NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5922

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D. D. BARTHOLOMAY, ORGANIZATION MEMBER

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NORFOLK WESTERN RAILWAY COMPANY

Award No. 1
Case No. 1

Date of Hearing - October 17, 1996
Date of Award -April 21, 1997

Statement of Claim:

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed to recall furloughed employee L. E. Adkins, Jr., to service on June 1, 1995, and instead hired an individual off the street.

2. As a consequence of the violation referred to in Part 1 above, Claimant L. E. Adkins, Jr., shall be compensated at the appropriate rate of pay for all hours worked by the new employee commencing June 1, 1995, and continuing until he is returned to service.

FINDINGS:

Public Law Board No. 5922, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

On November 2, 1990 Carrier and Organization entered into a special agreement covering the operation of the coal transfer facility ("WT") at Wheelersburg, Ohio, which Carrier had recently purchased. On June 16, 1992, the parties effected a modification to that Agreement. Under the Agreement, as modified, three classifications of positions were established, Equipment Operator, Equipment Repairman, and Laborer. Not all of the rules of the Railroad Agreement were made applicable to Maintenance of Way employees

working in WT operations. Carrier retained considerable flexibility in assignment of personnel and operations in the WT facility.

Sections 1 and 3 of the WT Agreement are applicable to the dispute under review here. These Sections provide:

> Section 1: Positions with titles of Equipment Operator, Equipment Repairman, and Laborer established at WT are positions within the craft and class of maintenance of way workers and are covered by those rules and provisions of the BMWE agreement effective July 1, 1986 which are listed in Attachment A hereto. Management shall continue to have the right to have the work performed in the most efficient, cost saving and expeditious manner using any means.
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> Section 3: Employment shall be at the sole discretion of management, provided however that no BMWE-represented employee on WT will be subject to discharge or discipline except for just cause shown; and provided further that force reductions will be by order of inverse seniority, where employees' skills, abilities and work are equal.

Claimant was working as a Laborer at WT. In November 1993, he was furloughed. While still in a furloughed status as a Laborer, Carrier in June 1995, hired a new employee off the street to fill a vacant Machine Operator's position. The Organization contends that it had a "verbal understanding" with Carrier that furloughed Laborers would be given an opportunity to qualify for vacant Machine Operator's positions before new hires were brought in off the street. It argues that the Agreement was violated when this verbal understanding was not honored, and that Claimant was constructively disciplined in violation of Section 3, because just cause was not shown at a fair and impartial hearing. Further, the Organization asserts that Claimant was capable of qualifying as a Machine Operator.

Carrier argues that there is no agreement that prohibits Carrier from filling an Equipment Operator vacancy with a qualified new hire without first recalling furloughed Laborers. Further it rejects the notion that Claimant was somehow or other disciplined when he was not recalled for a position for which he was not qualified. Finally, it disputes that Claimant was capable of doing the work of a Machine Operator.

The Organization as petitioner in this matter has the burden of supporting its claim with the preponderance of evidence. It has woefully failed to do so in this record. The Board finds that there is absolutely no rule support for the Organization's claim. First, it stretches credulity to embrace the notion that Claimant is somehow or other being disciplined because he was not recalled from his furloughed status as a Laborer to fill a vacant Equipment Operator vacancy. Claimant's status as a furloughed Laborer was not altered. He retained all entitlements as a furloughed Laborer, there was no discipline. There is nothing in the Agreement that remotely suggests, by inference or otherwise, that a furloughed employee is entitled to be recalled to anything but the position from which furloughed. And Section 3 clearly provides that

"employment shall be at the sole discretion of management." This is very broad, to say the least.

Additionally, while the Organization has argued the existence of a verbal agreement on that furloughed Laborers would be recalled before new hires for Machine Operator vacancies, there is simply insufficient evidence to support this showing. Absent adequate proof of such a verbal understanding, the Organization can only expect to prevail if it can demonstrate rule support for its claim. This has not been accomplished in this record.

Accordingly, the Board has no alternative but to deny the claim for lack of agreement support.

A W A R D

Claim denied.

John C. Fletcher, Chairman & Neutral Member

E. N. Jacobs, Jr., Carrier Member

D. D. Bartholomay, Employee Member

Dated at Mt. Prospect, Illinois., ~~April 21~~ May 29, 1997