

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38376
Docket No. CL-39200
08-3-NRAB-00003-050693
(05-3-693)

The Third Division consisted of the regular members and in addition Referee Robert E. Peterson when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Union (GL-13111) that:

1. The Carrier violated the terms of the clerks general agreement Rule 18 when it removed Sheldon Bertrand ID 535842 from seniority roster number 6 on August 4, 2004 without properly notifying Mr. Bertrand by U.S. Mail recalling him to service on janitor position 4Y18-202 located at Shelby, KY.
2. Mr. Bertrand did not receive a recall letter by mail or telegram notifying him of being awarded a position of Janitor 4Y18-202 at Shelby, Kentucky.
3. Claiming eight (8) hours straight time beginning August 5, 2004 and continuing each work day until violation is corrected and any health and welfare benefits that may have been lost because of this violation. This is a violation of the clerk's general agreement scope Rule 18, and any others that may apply.”

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.

In study of the record the Board finds several conflicting statements and omissions of necessary documentation during the handling of the claim on the property that make it difficult to pass judgment on certain aspects of the claim. The Board will, therefore, confine its decision to unrefuted statements as contained in correspondence and exhibits of record.

The claim as advanced involves a determination as to whether the Carrier violated Rule 18 of the Agreement when it unilaterally removed the Claimant's name from the seniority roster and terminated his employment relationship without notifying him in writing that he had been recalled to service from furlough, notwithstanding the Claimant had voluntarily bid for and been awarded a temporary vacancy on a position of Janitor at Shelby, Kentucky.

Rule 18, as relates to the claim, reads in part as follows:

"Employees failing to protect their seniority rights as provided in this Section (d) and those failing to return to service on the district from which 'cut-off,' within ten (10) days after being notified by mail or telegram sent to the last address given, will, unless prevented by sickness or other unavoidable cause or giving satisfactory reason for not doing so, forfeit all seniority rights, except as otherwise provided in this Agreement." (Emphasis added.)

Contrary to the Organization's contentions, the Carrier asserts that although the Claimant was on furlough, in submitting an actual bid on a bulletined position, and being awarded that position as the senior furloughed employee, the Claimant accepted responsibility for being available to report for work without written notice. Thus, the Carrier contends that by failing to report for the assignment that he was

awarded as the senior bidder, the Claimant was properly terminated pursuant to what it calls the self-executing provisions of Rule 3(f) of the Agreement, which states:

“Employees leaving the service without leave of absence will forfeit all seniority and, if they reenter, be considered as new employees except by agreement of the parties hereto.”

A bulletin advertising the Janitor position as a temporary vacancy, with a five-day workweek of Saturday through Wednesday, 4:00 P.M. to 12:00 A.M., issued under date of June 30, 2004. Although nothing of record shows Rule support for an employee on furlough having a right to bid for a position, it is undisputed that the Claimant requested his local Organization representative to submit a bid for the position on his behalf. When the bidding cycle closed on July 6, the Claimant was declared the senior bidder. A bulletin awarding the Claimant the position was posted on July 7, 2004.

Circumstances surrounding how and when the Claimant was notified to report for work to cover the Janitor position are not entirely clear. Carrier letters of record in denial of the claim state in part:

“When the claimant was contacted by phone and notified of his successful bid by both the Manpower Support Clerk and his TCU District Chairman, he immediately contacted Terminal Trainmaster K. R. Stewart at Shelby, KY requesting a leave of absence for personal reasons. Because of the needs of service, (the job had to be filled) – that leave of absence request could not be granted. There was no further contact between the Carrier and claimant Bertrand and claimant Bertrand never reported to the position. Later information developed that the claimant was employed at a local bank and was reluctant to give up that position to return to the CSX for a temporary assignment of indeterminate length.”

The Organization disputes the Carrier’s contention that the Claimant was notified of his being the successful bidder by the Manpower Support Clerk, albeit there does not appear to be a dispute that the Claimant was notified by the local representative of the Organization of such fact. The Board also finds it worthy of note that whereas the Carrier states that after being notified that he was the successful

bidder the Claimant "immediately" asked for a leave of absence, a letter the Carrier placed into the record from the Claimant requesting a leave of absence is dated July 28, 2004, or three weeks after the bulletin awarding the position was posted. This letter, addressed, "To Whom It May Concern," reads:

"This letter is to inform you of my request for a twenty nine day leave of absence. I would greatly appreciate your consideration in this matter, as it would be beneficial in waiting to see if a permanent position becomes available. My leave of absence will be effective as of July 28, 2004."

Nothing of record shows that a formal response was made to the Claimant's letter of July 28, 2004.

There is no question that a literal interpretation of Rule 18 requires that furloughed employees be notified in writing of a recall to service, and nothing of record shows this Rule or requirement to have been interpreted or applied to forgo such written notice for the purpose of filling a temporary vacancy. It must, therefore, be held that in not providing written notice of a recall to the Claimant, the Carrier violated Rule 18.

At the same time, it concerns the Board that Claimant requested and was permitted to place a bid for the temporary position and that he did not thereafter report for work upon being awarded the position without benefit of a formal recall. Certainly, there is some benefit to both the Carrier and its furloughed employees in permitting an employee on furlough to bid for a known temporary vacancy, as opposed to each time a temporary vacancy exists that senior furloughed employee be issued a recall letter that might require him or her to leave outside employment or risk the loss of seniority rights in a failure to return to service for an indeterminate length of time.

In the particular circumstances of record, the Board concludes that the Claimant should have his name and seniority date restored to the seniority roster. However, it being evident that by his own actions the Claimant was not available for work, we find that he is not entitled to compensation or health and welfare benefits as claimed. The Board also notes that the Claimant would be well advised to recognize that when and if he is again recalled to service, or a leave of absence

request is denied, he is required to return to active service, and that a failure to report without satisfactory reason for not doing so may be viewed as cause for a termination from service.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 21st day of December 2007.