Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36677
Docket No. MW-35097
03-3-98-3-843

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 Employes
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(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly recalled and assigned Mr. H. K. Sealy as an automatic bidder to a position on Rail Gang 320, while he was assigned and working another position and thereafter terminated his seniority on the West Regional seniority rosters, on March 12, 1996, when he failed to report for the position on Rail Gang 320 (System Docket MW-4711).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant's seniority on the West Regional seniority rosters shall be restored, as it existed prior to its removal on March 12, 1996."

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.

On February 24, 1996, while working a vacancy on position 05-042-3597-0075-1 pending award, the Claimant received notice that he was an automatic bidder as a Class 3 Machine Operator on System Rail Gang RG 320 at Pitcairn, Pennsylvania. He was instructed to report to RG 320 on February 26, 1996, but no later than ten days after receiving the notice. When the Claimant continued working his assignment on the Pittsburgh Seniority District, the Carrier notified him by letter of March 12, 1996 that his Western Zone seniority was forfeited under the provisions of Rule 4, Section 3.

The Organization's position is that because the Claimant was working during the relevant time period, albeit on a temporary vacancy, he was not "furloughed" during the relevant time frame, and thus was not an "automatic bidder" under the express language of the second sentence of Rule 3, Section 3 and therefore did not forfeit his seniority under the terms of the second sentence of Rule 4, Section 3. The Carrier, on the other hand, maintains that the Claimant was properly treated as a furloughed "automatic bidder" because he was not the incumbent of a permanent position at the time the claim arose.

Third Division Award 35436 dealt with a virtually indistinguishable companion case involving three different Claimants, but the identical Parties, issues, arguments and Agreement language. Award 35436 explicitly sustained the Organization's interpretation of the disputed "automatic bidder" contract language in the second sentence of Rule 3, Section 3, as follows:

> "After careful review, two observations are warranted. Overall, the cited portions of the parties' negotiated Agreement language are not a model of clarity as they relate to the instant dispute. Secondly, the provisions are devoid of precise guidance for their application to the facts at hand. Although both parties provided their views on the intent of the language, neither presented any evidence of bargaining history to resolve their conflicting assertions.

* * *

The Carrier's interpretation of the applicable provisions is very plausible as well as rationally consistent with the customary administration of traditional seniority systems. Unfortunately for the Carrier, however, the explicit words of the cited provisions rather clearly favor the Organization's position. For examples, Rule 4 (Seniority), Section 3, provides that an '. . . employee not in service will be subject to return to work from furlough. . . .' In addition, Rule 3 (Selection of Positions), Section 4 (Filling temporary vacancies), contains the following significant language:

'(a) . . . 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' (Emphasis added)

* * *

Despite the intuitive logic of the Carrier's approach, the governing Rule language appears to support the Organization's position that one who is working, even in a temporary vacancy, is not furloughed within the meaning of the automatic bidding provisions of Rule 3, Section 3."

However, the foregoing quoted holding was only a Pyhrric victory for the Organization. In a highly nuanced caveat, the Board nonetheless denied that particular claim in Award 35436 because "the Rules do not describe with precision the point in time that the status of a given employee is to be ascertained for purposes of automatic bidding" i.e., the date of the advertisement, the date of the Carrier's notice or the effective date of the awards. Based on that finding, the Board denied the claim in Award 35436, as follows:

> "Notwithstanding the foregoing conclusion, the Rules do not describe with precision the point in time that the status of a given employee is to be ascertained for purposes of automatic bidding. For example, is the employee's furlough status to be determined as of the date of the advertisement? On this record, there is no evidence that any of the Claimants were working in temporary vacancies on June 27, the advertisement date. If this date is the magic trigger date, then all three Claimants were in furlough status on that date. Accordingly, the Carrier properly deemed them automatic bidders. Thus, their awards did not violate the Agreement.
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> If, however, the magic date is some other date, we have divergent results. If the magic date is the date of the Carrier's notice, which was July 7, all three Claimants were working temporary vacancies on that date. Hence, none of them was in furloughed status that date. Treating them as automatic bidders would, accordingly, violate the Agreement.
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> If the effective date of the awards is the magic date, then we have yet a third result. On July 11, the record shows only Claimant Feagin to have been working. Thus, only he might have a valid claim.
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> Establishing with certainty the precise date upon which the Claimants' furlough status was to be determined is an essential element of the claim. It is well settled that the Organization bears the burden of proof to establish this element. On this record, for the reasons just discussed, we must conclude that the Organization's burden has not been satisfied."

We consider Third Division Award 35436 authoritative precedent for the proposition that when an employee is actually working on a temporary vacancy s/he is not "furloughed" for purposes of application of the second sentence of Rule 3, Section 3. However, the foregoing additional holdings from Award 35436 produce essentially the same result in the present matter. The record in the instant case shows that Claimant Sealey was working the temporary vacancy on the Pittsburgh Seniority District on the notification date of the February 21, 1996 and on the award

date of February 26, 1996 [and that he eventually was awarded the Pittsburgh Seniority District position on March 18, 1999]. However, the record in this case does not show whether he was furloughed or working a temporary vacancy on the critically important date of February 12, 1996, the date of the advertisement for the Class 3 Machine Operator position on the Western Zone. Notwithstanding mischievous dicta in Award 35436 to the effect that an employee who was working on the date the position was awarded "might have a valid claim", it remains unclear in this record whether the mutually intended operative point in time that the status of a given employee is to be ascertained for purposes of automatic bidding is the date of the advertisement, the date of the Carrier's notice or the effective date of the assignment. Unless and until that point is persuasively established, the Organization's failure of proof that the Claimant was working rather than furloughed on the advertisement date of February 12, 1996 requires a denial decision in this case as in Award 35436.

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 18th day of August 2003.