Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35436
Docket No. MW-33119
01-3-96-3-543

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when, by bulletins effective July 11, 1994, the Carrier recalled and assigned Messrs. K. L. Feagin, T. E. Daum and H. C. Immekus to positions by automatic bid instead of allowing them to remain on positions they were assigned to when recalled (System Docket MW-3869).

(2) As a consequence of the aforesaid violation, Messrs. K. L. Feagin, T. E. Daum and H. C. Immekus shall each be:

'. . . permitted to return to their former positions. Until such time as so allowed, the carrier must assume liability for any lost wages including overtime attributed to this improper assignment. Due to the continuing nature of this violation Rule 26(f) must be invoked. Additionally, all lost wages and/or credits normally due must be allowed. ***"

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 employee 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 were given due notice of hearing thereon.

The basic facts are not in dispute. Claimants Immekus and Feagin had been furloughed in the fall 1993. Claimant Daum was furloughed on April 20, 1994. All three had been working in various temporary vacancies immediately prior to the claim arising. The Organization maintains the violation began on July 11, 1994. On June 27, 1994, the Carrier advertised Trackman Operator positions that were available to Claimants' seniority. None of the Claimants chose to bid on the vacancies. The Carrier, however, deemed them to be automatic bidders per Rule 3, Section 3, which reads, in pertinent part, as follows:

> "(c) . . . Each furloughed employee shall be an automatic bidder for advertised positions for which he has seniority and is qualified in his working zone, . . ."

On July 7, 1994, the Carrier issued notice that all three Claimants were awarded advertised positions effective July 11, 1994.

The Organization's position is that the Claimants were not "furloughed" during the relevant time frame and should not have been deemed automatic bidders. The Organization noted that the Claimants understood the perils of passing up the advertised position in favor to working only on temporary vacancies.

The Carrier, on the other hand, maintains that the Claimants were properly treated as automatic bidders. It is undisputed that none of the Claimants were incumbents of permanent positions at the time the claim arose. The Carrier contends that the Organization's view of the relevant Rules is illogical and could lead to having senior employees in furloughed status while junior employees held advertised permanent positions.

After careful review, two observations are warranted. Overall, the cited portions of the parties' negotiated Agreement language are not a model of clarity as they relate to the instant dispute. Secondly, the provisions are devoid of precise guidance for their application to the facts at hand. Although both parties provided their views on the intent of the language, neither presented any evidence of bargaining history to resolve their conflicting assertions.

The Carrier's interpretation of the applicable provisions is very plausible as well as rationally consistent with the customary administration of traditional seniority systems. Unfortunately for the Carrier, however, the explicit words of the cited provisions rather clearly favor the Organization's position. For examples, Rule 4 (Seniority), Section 3, provides that an ". . . employee not in service will be subject to return to work from furlough. . . ." In addition, Rule 3 (Selection of Positions), Section 4 (Filling temporary vacancies), contains the following significant language:

> "(a) . . . 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." (Emphasis added.)

In addition to the foregoing, the arguments upon which the Carrier bases its position are not supported by its Ex Parte Submission. Beginning with Exhibit 5a, the Award exhibits cited in the body text do not correspond with the actual exhibits supplied. It is not merely a numbering error. Instead, an entirely different set of exhibits was attached.

Despite the intuitive logic of the Carrier's approach, the governing Rule language appears to support the Organization's position that one who is working, even in a temporary vacancy, is not furloughed within the meaning of the automatic bidding provisions of Rule 3, Section 3.

Notwithstanding the foregoing conclusion, the Rules do not describe with precision the point in time that the status of a given employee is to be ascertained for purposes of automatic bidding. For example, is the employee's furlough status to be determined as of the date of the advertisement? On this record, there is no evidence that any of the Claimants were working in temporary vacancies on June 27, the advertisement date. If this date is the magic trigger date, then all three Claimants were in furlough status on that date. Accordingly, the Carrier properly deemed them automatic bidders. Thus, their awards did not violate the Agreement.

If, however, the magic date is some other date, we have divergent results. If the magic date is the date of the Carrier's notice, which was July 7, all three Claimants were working temporary vacancies on that date. Hence, none of them was in furloughed status that date. Treating them as automatic bidders would, accordingly, violate the Agreement.

If the effective date of the awards is the magic date, then we have yet a third result. On July 11, the record shows only Claimant Feagin to have been working. Thus, only he might have a valid claim.

Establishing with certainty the precise date upon which the Claimants' furlough status was to be determined is an essential element of the claim. It is well settled that the Organization bears the burden of proof to establish this element. On this record, for the reasons just discussed, we must conclude that the Organization's burden has not been satisfied.

One remaining observation relates to the remedy. The record shows none of the Claimants to have been in line to work temporary vacancies after July 11. Accordingly, there is no proper basis concluding any of the Claimants have been harmed by being returned to service in advertised positions.

Given the foregoing discussion, we must deny the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of April, 2001.