

The Second Division consisted of the regular members and in addition Referee Robert E. Fitzgerald, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 22, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Firemen & Oilers)
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(St. Louis-San Francisco Railway Company

Dispute: Claim of Employees:

1. That the Carrier failed to comply with the procedural requirement of Article V of the August 21, 1954 Agreement, and accordingly the claim shall be allowed as presented.
2. That under the current agreement, Laborer, Hubert Hopkins, was not recalled as per Rule 27.
3. That accordingly, the Carrier be ordered to compensate Laborer, Hubert Hopkins, for December 27, 28, 29 and 30th, 1977 for the time worked by Laborer, Ron Lewis, a junior employee.

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 waived right of appearance at hearing thereon.

The Claimant was employed by the Carrier at its Springfield, Missouri facility, and he had a seniority date of May 25, 1977. On December 23, 1977, the Carrier had a substantial reduction in forces which included both the Claimant and another laborer with a seniority date of September 7, 1977. The Claimant filed the necessary request for reinstatement with the Carrier.

On December 23, 1977, the less senior laborer was advised by a foreman to report for work on December 27, to continue in a job to which he had been previously temporarily assigned. When he reported for work he advised the foreman that he had less seniority than other laborers who were laid off pursuant to the reduction in force. He was advised by the foreman to work the days of December 27 through December 30.

Upon his return to work, the Claimant learned of the four days work by the less senior employee and filed the instant claim. The immediate response from the Carrier was a terse statement that the claim was denied because it was unsubstantiated.

It is the position of the Claimant that the assignment of the less senior employee was a violation of Rule 27, which requires that employees be recalled from a reduction in force in the order of their seniority.

Further, the Claimant contends that the reply to the claim was a violation of Article 5(a) of the agreement between the parties, which requires that a reason be given for the denial of any claim. They noted that the response merely states that the claim is unsubstantiated, and that this did not meet the essence of the requirement of Article 5(a).

The Employer position is that the agreement between the parties provides for three distinct seniority groups. They contend that the Claimant did not have seniority in the group where the vacancy occurred. Although the Carrier admits that the less senior employee did not have seniority within the seniority group where the vacancy occurred, they note that he had been assigned temporarily to that group prior to the reduction in force. They argue that this assignment was based upon his earlier training in the job for which the vacancy occurred.

Further, the Carrier argues that the Claimant failed to comply with the procedural requirements of the agreement, which requires that bids for jobs be submitted in writing. They argue that the Claimant had not submitted a written bid for the position occupied by the less senior employee.

Claimant's argument that the claim should be granted because of the Carrier's failure to give a reason for denial of the claim, is not meritorious. Although it is clear that the written response of the Carrier was less than the most erudite response conceivable, the Claimant was given some basis for the denial. The wording that the claim was unsubstantiated may well be considered to have articulated the subsequent argument of the Employer that the Claimant failed to submit evidence that he had filed the allegedly required written request for the job being worked by the less senior laborer.

Conversely, the procedural argument of the Carrier, that the failure of the Claimant to file a written bid for the work was sufficient to deny the claim, is without merit. The Claimant notes that it was impossible for the Claimant to file a written bid for a job which he was not aware of. Obviously, the agreement between the parties cannot be construed to require an impossible act at the risk of having the claim denied. Therefore, both procedural arguments are denied.

On the merits of the claim, the language of Rule 27, particularly Subsection (d) is controlling. There the wording states simply that employees will be recalled based upon their seniority. This must be construed in light of the employee's overall Company seniority. As stated in Rule 14, an employee's seniority date begins with the time that the employee earns his pay. Thus, it is this seniority date which is applicable to the order of recall.

The argument of the Carrier that an employee may be recalled only in the group in which he has established seniority is without merit. The wording in Rule 27 is that the employee, upon recall, will be returned to their former position if possible. The clear intent of the qualifying words "if possible" is to mean that the employee may be recalled to other job positions. This negates any requirement that the employee may only be recalled to their seniority group.

Accordingly, we hold that the instant case should be sustained.

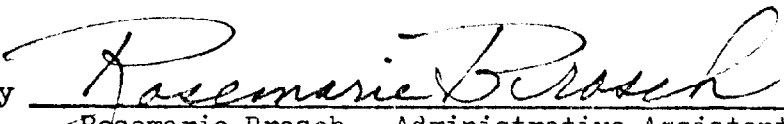
A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of November, 1979.