

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37945
Docket No. MW-36897
06-3-01-3-458

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 Agreement was violated when the Carrier assigned junior Sectionman D. A. Middleton, instead of senior furloughed Sectionman T. A. Dean, to fill a sectionman vacancy at Cicero, Illinois beginning June 21, 2000 and continuing (System File T-D-2054-H/11-00-0354 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. A. Dean shall now be compensated “***eight (8) hours pay at the sectionman’s rate of pay for each of June 21, 22, 23, 26, 27, 28, 29, 30, July 3, 4, 5, 6, and 7, 2000, and continuing. We also request that Claimant receive pay, equal to any and all overtime paid Mr. Middleton during the claimed period. We request that all claimed dates be accredited as vacation 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 Sectionman on Fargo Seniority District No. 300 dating from April 15, 1997. The Claimant was placed on furlough status, and as required by Rule 9 of the parties' Agreement, filed his name and address with the Carrier.

During June 2000, the Carrier exhausted the furlough roster on Galesburg Seniority District No. 500 and had a temporary manpower shortage there. At that time, according to the Carrier, D. A. Middleton, a furloughed Sectionman holding seniority as of April 20, 1998, on Northwest Seniority District No. 100, telephoned the Carrier's Manpower Office to ask if there were any vacant positions anywhere on the system. Manpower told Middleton that there were no positions available in his seniority district, but there was a temporary vacancy of less than 30 days' duration on the Galesburg District. Middleton volunteered to fill that position.

The Claimant subsequently became aware of the Galesburg position and contacted the Organization, which filed a claim on his behalf on July 12, 2000. The Carrier denied the claim, and the parties exchanged additional correspondence and discussed the matter in conference. Having failed to reach a satisfactory resolution of the issues on the property, the parties submitted the dispute to the Board for final and binding resolution.

Rule 2A of the parties' Agreement provides:

"Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided."

Rule 9 of the parties' Agreement provides in pertinent part:

"When an employe laid off by reason of force reduction desires to retain his seniority rights, he must within ten (10) calendar days of date so affected file his name and address in writing on the form supplied for that purpose. . . . When new positions of more than thirty (30) calendar days' duration are established, or when vacancies of more than thirty (30) calendar days' duration occur, employes who have complied with this rule will be called back to service in the order of their seniority. Failure to file his name and address or failure to return to service within ten (10) calendar days, unless prevented by sickness, or unless satisfactory reason is given for not doing so, will result in loss of all seniority rights. If he returns to service and has complied with the provisions of this rule, his seniority will be cumulative during the period of absence. . . ."

The Organization contends that the Carrier improperly recalled junior employee Middleton rather than the Claimant to the Galesburg temporary position, in violation of both Rule 2A and Rule 9 of the parties' Agreement. Rule 9 provides that furloughed employees retain their seniority if they file their name and address within ten days of being furloughed. It is undisputed that the Claimant had filed as required under Rule 9 (as had Middleton). Therefore, the Organization submits, under Rule 9, the Claimant should have been called back to service before Middleton. It is the Organization's position that under Rule 2A, seniority must be observed when making assignments regardless of the nature of the position, whether regular, temporary or overtime work. It is the Organization's additional position that the Carrier provided no evidence in support of its affirmative defense that Middleton volunteered for the Galesburg position rather being recalled.

Before the Carrier can be required to present evidence in support of any defenses to the Organization's claim, the Organization bears the burden of proving that its claim is colorable. The Board finds that the Organization failed to meet that burden of proof. The Organization relies on Rules 2A and 9 for its proposition that the Carrier should have recalled the Claimant for the temporary vacancy on Galesburg District No. 500, rather than Middleton. However, neither the Claimant

nor Middleton had accrued seniority on that district. The Claimant had accrued seniority on Fargo District No. 300, while Middleton's seniority had been accrued on Northwest District No. 100. Therefore, neither the Claimant nor Middleton had a right by seniority to the Galesburg vacancy.

The Organization pointed to no contractual language extending seniority entitlement beyond seniority district limits. Rule 2A simply says that accrued seniority rights entitle employees for consideration for positions in accordance with seniority "as hereinafter provided." Rule 5 - Seniority Rosters of the parties' Agreement, states in pertinent part:

"A. Seniority rosters of employees of each sub-department by seniority districts and rank will be compiled. . . .

D. . . . Sub-seniority rosters for Sectionmen shall be prepared so that all employees who hold seniority in that classification on each seniority district shall appear on one roster in seniority order, with an appropriate designation to indicate the home sub-district of each employee. . . ." (Emphasis added.)

It is clear from the language of the parties' Agreement that the "relative length of service" referred to by Rule 2A is relative to other employees within one's classification and within one's seniority district.

The flip side of this lack of entitlement via seniority to any position outside of an employee's seniority district is that the Carrier has a parallel lack of ability to force recall a furloughed employee to a vacancy outside of his own seniority district. If the sort of systemwide seniority the Organization assumes in the instant claim existed, then the Carrier, under Rule 9, would be able to recall a furloughed employee to a position far from his home district at the risk of forfeiting his seniority rights if he could not or would not accept the position.

The Board finds, therefore, that the Organization failed to show either any authority for the Carrier to recall either the Claimant or Middleton to the Galesburg vacancy, or any entitlement by the Claimant over Middleton for such a position in a district in which neither had accrued seniority. The Carrier did not

**Form 1
Page 5**

**Award No. 37945
Docket No. MW-36897
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violate the Agreement when it assigned Middleton to fill the Galesburg vacancy at his request.

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.