

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Soo Line Railroad Company

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

(1) The Agreement was violated when the Carrier recalled junior Ballast Gang Laborer K. Lemer instead of Ballast Gang Laborer W. M. Townsend to work on the Z-15 Ballast Gang in the vicinity of Kenmare, North Dakota effective August 19, 1986 (System File R335 #0795T/800-46-B-274).

(2) As a consequence of the aforesaid violation, Claimant W. M. Townsend shall be reimbursed for all straight time and overtime wage loss suffered beginning September 22, 1986 and continuing through November 4, 1986 and he shall have all vacation, fringe benefits and other rights restored."

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 employees 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 waived right of appearance at hearing thereon.

On November 21, 1986, the Organization presented a Claim for the Claimant who holds seniority as an Extra Gang Laborer in the Western Region dating from April 25, 1977. The junior employee has a corresponding seniority date of May 28, 1978. Prior to the time this dispute arose, both the Claimant and the junior employee were laid off from the Soo Line System Western Region Seniority District No. 4. The Organization contends that on August 19, 1986, unbeknownst to Claimant, Carrier recalled the junior employee to work as an Extra Gang Laborer on Ballast Gang Z-15 headquartered near Kenmare, North Dakota. At that time, there is no dispute that Claimant was working on a temporary position for the Chicago, Milwaukee, St. Paul & Pacific Railroad.

Claimant was subsequently furloughed from the Milwaukee Road and he contacted Carrier on September 29, 1986. According to the Organization, he spoke with the Carrier Supervisors in an effort to exercise his rights in his home seniority district. The Organization alleges that Claimant was informed, incorrectly, that there were no junior employees working on the Soo Line System. In fact, several other employees junior to Claimant were employed in the Z-15 Ballast Gang, the Organization maintains, until November 4, 1986, when the Gang was abolished.

The Organization advances two reasons in support of its contention that this Claim should be sustained. First, it asserts that Carrier should have properly notified the Claimant of his recall on August 19, 1986 in accordance with Rules 4(e) (h) and 8(h) which state:

"RULE 4 - Seniority

* * *

- (e) Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service as hereinafter provided.

* * *

- (h) Seniority rights of extra gang laborers employed in large extra gangs of 35 men or over shall extend over the system but confined to extra gangs. Seniority rights of extra gang laborers employed in small extra gangs of less than 35 men shall extend over districts outlined in paragraph (p) of this rule, but confined to extra gangs only. Seniority of such employees shall not apply until in service for one year."

* * *

"RULE 8 - Force Reduction and Increase

* * *

- (h) When forces are increased or vacancies occur, furloughed employees shall be returned and required to return to service in the order of their seniority rights, except as otherwise provided in this rule. Furloughed employees failing to return to service within 7 days after being notified in writing, or failing to give satisfactory reason for not doing so, will be considered as out of the service."

Second, the Organization contends that when Claimant contacted the Carrier in an effort to exercise his displacement rights, he was misinformed and deprived of an opportunity to work as a ballast gang laborer in violation of Rules 5(c) and 8(g) which read:

"RULE 5 - Seniority Rosters

* * *

- (c) Names of sectionmen will not be included on the seniority roster until they have acquired cumulative seniority in excess of 60 days. Sectionmen accumulating in excess of 60 days' seniority will notify their superior officer in writing at least 30 days before the seniority roster is posted, which will be acknowledged. When entered on the roster, they will be credited with seniority rights from the date of first entrance into this service, providing they have complied with Rule 8 (k)."

* * *

"RULE 8 - Force Reduction and Increase

- (g) Furloughed sectionmen will have the right to displace junior laborers in extra gangs when such extra gangs are working on their seniority districts.

When seasonal extra gangs are used sectionmen will have the privilege of working in such extra gangs if they so desire. Sectionmen working in extra gangs will be paid the same rate of pay as paid other extra gang employees."

The Carrier makes a number of procedural objections to this Claim which we will consider at the outset. These involve such matters as the Claim is vague and indefinite; it is not specific; and not timely filed within the rule requirements. We find no merit to these procedural objections. In our view, the Statement of Claim is sufficiently precise so as to vest this Board with jurisdiction and any question as to the precise time pertinent to this dispute is ascertainable from Carrier's records. Moreover, our review of the correspondence during the handling of this dispute on the property reveals that timeliness issues were never raised at that level, and therefore they are now deemed waived. Third Division Awards 19722, 14879, 16061, 16423, 26733.

On the merits, Carrier submits that Rule 8(a) clearly obligated the Claimant to make inquiry of the proper Carrier officer with regard to prior employees working. That rule states as follows:

- "(a) When a position that has existed over thirty days is to be abolished, not less than 5 working days notice will be given to regularly assigned employees affected except as provided for in paragraphs (b) & (c) of

this rule. An employee whose position has been abolished, who desires to exercise displacement rights in accordance with paragraph (d) of this rule, must notify the proper officer and the employee who is to be displaced at least 48 hours in advance of the date on which he wishes to displace. The same procedure must be followed by displaced employees wishing to exercise displacement rights."

Here, Carrier notes that the proper Carrier officer was the roadmaster in the seniority sub-district. Claimant had the burden of determining if employment was available, and he did not meet that burden. With reference to the recall issue, Carrier argues that the gang in question commenced on August 19, 1986, and Claimant was not called to work at that time because he was already working. For all these reasons, Carrier submits that the Claim must be denied in its entirety.

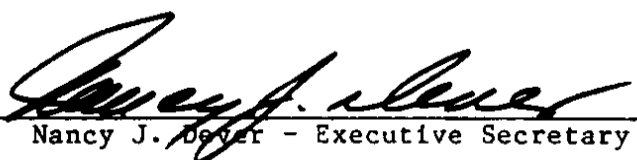
Based on our review of the record, it is clear that the instant Claim raises two separate and distinct issues. The first is an asserted recall violation, which occurred on August 19, 1986, when Carrier recalled the junior employee. The second asserted violation involved Carrier's failure to allow displacement when Claimant contacted Carrier on September 29, 1986, in an effort to exercise his seniority in his home district. In our view, the recall violation is determinative of this case and obviates the need for any finding on the question Carrier failed to allow Claimant's displacement. Under Rule (h), Carrier is obligated to recall employees in seniority order. Carrier's only justification for its failure to recall the Claimant to the bal-last gang laborer position was that he was already working. However, we do not deem Claimant's availability to be decisive. The obligation was upon the Carrier to recall the Claimant by notifying him at the address he submitted when furloughed on the Soo Line. Having received proper notification, it then would have been Claimant's decision whether or not to accept the recall. Absent a showing by the Carrier that the Claimant somehow waived his right to recall, Carrier's assertion that it need not notify Claimant of a work opportunity must fail for lack of evidence. We shall therefore rule to sustain the Claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of October 1990.