

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37944
Docket No. MW-36877
06-3-01-3-456**

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign furloughed District 14 employe J. M. Ruud to fill a Group 3 machine operator vacancy on System/Region Gang RP-21 beginning on October 11, 1999 and continuing (System File T-D-1910-H/11-00-0057 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. M. Ruud shall now be compensated for ‘***eight (8) hours pay at the Group 3 machine operator’s rate of pay beginning October 11, 1999 and continuing. We request that Claimant receive pay, equal to any and all overtime paid Gang RP-21 during the claimed period. We request that all claimed dates be accredited as vacation, and other fringe benefit, qualifying days.’”**

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.

The Claimant holds seniority as a Group 3 Machine Operator in the Track Subdepartment on Seniority District 14. On September 3, 1999, the Claimant was placed on furlough status. By letter dated October 8, 1999, the Carrier recalled the Claimant to the first half of dual Machine Operator Job No. 34522/34523 in District 300, to report October 11. The Claimant did not receive the letter until October 15. In the meantime, at 6:56 A.M. on October 8, the Claimant was bumped from Job No. 34522 by D. L. Smith. The Carrier's Manpower Department thereupon assigned the Claimant to Job No. 34523; however, at 7:56 A.M., the Claimant was also bumped from that job by S. J. Peterson.

Under Rule 8F of the parties' Agreement, an employee who is displaced by a senior employee has ten days from the date of the displacement to exercise seniority and displace a junior employee. If the displaced employee fails to exercise seniority in this manner within ten days, the employee is placed on furlough status and is thereafter governed by Rule 9. Under Rule 9, where there is a permanent vacancy (defined as a vacancy of more than 30 days) or new job, the senior furloughed employee is recalled for the position. Recalled employees have ten days to report after they receive their recall notice.

On October 11, 1999, several vacancies arose on System/Region Gang RP-21. By letter dated November 2, 1999, the Organization initiated the instant claim on behalf of the Claimant, asserting that he should have been recalled for one of the Gang RP-21 positions. The Carrier responded that the Claimant was not on furlough and available for recall on October 11, because he had already been recalled by letter dated October 8, 1999. The Carrier provided a handwritten note from a Manpower Department Clerk and a computer printout showing the events regarding the Claimant's October 8 recall. The parties exchanged additional

correspondence and discussed the matter in conference. By letter dated April 17, 2001, the Organization repeated a request for a copy of the October 8, 1999 recall letter sent to the Claimant, along with proof of receipt by the Claimant. By letter dated August 30, 2001, the Carrier forwarded to the Organization a copy of the October 8, 1999 recall letter and a certified mail receipt showing the Claimant's signature for delivery on October 15, 1999. By letter dated August 30, 2001, the Organization filed its notice of intent with the Board.

The dispute before the Board is whether the Carrier improperly filled the Gang RP-21 vacancies because, as the Organization asserts, the Claimant should have been recalled to one of them. The Carrier contends that the Organization must prove that the Claimant was available on October 11, 1999 to be recalled to one of the Gang RP-21 vacancies, and argues that no such evidence has been presented. The Organization's claim, the Carrier submits, is based on the "false premise" that the Claimant was unassigned in furlough status on October 11. The Carrier argues that, having already been recalled by letter dated October 8, 1999, the Claimant was in the middle of his Rule 8F ten-day opportunity to bump a junior employee, not on furlough status, and unavailable for recall.

The Board finds that the Organization failed to meet its burden of proof that the Claimant was available to be recalled to one of the positions on Gang RP-21 that became vacant on October 11, 1999. The Organization urges the Board to disregard the October 8, 1999 letter and certified mail receipt produced by the Carrier, asserting that it was submitted after the record had closed upon the Organization's having filed with the Board on August 30, 2001. However, at best, the Carrier produced the evidence on the same day that the record closed, not after. Furthermore, the Carrier produced the evidence at the Organization's request, and it is clear from notes associated with the documents that the Carrier had some difficulty in retrieving documents that had likely been placed in storage two years before. The Carrier's delay in providing the documents was reasonable. The Board finds that the October 8 recall letter and proof of delivery to the Claimant were evidence properly included in the record and properly considered herein.

The Board further finds that having been recalled by letter dated October 8, the Claimant was not available for further recall until he was placed back on furlough status ten days after his October 11, 1999 report date. During those ten

days, having been bumped (twice) from the position(s) to which the Claimant had been recalled, he had the opportunity under Rule 8F of the parties' Agreement to secure another position by bumping a junior employee. The Claimant apparently did not avail himself of this opportunity and, therefore, returned to furlough on October 21, 1999. However, while the opportunity to bump into a position at the Claimant's own choosing remained open, the Carrier could not force recall the Claimant into a Gang RP-21 position and thus deprive the Claimant of his rights under Rule 8F.

Having found that the Organization failed to prove any violation of the Agreement, the Board must deny the claim.

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 19th day of September 2006.