Jackson and B. Johnson to work on the T-1, Extra Gang No. 51 and Giddings, Texas instead of recalling from furlough and allowing Messrs. J. B. Medina and H. V. Sanchez to perform said work (System File MW-94-86/BMW 94-252 SPE).

(2) As a consequence of the violation referred to in Part (1) above, Claimants J. B. Medina and H. V. Sanchez shall each be allowed twenty-four (24) hours' pay at their respective straight time rates and they shall each be credited with three (3) days for vacation qualifying purposes."

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 were given due notice of hearing thereon.

At the time this dispute arose, Track Laborers Medina, Sanchez, Jackson and Johnson were all in furlough status. Medina and Sanchez had common seniority dates and were senior to Jackson and Johnson by approximately seven and one-half and eight and one-half months, respectively.

By certified letters dated December 13, 1993 and mailed two days later, Carrier recalled all four men to service subject to successful completion of return-to-work physicals. The notices did not recite specific report dates. Each directed the employees to call the Houston Regional Office within ten calendar days of receipt for assignment to duty and to make arrangements for physical exams on an individual basis with company doctors in their localities.

Sanchez signed for his recall notice on December 18; Medina's return receipt is dated December 20. The record does not reflect when Johnson and Jackson received their letters, but both scheduled physicals promptly. Jackson, having been notified of his recall by telephone, was in fact examined on December 14 before the formal recall notice was even mailed. Johnson set up his physical for December 17. Both men were cleared to return to work on December 28 and reported at Giddings, Texas, on January 3. Medina and Sanchez were examined on December 29 and cleared by the Houston Labor Clerk to return on January 4. In order to remain closer to their homes, some 400 miles from Houston, both chose to return to Extra Gang No. 54 rather than report to service on T-1 Gang No. 51 at Giddings, and did so on January 6.

The Organization contends that both Claimants were senior, available, willing and fully qualified to work on January 3, and that by allowing junior personnel to return to work while they remained furloughed and in the absence of any emergent conditions, the Carrier violated the Seniority Rule and other terms of the current Agreement.

The Carrier maintains its recall was accomplished in perfect accordance with Article 3, Section 8 of the Agreement, which mandates that when forces are increased, "senior laid off employes in their respective rank, seniority group and seniority district will be given preference in employment." In support of its position Carrier presented

on the property copies of properly addressed and simultaneously posted certified letters it says it deposited in the United States mail on December 15 to all four men, together with copies of the return receipts signed by the Claimants. That documentation raises the refutable presumption that all recall letters were at least dispatched on the same date, and there the matter might normally end, with Carrier's argument that it did all it was required to do under the Agreement carrying the day. But keeping tension on the boil here is one additional fact. Beyond formally notifying in writing each of its furloughed Laborers, it also extended an early alert to at least one of the two junior men by phone. Thus, the claim cannot be fairly evaluated without reference to that fact.

The method of communication used for recall notices under the Agreement is at the discretion of the Carrier, except to the extent it must be "by mail or telegram" pursuant to Article 3. Implicit in the argument of the Organization however is the suggestion that once it elects, the Carrier cannot recall senior men by registered mail and use both registered mail and telephone notice for junior people and divorce itself from the practical consequences of employing fast and slow modes of notification.

The Board agrees with the underlying theory of the Organization's case, although it finds nothing in the record to support its charges of Carrier "manipulation" or other purposeful misconduct. Claimants' seniority entitled them to be recalled before Jackson and Johnson. If it were established that calling the junior employees while not phoning the Claimants had the effect of delaying the return of the senior men to pay status, this Board might well be faced with a violation of Claimants' seniority entitlements. For the reasons stated below, we do not find that to be the case.

It is evident from the record that Carrier gave early notification by phone to Jackson on December 13, as a result of which he was then able to arrange for a physical the next day. The Organization contends that the same thing must have happened with Johnson, or how else explain why he was able to set his exam for December 17. But while the inference is strong, Johnson never makes such an allegation, and the record is devoid of any proof in that regard.

The Claimants' position is deficient in one more serious respect, however. Even if the Board were to fully credit the argument that Jackson and Johnson were both given early notice of recall by phone and Claimants were not, nothing follows from those facts. The record establishes indisputably that Jackson took one day to get his physical. He was cleared to report 15 days from the date of the phone call, and actually reported six

days after being cleared, three days ahead of Claimants. Johnson apparently took two to four days to arrange for his physical - the record is murky on when or even whether he got a phone call. As with Jackson, however, there is no question but that he moved quickly thereafter, scheduling his physical for December 17. He was cleared to report 11 days later, and reported six days after clearance, also three days before Claimants. In contrast, Medina took 11 days to set up his physical after receiving his written recall notice. He was cleared to return six days later, and returned eight days after the date of clearance. Sanchez took nine days to be examined after receiving his certified letter. He was cleared six days later and, as with Medina, reported eight days later.

From the above, we reach the following conclusions. First, both Medina and Sanchez *could have* returned on January 4, one day later than the junior personnel. The outside measure of their damages, therefore, in any event would be one day's pay. But more importantly, if the early phone alerts violated the Agreement, Claimants bore the burden of proving that such preferential treatment caused them to lose pay. A simple "after-therefore-on-account-of" explanation is not enough in this instance to prove a cause and effect connection between phone calls and late returns. The cord linking Claimants' late returns to causation is made of many strands. By far the most conspicuous impediment to their early returns was their lag in scheduling physicals after recall. It took 11 days in Medina's case and nine for Sanchez; Jackson did his in one day, and Johnson took two to four days. The plain fact here is that the junior people beat Claimants to the punch.

On this record, we conclude it is not possible to say that but for the telephone calls to the junior employees, Claimants would have returned to service before them. Medina and Sanchez may have held up their own returns through inactivity, although their return dates might equally well be accounted for in terms of weather, holiday plans, physicians' schedules, the declination of the Giddings assignments, or any other number of factors. Having mailed recall notices in seniority order, Carrier cannot be held responsible on this record for the fact that Claimants were not examined as quickly as the junior men. For those reasons, the claim cannot be sustained.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of December 1998.