Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35959
Docket No. MW-34789
02-3-98-3-501

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier recalled junior Sectionman R. L. Trulson, instead of senior furloughed Sectionman L.G. Fliflet, to fill a temporary vacancy on January 23, 1996 and continuing (System File T-D-1106-H/MWB 96-05-31AF BNR).

(2) As a consequence of the aforesaid violation, the Claimant shall '. . . receive pay equal to any and all time paid to R. L. Trulson beginning January 23, 1996, and continuing as long as Mr. Trulson continues to work. We further request that Claimant be accredited for any and all other benefits, vacation and lump sum payment accreditation, insurance, retirement and unemployment payments.'"

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.

At the time of the incident in question, Claimant L. G. Fliflet held seniority as a Sectionman on Seniority District 15. R. L. Trulson held seniority as a Sectionman on Section District 15. However, the Claimant's seniority is greater than that held by Trulson. At the time of the incident in question, both Claimant and Trulson were on furlough.

The facts in this matter appear to be uncontested. A planned temporary vacancy occurred on District 15 when Sectionman C. J. Lindahl left to attend a planned welding seminar in Kansas City from January 22 through January 26, 1996. At approximately 4:00 P.M. on Friday, January 19, 1996, the Carrier contacted the Claimant. This was the first time that the Carrier could contact the Claimant because no employees had filed "Rule 19A" requests. Rule 19A provides that employees may file requests to fill temporary vacancies and may do so until 4:00 P.M. on the day prior to the vacancy. However, the Claimant was not home when contacted and the Carrier's representative left a message on his home phone answering machine. The message instructed the Claimant to contact the Carrier's manpower office in Minneapolis for a work opportunity to fill the vacancy on District 15. When the Claimant did not answer or return the call, the Carrier representatives contacted less senior employees and Trulson eventually accepted the assignment. The Claimant returned to his home after hours on January 19, 1996 and attempted to contact the manpower office, but was informed that the office had closed. On the early morning of Monday, January 22, 1996, the Claimant again contacted the manpower office and was informed that the vacancy had been filled by Trulson.

The Organization takes the position that the Carrier violated Rule 9 of the Agreement in this case. According to the Organization, the Carrier did not take sufficient steps to have the Claimant fill Lindahl's vacancy. Under Rule 9, when vacancies of more than 30 days' duration occur, employees will be called back to work in seniority order. Further, from the time that an employee is recalled, the employee will have ten days to return to work. According to the Organization, in this case, Trulson worked the Lindahl vacancy from January 22, 1996 through February 26, 1996. Because this vacancy lasted for more than 30 days, the Carrier was obligated to properly notify and assign the position to the Claimant. As the Claimant was improperly denied the vacancy, the Organization contends that the Claimant should receive pay for the period of January 22 through February 26, 1996. In addition, the Organization claims that the Carrier violated Rule 8 in that even after Trulson was

offered the position, the Claimant should have been able to displace him because of his seniority.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. First, the Carrier contends that the planned vacancy which occurred when Lindahl went to a welding class lasted only for the period of January 22 through January 26, 1996. While Trulson was not placed on furlough again until February 26, 1996, the Carrier claims that this is not reflective of the Lindahl vacancy in the instant case. According to the Carrier, because the Lindahl vacancy only lasted for a short period of time, Rule 9 does not apply. Rule 9 specifies:

> "When new positions of more than thirty (30) days' duration are established or when vacancies of more than thirty (30) calendar days' duration occur, employes who have complied with this rule will be called back to service in the order of their seniority. . . ." (Emphasis added)

According to the Carrier, in this case because Lindahl's vacancy lasted only for five days, the Carrier has discretion to fill the position. Thus, according to the Carrier, it acted appropriately by contacting furloughed employees in seniority order and recalled the first individual who responded to the request. Further, because the vacancy was of a short-term nature (five days), it is appropriate to contact employees by telephone. The Carrier stresses that individuals were needed quickly and it is reasonable to contact the employees in such an expeditious manner. Thus, the Carrier contends that the claim should be denied.

