

PUBLIC LAW BOARD NO. 3460

Award No. 64

Case No. 64

PARTIES Brotherhood of Maintenance of Way Employees
TO and
DISPUTE Burlington Northern Railroad Company

STATEMENT "1. The Carrier violated the Agreement when it re-
OF CLAIM: called Junior Sectionman R. E. Doyle to fill
a temporary vacancy as Cook Helper from Febru-
ary 1, 1982 to March 15, 1982, instead of re-
calling Sectionman D. J. Mausolf who was senior,
available, and willing to fill that vacancy.

2. Because of the aforesaid violation, Sectionman
D. J. Mausolf shall be allowed \$3,102.40 plus
any and all overtime pay allowed junior employee
R. E. Doyle, during the claim dates."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

The record indicates that Claimant had a seniority date of March 17, 1980 and Mr. Doyle, also a Sectionman, had a seniority date of March 26, 1980. At the time of the dispute herein, both employees had been furloughed as a result of a force reduction.

The record indicates that the parties signed and entered into a

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new regional gang agreement on December 17, 1981. In January of 1982, the Seattle region of Carrier commenced operation of a regional steel gang. In order to activate the gang, a number of employees had to be recalled from furlough. In this period of time Carrier determined that it would be necessary to fill a temporary Cook Helper's vacancy on the gang pending bulletin and assignment. In order to fulfill that need, Carrier recalled Sectionman R. E. Doyle to fill the temporary vacancy. He commenced work on February 1, 1982. Claimant was recalled and reported for work on March 22, 1981. The record also indicates that another employee, a Sectionman named Galloway, had a seniority date of May 16, 1979 and was recalled and reported for work on the same steel gang on February 22, 1982.

Petitioner relies in part on Rule 9 of the Agreement which provides in relevant portion as follows:

"When an employee laid off by reason of force reduction desires to retain his seniority rights, he must within ten (10) calendar days of date so affected file his name and address in writing on the form supplied for that purpose, with his foreman or supervisor with copy to General Chairman, receipt of which will be acknowledged in writing by the Company. He must advise in writing of any subsequent change of address, receipt of which will be similarly acknowledged. When new positions of more than thirty (30) calendar days duration are established or when vacancies of more

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than thirty (30) calendar days duration occur. Employees who have complied with this rule will be called back to service in order of their seniority...."

Petitioner alleges that Claimant had filed his name and address in timely fashion with Carrier as required by the rule and was entitled to be recalled to service in accordance with his seniority ranking when a temporary position was available. In this case, according to Petitioner, Carrier did not notify him when the temporary position was available and did not give him an opportunity to return to service; instead Carrier recalled and used a junior employee, namely, Mr. Doyle.

Petitioner notes that Carrier attempted to excuse its mistake in this instance by indicating that there were some difficulties in implementing the new rule and that it in good faith made an attempt to abide by the rule in this instance. Carrier's alleged problems, according to Petitioner, were insufficient to excuse its obvious and clearcut violation of the provisions of the Rule. In the course of that mistake in implementing recall process, Claimant was made to suffer which was unconscionable from the standpoint of the Organization. In addition, Carrier's argument that Claimant was not a proper Claimant in this matter is an error since he was entitled to be recalled to fill the temporary vacancy by virtue of seniority, whether or not some other

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employee had a better right to claim the work. Petitioner argues that the name of the claimant is immaterial insofar as the violation of the Agreement is concerned and should be of no concern to Carrier (Third Division Awards 10690 and 18557).

Carrier argues that there has been no affirmative showing by the Organization that Claimant had on file the proper form indicating his name and address and that in accordance with such form he was entitled to be recalled in advance of Mr. Doyle. Furthermore, Carrier argues that Claimant was not the senior employee on the roster since Mr. Galloway had more seniority than he did and, therefore, the claim is invalid. In addition, it is noted that Carrier acted in good faith in this instance and all available man power was immediately put to work and every attempt was made by Carrier to properly recall employees in protect temporary vacancies. There is no showing by the Organization to gainsay this statement.

As the Board analyzes the record of this dispute it is apparent that the issue of whether or not Claimant had the proper form 15364 on file was not raised on the property and, in addition, it is self evident that such form was on file since Claimant was indeed recalled in March 1982. With respect to the argument that Claimant was the improper Claimant in this dispute, the Board

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does not agree. This Board believes that the rationale for such conclusion is well expressed in Third Division Award 18557 which holds, inter alia, as follows:

"One of a group entitled to perform the work may prosecute a claim even if there be others having a preference to it. The essence of the claim by the Organization is for rule violation and the penalty claim is merely incidental to it. The fact that another employee may have a better right to make the claim is of no concern to Carrier and does not relieve Carrier of the violation and penalty arising therefrom."

As the Board views it, there is no 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. In accordance with longstanding practice, however, and in view of the points made by Carrier on this score, Claimant is not entitled to overtime pay as such. He is entitled, however, for payment for all time lost as a result of the improper assignment up to March 19, 1982 including straight time for any overtime work by Mr. Doyle during the claim period.

AWARD

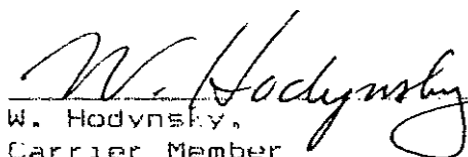
1. Claim sustained.
2. Claimant shall receive straight time pay in the amount of \$3,102.40 plus straight time for any overtime pay allowed Mr. R. E. Doyle during the period from February 1, 1982 through March 19, 1982.

ORDER

Carrier will comply with the Award herein within thirty (30) days from the date hereof.



I. M. Lieberman, Neutral-Chairman



W. Hodynsky,
Carrier Member



F. H. Funk,
Employee Member

St. Paul, Minnesota

~~June~~
May 24, 1988