

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood Railway Carmen/Division of TCU
(Birmingham Southern Railroad Company

STATEMENT OF CLAIM:

1. That the Birmingham Southern Railroad, hereinafter referred to as the Carrier, violated the Agreement, particularly, but not limited to, Article 59, Section 12(b), when on November 21, 22, 23 and December 19 through 30, 1988 employees other than the senior available carmen were arbitrarily assigned to fill vacation when a regular vacation worker was not used.

2. And accordingly, the Carrier should be ordered to compensate Carman Isiah Lewis for eight (8) hours straight time pay for November 21 and 22, December 19, 20, 22, 23, 27, 28 and 30, 1988; Carman Larry Rice for eight (8) hours straight time pay for November 23 and December 21, 1988; and Carman Larry Bufford for eight (8) hours at straight time pay for December 29, 1988 as a result of said violation.

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 employes 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.

At its Ensley, Alabama, facility, the Carrier has assigned one person to travel via truck to outlying yards to inspect and repair cars as necessary. The dispute arose because the Carrier filled the vacation absence of the Carman assigned to this task with employees less senior than the Claimants, who were on their off days.

The Organization argues that this Claim is controlled by the portion of Article 59, Section 12(b) of the Parties' Agreement which reads: "When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority." It contends that this provision can only be construed to mean "all" employees, not just "on-duty" employees, as argued by the Carrier.

The Carrier has advanced its objection to these Claims on both procedural and substantive grounds. With respect to its procedural arguments, it relied on Article 29(c) of the controlling Agreement:

"(c) The requirements outlined in paragraphs (a) and (b) pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within nine (9) months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the nine (9) months' period herein referred to."

The record shows that in December 1987, two Claims identical to these now before the Board were withdrawn at the Carrier's highest level. While the Organization, at the time that the instant Claims were processed, has took the position that the 1987 Claims were withdrawn without prejudice, there is no proof that such was the case. Because the Claims were withdrawn (and, in effect, settled on the property) past Awards have upheld the principle that, in such cases, the same issue cannot be claimed again at a later date. Accordingly, we find that pursuant to Article 29(c), the Organization is precluded from raising the same substantive issues at this late date.

A W A R D


Claim denied.

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Award No. 12056
Docket No. 11969
91-2-90-2-77

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 15th day of May 1991.