After a review of the evidence, the Board finds that the Organization has not been able to sustain its burden of proof in this matter. It is clear that Rule 9 applies only to those vacancies which last beyond 30 days. We note that the burden of proof in this matter falls on the Organization. While the Organization contended that the vacancy actually lasted in excess of 30 days, there is no evidence in the record that such vacancy actually did last for this duration. While the Organization indicated that Trulson was not furloughed again until February 26, 1996, it has not been able to prove that the Lindahl vacancy lasted more than five days. Thus, we have determined that the Lindahl vacancy which Trulson filled only lasted for a period of five not 30 days. Because the vacancy was less than 30 days, the Carrier was not obligated to follow Rule 9.

The Board addressed a similar issue in Third Division Award 28047 when it discussed why a lesser notification is required when a vacancy lasts fewer than 30 days:

> "Thus, the Rule indicates that employes on furlough will be notified in order of seniority of vacancies of more than thirty days' duration. That rule also contemplates a ten day period of grace for furloughed employees to return from furlough. Obviously, this Rule does not require Carrier to use furloughed employees in order of seniority for short-term vacancies, such as that in dispute in this matter."

Further, we reject the Organization's contention that once Trulson was offered the position, the Claimant should have been allowed to displace him. The Organization cited Rule 8 which indicates that displacement may only occur when forces are reduced or positions are abolished. However, neither of these conditions is present in the instant case. Thus, the Organization's argument is rejected.

Based on the record in the instant case, we find that the Carrier acted appropriately when it placed Trulson in the temporary vacancy which was created when Lindahl went to a preplanned welding seminar. The claim is denied.

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 8th day of March, 2002.

LABOR MEMBER'S DISSENT
TO
AWARD 35959, DOCKET MW-34789
(Referee Bierig)

The findings in this case simply cry out for a dissent. The claim arose when the Carrier sought to fill a vacancy because the incumbent was scheduled to attend a planned welding seminar. The Carrier was well aware of the fact that the position needed to be filled weeks, if not months, before the vacancy occurred. Does the Carrier plan in advance to fill the position? No! It waits, literally, until the 11th hour to begin the process. The Carrier's call desk called the Claimant at 4:00 P.M. on Friday afternoon, one hour before it closed the office for the week to fill the position in question the following Monday. The Claimant was not at home when the call desk called him, but left a message for him to return the call. The Claimant did not receive the message until after 5:00 P.M. on Friday evening and did not return the call until the next workday, i.e., Monday morning. He was then told that the position was filled by a junior employe. Had the Carrier exercised even a modicum of foresight to fill the position prior to the 11th hour attempt to contact the Claimant, this claim would never have been filed.

The Majority cited Award 28047 (Referee Lieberman) in support of its decision to deny this claim. That award interpreted Article 22 of the Detroit and Toledo Shore Line Agreement, which is markedly dissimilar to the rule involved in this dispute. The Organization cited Awards 9 and 64 of Public Law Board No. 3460 in support of our position in this case. Those awards were also decided by Referee Lieberman, wherein he stated in Award 64:

> "As the Board views it, there is not (sic) doubt but that Carrier did not abide by the seniority recall provisions of Rule 9 cited supra. In this instance, Claimant was available and should have been called in preference to Mr. Doyle. ***"

A review of the above-cited award reveals that Referee Lieberman recognized he was dealing with a completely different set of rules and two distinctly different collective bargaining agreements when he rendered his decisions in the awards mentioned above.

Also cited during the handling of this dispute on the property was Rule 2, which states:

"RULE 2. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS

A. Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided."

The Majority's findings in this case have the effect of negating the Claimant's seniority rights. It is not the function of this Board to rewrite the Agreement. Hence, it is clear that the Carrier violated the Claimant's seniority rights in this case and I respectfully dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member