Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13252
Docket No. 13229
98-2-96-2-142

The Second Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen, Division of
(Transportation Communications International Union
(
(CSX Transportation, Inc. (former Chesapeake and
(Ohio Railway Company)

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Chesapeake and Ohio Railroad Company (CSX Transportation, Inc., (hereinafter referred to as 'Carrier') violated the controlling Shop Crafts Agreement specifically Rule 18 (a), (d), Understanding (5), 18 1/2, (b) and 60 1/2, when on October 13, 1995, the Carrier allowed employee Keith Hornbuckle to be displaced from his regular assigned position, by J. Reynolds under the violation of the said Rules Outlined above at Huntington, West Virginia.

2. Accordingly, the Carrier be instructed to revert employees Keith Hornbuckle, ID #628863, and J. Reynolds ID #624455 to their former positions prior to October 13, 1995, along with loss of lead man rate for Keith Hornbuckle, from the effective date."

FINDINGS:

The Second 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.

Carman D. K. Ramey marked off in June to undergo carpal tunnel surgery. The Carrier bulletined his Huntington Shops vacancy as permanent. After Carman Ramey fully recovered from the surgery, he returned in October to the position he occupied prior to the surgery. He displaced Carman J. Reynolds, who then exercised his seniority, displacing Claimant K. Hornbuckle. Therein lies the dispute, as the Carman displacing Claimant did not return to the position he occupied prior to Carman Ramey's medical leave.

The Organization argues that the vacancy created because of Carman Ramey's surgery was a temporary vacancy, and when he returned from his medical leave, each succeeding employee should have returned to his previous assignment. In other words, Rule 18(d) which reads:

> "Employees returning from temporary vacancies and those effected thereby will revert to their former position, except where their former positions have been abolished."

is, insofar as the Organization is concerned, the controlling Rule, not Rule 60 1/2, which reads:

> "The exercising of seniority to displace junior employes, which practice is usually termed 'rolling' or 'bumping', will not be permitted, except that when forces are adjusted or reduced. . . ."

The Carrier argues that it acted pursuant to Understanding (5) of Rule 18 which does not limit Carrier's discretion to consider a vacancy as permanent. That Understanding reads as follows:

> "It has been the policy in the past in applying Rule 18 of the Shop Craft Agreement that when an employee becomes ill of an incurable malady or incapacitated through failure of eye sight, hearing, etc., and those in charge can satisfy themself that there is little or no likelihood of such

employee returning to service or working of his class, that the vacancy so created would be considered as a permanent vacancy." (Emphasis added)

The Board, after reviewing all arguments and Rules raised or cited on the property, and ignoring any and all new material contained in either parties' Submission to the Board, is of the opinion that both parties, for some time, have classified vacancies as temporary or permanent by the anticipated length of the vacancy, not the reason therefore.

This is somewhat alluded to by the first Carrier officer's response to the claim. He advanced two solid positions which were never addressed by the Organization. He stated in his denial:

> ". . . I do not know how the original vacancy occurred, whether it was considered long-term or short-term, etc. Since the locomotive shop at Huntington handles all job advertisements any improper application of the Agreement should have been contested by your local representative in a timely manner.
>
> Obviously, local representative Mr. D. P. Reyburn was in agreement with the bulletin procedures and employee displacement moves at the time they were made."

The short term, long term position is further bolstered by evidence the Organization offered as proof that Carrier did indeed bulletin positions as temporary based upon expected duration. Bulletins contained in the Organization's Submission were advertised with the notation that each position was a temporary new position of less than 30 days duration. In other words, each vacancy was caused, not by the absence of another Carman, but because the Carrier found a need for additional personnel for a period of less than 30 days.

Furthermore, when the Carrier argued that Understanding (5) of Rule 18 permits it to exercise its discretion in determining whether a vacancy created by a medical leave is to be bulletined as either permanent or temporary, it was doing so in accordance with the language of the Understanding. The only parties who have to be satisfied are "those in charge."

It is also significant to note that the second argument advanced by the first Carrier officer who received the claim, i.e, ". . . Since the locomotive shop at Huntington handles all job advertisements any improper application of the Agreement should have been contested by your local representative in a timely manner. . ." was never adequately refuted by the Organization.

Because there exists no evidence in the on-property handling that the vacancy created by the medical leave of absence was improperly bulletined as permanent, it is too late to argue that the subsequent displacements were improper. To the contrary, they were consistent with Rule 60 1/2.

Two wrongs do not make a right, so goes the cliche, but in this instance there is no evidence that Carrier erred at any step of the handling of the vacancy and resulting displacements.

The Organization has the burden of proof role in Rules disputes. It has not fulfilled that obligation. The claim will be 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 Second Division

Dated at Chicago, Illinois, this 30th day of March 1998.