Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29264
Docket No. MW-28471
92-3-88-3-268

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 Employes
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(Missouri-Kansas-Texas Railroad Company

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

(1) The Agreement was violated when the Carrier assigned District No. 3 employe L. G. Smith instead of furloughed District No. 4 employe M. Flores to work on District No. 4 from February 9 through March 18, 1987 (System File 300-35).

(2) As a consequence of the aforesaid violation, Mr. M. Flores shall be compensated for all wage loss suffered beginning February 9 and continuing through March 18, 1987."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

Beginning January 19, 1987, several furloughed Maintenance of Way employees were recalled in seniority order to active service, subject to satisfactorily completing the return-to-service physical examination. Two senior furloughed Maintenance of Way employees, M. W. Heard and C. R. Pennington, were given return-to-service physicals on January 27 and February 2, 1987, respectively. Both employees tested positive on drug screen tests, and therefore Carrier ordered a second set of tests. Subsequently, on February 17, 1987, the Carrier's Medical Director disapproved M. W. Heard and on February 27, 1987, C.R. Pennington was disapproved for return-to-service due to positive drug tests results.

On February 21, 1987, Carrier sent the Claimant a notice of recall. He reported to the Medical Examiner for a return-to-service physical on February 25, 1987. The Medical Director approved the Claimant for return-to-service on March 12, 1987. Claimant returned to work on March 19, 1987.

During the recall process, a floating extra gang moved onto Seniority District No. 4, and Track Laborer L. G. Smith, who has seniority on District No. 3, was assigned to temporarily fill a track laborer's vacancy pending the return-to-service of Seniority District No. 4 furloughed employees. The Organization contends that Carrier acted improperly and in violation of Article 3, Rule 3 in assigning Mr. Smith, who holds no seniority on District No. 4, rather than the Claimant, who has established seniority on District No. 4, to perform the subject work. The pertinent portion of Article 3 states, inter alia:

> "Rule 3. Seniority rights of employes, except those with system seniority as provided in Rule 2, Article 3, will be restricted to Seniority Districts as outlined below ...."

The Organization argues that it is a well-established principle that work within a specific seniority district must be reserved for employees holding seniority therein, and that work cannot be removed from the confines of one seniority district and placed in another. Carrier cannot disregard Agreement rules, nor can it issue administrative requirements or operating rules contrary to the provisions of the Agreement, the Organization stresses. Claimant was available and would have filled the District No. 4 track laborer's position on February 9, 1987, had he been recalled to service in a timely manner, and therefore, the Organization submits, he should be made whole as a result of his lost work opportunity.

Carrier contends, first, that the instant claim is untimely and should be dismissed. Second, Carrier maintains that even if the claim is considered on its merits, there has been no proven violation of the Agreement so as to warrant a sustaining award. Carrier argues that Claimant had no right of recall until the more senior employees were disqualified; that Carrier acted properly in recalling furloughed employees in accordance with seniority; and that the return-to-duty physicals are a necessary process by which Carrier can determine which employees are medically fit to return to work.

After careful review of the record in its entirety, the Board at the outset finds that Carrier's timeliness argument is not properly before us for consideration, as it was never raised during the handling of this dispute on the property. It is so well-established as to preclude the necessity of citation that such procedural objections must be set forth in a timely fashion before submission of the dispute to this Board or the objections are deemed waived.

Turning to the merits, we are not persuaded that the Organization has met its burden of proving that the Carrier violated the Agreement in the instant case. Carrier has the right to determine an employees' fitness-for-duty. Third Division Awards 21344 and 20652. Further, Carrier can require examinations so long as such a requirement is not based upon arbitrary or capricious reasons. Third Division Awards 26249, 25634. In this case, the Organization does not dispute that furloughed employees were senior to the Claimant, nor does the Organization directly challenge the Carrier's right to require physicals prior to return to duty. Instead, the Organization characterizes as a "bunch of bull" the Carrier's time frame in ordering the physicals, essentially arguing that there was ample time prior to the recall to advise the senior employees that they had failed their physical examination, thereby enabling Claimant to return to work in a more expeditious fashion. However, as Carrier explained during the handling of this dispute on the property, when vacancies exist, that number of senior furloughed employees are contacted for return-to-service physicals. If someone fails the physical, then the next senior furloughed employee is called, and so on. Clearly, if recall were not handled in this manner, there would be a justifiable basis for asserting that a junior employee was physically approved and returned to work before a senior employee. We can discern no bases for a finding that Carrier's actions were arbitrary or capricious when the aforementioned factors are considered.

The Organization has also relied upon Claimant's seniority rights in the District, asserting that it takes preference to assigning work to employees whose seniority did not entitle them to perform it. Reliance on the part of the Organization on the two Awards cited in support of the Organization's positions is misplaced, however. In both Third Division Award 28270 and Public Law Board 1844, Award No. 82, there was a claimed emergency and Carrier called in employees whose seniority did not inure in that district. In those cases, unlike here, senior furloughed employees in the district were not recalled, precipitating both claims. This matter has a different factual underpinning. Senior furloughed employees were recalled; it is the sequence and timing which is really the gravamen of the Organization's claim. There being no contractual support for the Organization's argument that Carrier was required to assign Claimant to work on District 4 during the time period beginning February 9, 1987, we rule to deny this claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of June 1992.