

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29852
Docket No. MW-29570
93-3-90-3-517

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance
(of Way Employees
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier recalled junior employe C. Carey instead of Mr. J. K. Hackworth to fill a Class 2 Machine Operator position on Switch Timber Gang No. 2 at Columbus, Ohio effective May 30, 1989 (System Docket MW-633).

(2) As a consequence of the aforesaid violation, Mr. J. K. Hackworth shall be allowed thirty (30) hours of pay at the Class 2 Machine Operator's rate."

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 employe 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.

This dispute pivots on the principle of seniority as it applies to two furloughed employees. Claimant has a Class 2 Machine Operator seniority date of September 15, 1976. The junior employee has a Class 2 seniority date of April 7, 1978.

Two Class 2 Machinist positions were reestablished May 30, 1989, at Columbus, Ohio, (later the headquarters were moved to Middletown, Ohio). Carrier maintains that on May 25, and again on May 26, 1989, the Assignment Clerk attempted to telephone the Claimant to advise him of the aforementioned positions. Carrier alleges that the telephone number Claimant had supplied the Carrier had been disconnected, and when the Assignment Clerk attempted to ascertain the correct phone number, the phone company advised the Clerk that Claimant's number was unlisted. Carrier then contacted a junior employee who accepted the vacancy and commenced work on May 30, 1989. Shortly thereafter, Claimant was contacted and was ordered to report to work June 2, 1989.

The Organization submitted a claim for 10 hours pay for May 30, 31, and June 1, 1989, stating that when Carrier did not recall Claimant, it violated Rule 3, Section 4 of the current Agreement. Further, Organization contended that Claimant should have been recalled by certified letter rather than by phone. In correspondence dated August 11, 1989, the Division Engineer denied the claim, stating that it "did exhibit a diligent effort" to contact Claimant; but due to his failure to provide a current phone number, Carrier was unable to contact him, and therefore, contacted the junior employee. Carrier further provided a copy of the Assignment Clerk's call sheets in defense of its position.

Rules pertinent to the instant dispute are as follows:

"(c) Furloughed employees desiring to protect their seniority will keep their correct address on file with the Company and the General Chairman."

"Section 3. Return to service

An employee not in service will be subject to return to work from furlough in seniority order in any class in which he holds seniority in his working zone (either divisional or inter-regional). If he fails to return to service within ten (10) days from date notified by certified mail to his last recorded address for a position or vacancy of thirty (30) days or more duration, he will forfeit all seniority under this Agreement. Forfeiture of seniority under this paragraph will not apply when an employee furnishes satisfactory evidence to the officer signatory to notification that failure to respond within ten (10) days was due to conditions beyond his control. Copy of recall letter shall be furnished the designated union representative. An employee who declines in writing within this ten (10) calendar day period to accept recall to an Inter-Regional Unit shall only forfeit all Inter-Regional seniority."

"RULE 3 - SELECTION OF POSITIONS

Section 4. Filling temporary vacancies.

(a) A position or vacancy may be filled temporarily pending assignment. When new positions or vacancies occur, the senior qualified available employees will be given preference, whether working in a lower rated position or in the same grade or class pending advertisement and award.

When furloughed employees are to be used to fill positions under this Section, the senior qualified furloughed employees in the seniority district shall be offered the opportunity to return to service. Such employees who return and are not awarded a position or assigned to another vacancy shall return to furlough status."

For its part, the Organization stated the following:

1. preference for temporary vacancies must be given to the senior qualified employee;
2. any recall of employees not in service must be in seniority order by mail;
3. the Carrier's "telephone" defense is fallacious, irrelevant, and invalid; and
4. the Claimant is entitled to reparations as claimed.

The Organization asserts that Rule 3, Section 4 specifically stipulates that when furloughed employees are to be used to fill positions under this Section, the senior qualified furloughed employees in the seniority district shall be afforded the first opportunity to return to service. It is undisputed that the Claimant possessed superior seniority in the Columbus Seniority District. Further, the Organization stated that "even if the Carrier's alleged attempt to telephone the Claimant were true," such does not satisfy the Carrier's contractual obligation with respect to the recall of furloughed employees. The Organization asserts that when employees are placed on furlough and desire to protect their property right of seniority, they do so by keeping their correct address on file with the Carrier in accordance with Rule 4, Section 2(c). In a letter dated November 14, 1989, the General Chairman stated the following:

***This rule does not discuss recall by telephone.
The Claimant should have and could have been recalled by

certified mail. The call sheet states that attempts were made to call the Claimant by phone on May 25, and 26, 1989 for a position effective May 30, 1989. This means the Carrier could have mailed him a letter on May 25, 1989, and there would have been 4 days plus Sunday in which he would have had time to receive the letter."

In conclusion, Organization stated that "a sustaining award is required to protect the Claimant's seniority, compensate his lost work opportunity and protect the integrity of the Agreement."

For its part, the Carrier points to Rule 3, Section 4 asserting that there was no formal recall involved with the filling of the temporary vacancy, therefore, there is no contractual provision which would require the Carrier to delay the filling of such vacancy by utilizing formal notification procedures. Further, according to the Carrier, a furloughed employee is not required to accept temporary vacancies in order to protect his seniority, and there is no requirement for a furloughed employee to respond to a telephone call or a letter in connection with temporary vacancies. For these reasons, Carrier asserts the claim is without merit, and requests that same be denied.

The proper application of Rule 4, Section 2(c) of the Agreement is dictated by the clarity of the language of the provision. Only if the language is unclear or ambiguous may this Board look to other standards to discern the unwritten "intent" of the parties concerning the meaning of the Rule at issue.

The language of Rule 4, Section 2(c) is neither unclear nor ambiguous. By specifically enunciating the conditions under which a furloughed employee protects his seniority under any circumstance, the parties have implied that other forms of communication were not deemed acceptable. This follows from application of the well-established principle of contract interpretation which holds: *expressio unius est exclusio alterius* [to express one thing is to exclude another]. *Great Atl. & Pac. Tea Co.*, 46 LA 372 (Scheiber, 1966).

While it is certainly conceivable that instances may arise in which the Carrier requires an immediate response from a furloughed employee, this does not seem to be such an instance. Further, had the parties meant to make allowances for such instances, they would surely have done so at the bargaining table. For the foregoing reasons, this claim must be sustained.

A W A R D

Claim sustained.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: *Catherine Loughrin*
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.