Award No. 12092
Docket No. MW-11401

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when, on July 12, 13, 14, 15 and 16, 1958, it used an extra gang from Seniority District No. 8 and a yard gang from Muskogee to perform service on Seniority District No. 7 and failed to call and use Section Laborers L. L. Nichols, R. C. Wilkins and F. L. Schumaker who held seniority on and were furloughed from Seniority District No. 7.

(2) Section Laborers L. L. Nichols, R. C. Wilkins, and F. L. Schumaker each be reimbursed for the exact amount of monetary loss suffered account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Claimant employes each hold seniority as a Section Laborer on Seniority District No. 7 and, as of the dates here involved, were each in furloughed status and had protected and retained their seniority rights in full conformity with Agreement rules.

Because of a derailment and high water between Vinita, Oklahoma and Welch, Oklahoma (on Seniority District No. 7) the Carrier had need for additional employes to augment the regular track forces then working on Seniority District No. 7.

Each of the Claimant employes was available, ready, and willing to be recalled to perform this necessary service on Seniority District No. 7, but **no effort whatever was made to call them.** Instead of recalling the Claimants to perform the necessary service on their seniority district, the Carrier used an extra gang and a yard gang from another seniority district, despite the fact that each of the claimant employes was much more readily available for this service than were the extra gang and the yard gang from a foreign seniority district.

and each of them, respectfully request the Third Division, National Railroad Adjustment Board, deny said claim and grant said Railroad Companies, and each of them, such other relief to which they may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier objects to the jurisdiction of the Board to hear and determine this claim because it was not filed within the time limits of the National Agreement of August 21, 1954.

The Petitioner filed a letter within the time limit which stated that it intended to file an ex parte submission within 30 days of the date thereof.

This Board has held that the filing of the Employes' "Notice of Intention" is in compliance with the National Agreement. See Award 11665 and awards therein cited. Carrier's plea to bar the claim is therefore denied.

Carrier also objected to the jurisdiction of this Board on the ground that the Employes failed to notify the representative of the Carrier within the time limit that they had rejected his decision, as required under Section 1(b) of Article V of the National Agreement.

No objection was raised on this question by the Carrier during the handling of the claim on the property. This is a procedural rule which the parties may waive and the Carrier must be deemed to have waived it. It may not be raised for the first time in a submission to this Division. See Awards 10195, 11848, 11752, 11735, 11731, 11665 and 11570. The Carrier's plea to dismiss on this procedural question is therefore denied.

The facts of this claim are not in dispute. The Carrier needed to augment its track forces to repair a roadbed weakened by a flash flood which caused a derailment. It called in track forces from another Seniority District without notifying or recalling 3 furloughed Section Laborers who held seniority in the district.

Carrier relies on Rule 4, Article 3 which provides:

> "Rule 4. Vacancies or new positions of section laborers of twenty (20) days or less duration will be considered as 'temporary' **and may be filled without regard to seniority rules. When practicable to do so in the judgment of the railroad,** furloughed section laborers holding established seniority rights on the Roadmaster's district concerned **will be used** for 'temporary' work." (Emphasis ours.)

Rule 5 defines "When practicable" that it

> ". . . shall be construed as requiring the use of furloughed laborers **when such laborers report at the point where temporary work is available.**" (Emphasis ours.)

The Carrier argued that since the work was temporary, of less than 20 days duration, the positions could be filled without regard to seniority rules, and that since the Claimants failed to report at the point where the temporary work was available, the Carrier was under no obligation to use them.

The Carrier's interpretation of the rules is much too narrow and literal. Rules must be interpreted in the light of the whole agreement, else how could the intentions of the parties be ascertained?

The intention of the parties must govern any interpretation we place upon their words,—for an agreement would be an exercise in futility if the intention of the parties was disregarded. Rules 4 and 5 do not stand separate and apart from each other. They relate to each other and to the other rules and articles of the Agreement. If we search more deeply into these rules, we see that they did not mean that seniority should be disregarded in filling a temporary position. The word used was "may", which implies permission, not a requirement, that seniority be disregarded. Had the parties wished to make it absolute they would have used words to make it mandatory rather than permissive. They would have said "shall be filled without regard to seniority rules".

If they made it permissive, did they intend that seniority be applied or ignored by whim or caprice of the Carrier? Obviously not, because in the next sentence it was made to depend on "practicability". We may not be able, in advance, to prescribe when a situation is or is not practicable, but generally most would agree that the rule of reason would apply.

The parties went on to say, in effect, "We will not quibble or quarrel about practicability, or reasonableness. We will rely on the judgment of the Carrier." But, for fear that this was too much faith in the Carrier's judgment, they provided that neither judgment nor practicability nor permission would apply if the men showed up at the site. When they did, seniority rules applied and it was made mandatory.

The second sentence of Rule 4 goes on to say that senior furloughed section laborers will be used, when practicable. This is a promise and it imposes an obligation on the Carrier to use good faith in deciding if it is practicable to use them. Again, the parties have, in effect, said that the use of senior men will not depend on caprice, but on reason.

These rules, read carefully, reveal the intention of the parties. Seniority was not abolished on temporary jobs, but merely relaxed to permit the Carrier to correct emergency and short run needs without being tripped up by technical violations of seniority. It would permit them to use men at hand when speed was required or when the delay in reaching men on the seniority roster made it impracticable, or until they could be notified.

Read this way, the rules require the Carrier to notify the next senior men, just as they are required to do when recalling men on other assignments. We note that Rule 4 requires laborers to keep the foreman of their gang up-to-date as to their addresses, so that they may be reached if the need arose.

In this case, the Carrier completely disregarded the senior men; it exercised no judgment as to the practicability of using them and failed to give them notice so that they might have the opportunity to show up at the point where the temporary work was available, contrary to the intention of the parties as expressed in their Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of January 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12092 DOCKET MW-11401

Rules 4 and 5, Article 3 of the applicable agreement are clear and unambiguous in expressly authorizing carrier's action in this case. No rules of the agreement requires carrier to notify furloughed employes under the existing circumstances.

To impose such an obligation on this carrier amounts to writing a new rule under the guise of interpretation contrary to the sound awards of this Board.

For these and other reasons we dissent.

W. M. Roberts

G. L. Naylor

R. A. DeRossett

R. E. Black

W. F. Euker