

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Southern Pacific Company (Texas and Louisiana Lines)

Dispute: Claim of Employees:

1. That the Southern Pacific Company did improperly force assign electrician H. Alsbury to the job of Interstate Commerce Commission Inspector against his will on April 15, 1980.
2. That, accordingly, the Southern Pacific Company be ordered to compensate Mr. H. Alsbury in the amount of forty (40) hours at straight time, account of Carrier failed to give him five (5) working days notice before changing his assignment on April 15, 1980.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

On April 15, 1980, Employee B. L. McNiel was filling a vacancy on the electrical inspector's job. The regular incumbent was off duty due to illness. At approximately 12:00 noon Mr. McNiel had to leave his assignment to attend to an emergency at his home.

The Carrier's Shop foreman directed the Claimant to work the electrical inspector's job for the balance of the shift. He was paid the differential in rate per Rule 115. However, the claim protests the assignment to the vacancy in question as a violation of the Agreement. In their submission, the Organization claimed that Rules 1, 15, 24 and Article III of the June 5, 1962 Agreement were violated.

The Organization's general position is that the Agreement was violated when the Carrier forced the Claimant to fill the position. If an employe is going to be forced to fill a vacancy, a junior employe should be forced. As a senior employe, the Claimant should have had a right -- in the opinion of the Organization -- to refuse the assignment. Rule 15 which relates to bulletining vacancies underlines the principle of seniority preference and that preference should apply in the instant case. Rule 15 states:

***Rule 15**
Bulletining Vacancies

When new jobs are created or vacancies occur in the respective crafts, the oldest employees in point of service shall, if sufficient ability is shown by trial be given preference in filling such new jobs of any vacancies that may be desirable to them. All vacancies or new jobs created, including differential jobs as helpers will be bulletined.

Bulletins must be posted five days before vacancies are filled permanently. Employees desiring to avail themselves of this rule will make application to the officer in charge and a copy of the application will be given to the local chairman. Assignment will be made and the successful applicant assigned within seven (7) days following expiration of bulletin.

An employee exercising his seniority rights under this rule will do so without expense to the Carrier; he will lose his right to the job he left, and if after a fair trial he fails to qualify for the new position, he will have to take whatever position may be open in his craft.

Temporary Vacancies

Vacancies known to be of thirty (30) days or more duration will be placed under bulletin as temporary vacancies and assignments made in the manner provided in this rule. An employee who is temporarily absent and whose position has been bulletined under the provisions of this rule, shall return to his position on reporting for duty and the employee who worked the temporary vacancy in the exercise of his seniority during absence of the regular occupant of the position, shall return to the position he left. The same procedure shall be followed by other employees similarly affected.

Displacements

When a position is abolished, or an employee is displaced through no fault of his own, he shall, upon written application to the officer in charge, with copy of the application to the local committee, be permitted to displace any junior employee on the same seniority list. All displacements made under this rule shall be without expense to the Company."

The Organization places special emphasis on the last paragraph of Rule 15. They view the Claimant as having been "displaced". Thus, pursuant to the remainder of the provision he should have been able to displace a junior employee. In the normal sense of the word he was "displaced" through no fault of his own by Supervisor V. F. Stanush who instructed him to work the temporary vacancy notwithstanding the fact that a qualified junior employee, Electrician E. A. Dzierzanowski could have properly been assigned. They further submit that the only departure from the rule in this instance was that no formal written application was made by reason of past practice. Over the years, the parties have acquiesced in this practice of assigning such desirable positions to the senior man desiring them but, assigning them in the absence of a taker to the junior man.

It is the position of the Carrier that Claimant Alsbury's job was not abolished, thus there were no violations of Rules 1, 15, 24 or 28 as the Organization alleges. Further, the temporary assignment of a qualified electrician to perform electrical inspector's work is not a violation of the current agreement and there is no rule requiring this work be assigned to the electrician with least seniority on the shift. They note this was an emergency and the assignment was only for 1 day, April 15, 1980. Claimant was qualified to fill the position, he worked only three (3) hours and was paid the higher rate of Electrical Inspector, as specified in Rule 13 and 115; therefore, this claim has no basis.

It is first noted by the Board that there does not appear to be any reference in the handling of the claim on the property to Article III of the Agreement. Therefore, in accordance with longstanding rules regarding the inclusion of new arguments and evidence for the first time at the Board, the Board will not consider any issues relating to Article III.

The Organization argues that Rule 15 is clear in its application to the instant dispute. The Board disagrees. Rule 15 is not unambiguous in the context of these facts. It is not entirely clear that the Claimant was "displaced" as the term is used in Rule 15. The term displaced or displacement usually has a special meaning related to the exercise of seniority. The term may have other connotations however it isn't apparent that it was intended to apply to a situation where an employee is removed from his position to fill another's position for three hours due to an emergency condition.

The ambiguity in the Rule certainly does per se preclude a sustaining award. In interpreting ambiguous language, the Board often gives weight to past practice. Past practice is usually indicative of the intent of the parties.

In this case, the Organization asserts that there is a practice of assigning desirable positions such as the vacancy of Mr. McNiel to the senior employee and then to the junior employee if refused. Based on this they suggest the Claimant should have been allowed to refuse.

There may be a past practice consistent with the assertion of the Organization. However, the Board can find no convincing demonstration of such a practice beyond this mere assertion in the record. Thus, we cannot sustain the claim. Moreover, such evidence if it were submitted of past practice would have to extend to the individual facts and circumstances of the case which as mentioned involved emergency conditions.

It should also be stated that even if there was evidence of a past practice, there is no demonstration of monetary injury to the Claimant which would support the payment request. Further, there was reference in the record to two employees senior to the Claimant who claim they were not offered the job. This is disputed by the carrier. This factual dispute aside, if anybody was arguably injured by the Carrier's actions, it would have been these employees and not the Claimant.

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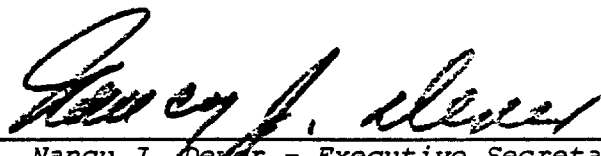
Award No. 9719
Docket No. 9059
2-SPT-EW-'83

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:



Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1983.