

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37822
Docket No. MW-38472
06-3-04-3-448

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to recall Mr. M. Holbrook to service following his furlough on October 22, 2002 and instead recalled other junior employees, including Messrs. R. Jarrett and E. Knight (System File NEC-BMWE-SD-4337 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Holbrook shall now be ' . . . made whole. Claim to include, but not limited to all lost time earnings, including overtime, vacation and retirement credits, and seniority on jobs posted and awarded, for this lost work opportunity."

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.

This claim protests the Carrier's failure to recall the Claimant from furlough in seniority order as a violation of Rule 21. It involves the Organization's contention that the Claimant filed his required furlough form by fax on October 22, 2002 and that junior employees were recalled prior to the Claimant's May 4, 2003 recall, and the Carrier's position that it never received such furlough form and had no information that the Claimant wished to be recalled until it received a copy of the instant claim in late June 2003, investigated it, and then recalled the Claimant on June 30, 2003.

During the exchange of correspondence on the property, the Organization submitted a copy of a furlough form dated October 22, 2002 and a fax transaction report indicating a transmission of one page sent to the Carrier's office at 3:07 P.M. on October 22, 2002, as well as telephone records of seven phone calls allegedly made by the Claimant to the Carrier between April 3 and June 17, 2003 after discovering that junior employees had been recalled, as well as six telephone calls placed to Philadelphia, on October 19 and 29, 2002. All of the Organization's appeals rely upon the fact that the Claimant was recalled on May 4, 2003 allegedly prior to the time the Carrier received notice of his claim in June 2003.

The Carrier, in turn, submitted pages from its furlough log book maintained by the Clerk in the Assignment Office responsible for recording entries when furlough forms are received for the period between March 28 and December 16, 2002, which does not contain the Claimant's name or receipt of any furlough papers on October 22, 2002. The Carrier also included its Personnel Action Request form indicating that the Claimant was recalled from furlough effective June 30 not May 4, 2003 as contended by the Organization. The Carrier took issue specifically with the documentation furnished by the Organization noting that the telephone records were not from a number that the Carrier had on file for the Claimant, two of the six October Philadelphia numbers were to the Police Department, one to a number outside of Amtrak, one to its Payroll Department, and only two of the October 29 entries were to its Assignment Office of one minute duration each at 1:36 and 1:40

P.M., not supporting that contact was actually made or a message left. The Carrier also notes that the copy of the furlough form submitted with the claim has fax transmission information at the top indicating that it was initially sent from the Carrier's office, and is not a copy of the original submitted, and that the fax transaction report has no similar indication verifying from where it originated and indicates that the one page document took 19 minutes to send.

The Organization argues that the Claimant proved that he timely submitted his furlough papers on October 22, 2002 and kept in contact with the Carrier's Assignment Office from that time forward to keep abreast of employment opportunities, and that the Carrier's recall of junior employees ahead of the Claimant was a violation of his important seniority rights under Rule 21, citing Third Division Awards 20310, 24480; Second Division Award 2910; First Division Award 15128. The Organization asserts that the Carrier's position does not jibe with the facts, because, if it did not receive the Claimant's furlough papers until June 2003, why was he recalled to service over one month earlier on May 4, 2003?

The Carrier initially contends that this claim is procedurally defective because it was amended to correct a date and to change the first name of employee Ron Jared, who the Carrier asserted did not exist on the property, to R. Jared, citing Third Division Awards 15847, 29272 and 36020. The Carrier argues that the Claimant's failure to follow the specific instructions on the furlough form requiring two copies to be sent to it by U.S. Mail shows that he made himself unavailable for recall, relying on Third Division Awards 30850 and 36523 and places the burden on him to show that the Carrier actually received the form by fax, known to be an unreliable method of transmission. The Carrier asserts that the Organization did not meet its burden of proving the form was received, because the entries and information missing from the documentation calls into question what it actually shows. At best, the Carrier contends that the record contains contradictory evidence with respect to the Claimant's submission of his furlough form, and the Board is required to dismiss this claim as one which contains an irreconcilable conflict in facts, citing Third Division Awards 28435, 28794, 33416, and 36071.

A careful review of the record convinces the Board that the Organization failed to sustain its burden of proving a violation of Rule 21 herein. The Carrier effectively called into question what the documentation proffered by the

Organization shows with respect to both the submission of the Claimant's furlough papers and his contacting the Assignment Office and rebutted the contention that it received the furlough papers on October 22, 2002 or recalled the Claimant prior to receiving his furlough form in June 2003. The thrust of the Organization's rebuttal of the Carrier's evidence is the fact that the Claimant was recalled in May 2003, prior to the time the Carrier claims it got his furlough papers. However, the Carrier submitted documentation showing that the effective date of the Claimant's recall from furlough was June 30, 2003, a fact continually ignored by the Organization on the property and never rebutted. The Claimant clearly did not submit his furlough papers by the method instructed on the form. At best the Board is left with an irreconcilable conflict in facts concerning whether the Claimant actually submitted his furlough form on October 22, 2002 via fax, which is a condition precedent for establishing a Rule 21 violation, requiring us to dismiss the claim. See Third Division Awards 28435, 28794 and 33416.

AWARD

Claim dismissed.

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 21st day of June 2006.