NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 THIRD DIVISION Award No. 29961

Docket No. SG-30612

93-3-92-3-389

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Illinois Central Railroad

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the IC Railroad:

Claim on behalf of T.L. Kuhns, for payment of 'Reasonably Continuous Employment' from April 5th, through April 21st, 1991, account of Carrier violated the current Signalmen's Agreement, as amended, particularly Rule 21(a), when it furloughed him prior to the three month period of continuous service." Carrier's File No. 135-692-1 Spl. Case No. 48. BRS Case No. 8547.ICG.

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.

Claimant was recalled from furlough status under the provisions of Rule 21, and reported for work on January 21, 1991. On April 5, 1991, Claimant was displaced from the position he had been working, and because he had insufficient seniority to displace another employee, he was furloughed at that time. The Organization contends that under Rule 21, Claimant was recalled for "reasonably continuous employment," which the Agreement defines to mean "a period of not less than three months." Inasmuch as he was furloughed before the expiration of this three month period, he is entitled to be compensated for the balance of workdays within that period, it is argued.

While Carrier made a variety of arguments while this matter was being handled on the property, before this Board it argues that Rule 21 does not provide a guarantee of three months employment when an employee is recalled. Carrier argues that the Organization is seeking to have the Board read the Agreement in a manner that would provide that recalled employees could not be furloughed within three months of the time of recall. It maintains that the Rule does not contain specific language providing such a guarantee, and none can be read into its text.

Further, Carrier notes that while the Rule specifically penalizes an employee who does not return with a forfeiture of seniority, it does not impose any penalties upon the Carrier. It argues that when one penalty is included within a Rule, all others not mentioned must be excluded.

Also, Carrier contends that even if the Rule could be read to impose some type of guarantee, none would be applicable in this case because Claimant was not furloughed because of a lack of work. Instead, he was displaced by another employee. The Rule defines "reasonably continuous employment" as available employment enjoyed by the regular assigned work force and Carrier notes that the regular work force is still in existence. Carrier points out that it has no control over many causes of displacements. Employees could be returning from sick leave, vacations, reinstated after dismissal, etc. Therefore, if the regular work force continues after an employee is displaced and cannot get another job because of his limited seniority, the employment for which he had been recalled is still reasonably continuous. In this case, Carrier points out, the regular position Claimant was recalled for, continued after he was again furloughed.

Finally, Carrier argues that the Organization is pursuing other claims that furloughed employees were not being recalled in instances where the recall would have encompassed durations far less than three months, one covering work that lasted but two and one-half hours. Carrier argues that the pursuit of these claims is an admission that the Organization does not read into Rule 21, that which it is seeking in the instant claim.

Rule 21 of the Agreement provides in part:

"Rule 21 INCREASE IN FORCES

(a) Employees furloughed as a result of force reduction who retain their seniority as provided in Rule 19 (c) will be recalled to service in the order of their seniority to fill

> vacancies or new positions for which no bids are received. Employees must return to service within 10 days from the date the company advises them in writing of reasonably continuous employment being made available. Furloughed employees failing to return to service within 10 days after being notified of reasonably continuous employment being available will forfeit their seniority and will be considered as having resigned from the service unless a leave of absence has been previously granted.
>
> NOTE: 'Reasonably continuous employment' as used in this agreement shall be understood to mean that full time employment is available, as enjoyed by the regular assigned forces, for a period of not less than three months."

Rule 21(a) and the note require that furloughed employees accept recall to fill vacancies or new positions for which no bids are received and that they must return to service for reasonably continuous employment or forfeit their seniority. Employees have to decide to return to service, or they are considered to have resigned. Carrier, when effecting a recall under the Rule, has an obligation to make available "reasonably continuous employment." "Reasonably continuous employment" is specifically defined as full time employment, as enjoyed by regular forces, for not less than three months. If Carrier does not provide "reasonably continuous employment" then it is not fulfilling its obligation under the Rule, to the recalled employee.

Carrier cannot be excused from providing "reasonably continuous employment" to the recalled employee on the grounds that the regular assigned work force continued to work after Claimant was laid off, as argued, because the provision in the Note to the Rule, defining "employment available" as "enjoyed by the regular assigned forces," pertains to the definition of what constitutes "full time employment," and not to the availability of "full time employment" to the recalled employee. Carrier's interpretation is simply nonsensical.

The Board also finds Carrier's arguments misplaced when it suggests that the Rule penalizes an employee for a failure to accept recall, thus it cannot penalize Carrier, because only one penalty is provided and no others can therefore be considered. The seniority forfeiture aspect of the Rule is not a typical contract penalty, usually found in situations where the parties to an agreement express performance expectations, and if one party or the other fails to meet the expressed expectations a penalty is provided. Instead, what the Rule does, is it tells a furloughed employee, you have a choice to make, you have an option to exercise, - return to service within ten days after recall for "reasonably continuous employment" or you will forfeit your seniority and be considered to have resigned. However, once an employee exercises the option to return to service for "reasonably continuous employment," as defined in the Note, he is entitled to participate in all benefits the Agreement conveys upon this employment, wages, holidays, vacations, etc., including an expectation to work full time for the minimum period agreed upon, three months.

Carrier agreed that when an employee is recalled he will be recalled for "reasonably continuous employment." "Reasonably continuous employment" has been defined by the Note to the Rule to be a "period of not less than three months." Carrier, by agreeing to the Rule and the Note agreed to provide this minimum level of employment to employees recalled. When it fails to do so, the Rule is violated and when an employee is worked less than three months he is entitled to be made whole for wage losses incurred. Carrier cannot be relieved of this obligation on the argument that the only penalty provided in the Rule is a seniority forfeiture.

The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 17th day of December 1993.