NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22672
Docket Number MW-22468

THIRD DIVISION

James F. Scearce, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Chicago, Milwaukee, St. Paul and Pacific
(Railroad Company

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

(1) The Carrier violated the Agreement when it failed to recall furloughed Laborer A. M. Lemrise to service on July 5, 1976 (System File C#69 - Illinois/Case No. D-1989).

(2) The claim* as presented by the General Chairman on August 9, 1976 to Roadmaster J. D. Burshiem shall be allowed as presented because said claim was not disallowed by Roadmaster J. D. Burshiem in accordance with Rule 47 1(a).

(3) For the reasons set forth in either or both (1) and (2) above, Laborer A. M. Lemrise be compensated at his applicable rate for all time lost from July 5, 1976 through August 6, 1976.

*The letter of claim will be reproduced within our initial submission."

OPINION OF BOARD: Claimant was a track laborer with in excess of three years service when he was furloughed on November 25, 1975. The record shows that, pursuant to the provisions of Rule 10, the Claimant submitted a notice to the Carrier on that date and again on May 20, 1976, so as to maintain his name on the seniority roster for recall. According to the Claimant's section foreman, he contacted the Claimant prior to June 1, 1976 and advised him of a vacancy to be covered during a vacation absence. According to this supervisor, the Claimant declined, indicating an interest only if such job opportunity were of a permanent nature. This same supervisor asserts he endeavored to contact the Claimant on July 3 relative to a machine operator position; the Claimant was not there and the foreman talked, instead, to his aunt who indicated that the Claimant was working, was not at home and was doubtful that the Claimant would be interested. Per the foreman, he advised the Claimant's aunt to have the Claimant contact him before July 5, at which time he would go on vacation himself. Failure of the Claimant

to do so before that time was the basis, according to the foreman, for the hiring of a new employe to fill the machine operator post.

According to the Claimant, he had taken a job after being furloughed when he found unemployment compensation was insufficient. While affirming that he preferred a permanent job, the Claimant asserts he never had the opportunity to decline the offer to cover the vacation vacancy because - in direct contrast with the foreman - he was never contacted by him in May. As to the July 3 call, the Claimant was advised of the foreman's call upon his return after the holiday and, after trying unsuccessfully to reach him, contacted the agent at the depot instead. Only upon the foreman's return did he learn of the hiring of the new employe. By subsequent agreement the Claimant was returned to work, but denied pay for the period of the Claim herein.

We are obliged to try to determine the validity of this claim where there is substantial differences in the accounts of the facts of the Claimant and the foreman. It is beyond this Board's ability to divine which account is correct; indeed, it is not our obligation to do so. The case in its entirety turns on certain events prior to June 1, when the foreman asserts contact with the Claimant took place relative to coverage of the vacation vacancy, a conversation which the Claimant disavows ever happened. Per the Carrier, failure of the Claimant to accept this assignment negated any official obligation for further employment offerings. It is noted from statements by the Claimant that he and the foreman purportedly spoke periodically when the Claimant would call inquiring about the job situation. It is feasible that the two misinterpreted the purpose of a call prior to June 1, but that is speculative in nature. What is clear, however, is that the Claimant filed a notice required under Rule 10 to maintain his seniority rights as recently as May 20, 1976. Essentially, we look to the Claimant's letter of May 20, 1976 as the last measurable event; thereafter the actions of both the Claimant and foreman are beyond substantiation.

We shall not, however, afford the Claimant an opportunity to reap any windfall; the Carrier is directed to compensate the Claimant at the appropriate rate for regular hours during the period in question, less any and all compensation he may have received from any other sources during that period.

As we have decided the case on its merits, it is not necessary to pass upon the procedural issues raised.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

The Agreement was violated to the extent indicated in the Opinion.

A W A R D

The Claim is sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1979.