

Award No. 11030
Docket No. SG-10044

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA
THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(CHESAPEAKE DISTRICT)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railroad Signalmen of America on the Chesapeake and Ohio Railway (Chesapeake District) that:

(a) The Carrier violated the current Signalmen's Agreement when it assigned and permitted J. N. Vergne, a junior Signal Helper, to fill an Assistant Maintainer's position at Stevens Hump from September 24, 1956, to October 5, 1956, in place of C. R. Chatman, a senior Signal Helper.

(b) The Carrier now compensate Signal Helper C. R. Chatman the difference between his Signal Helper's pro rata rate of pay (\$1.87) per hour and that of the Assistant Maintainer's pro rata rate of pay (\$1.99) per hour for all regular assigned hours from September 24, 1956, to October 5, 1956, inclusive (80 hours), plus four hours for a call on October 4, 1956, a total of 84 hours at 12¢ per hour, which amounts to \$10.08. [Carrier's File SG-107]

EMPLOYEES' STATEMENT OF FACTS: Mr. C. R. Chatman is employed by this Carrier on a permanent position of Signal Helper assigned to the Division Signal Gang with camp car headquarters. Mr. Chatman's seniority date as a Signal Helper on this Carrier is November 20, 1951.

Mr. J. N. Vergne entered the service of this Carrier on August 6, 1956, and was assigned to the position of temporary Signal Helper at CS Cabin. On Friday, September 21, 1956, Mr. Vergne was displaced from the position as Signal Helper, CS Cabin, due to the regular incumbent returning to the position.

On Monday, September 24, 1956, Mr. Vergne was sent by the Carrier to work the position of Assistant Signalman at the Stevens Hump. Inasmuch as the Carrier assigned Mr. Vergne, a junior Signal Helper to Mr. Chatman, to the position of Assistant Signalman at Stevens Hump, a claim was filed by Local Chairman S. J. Moffett in behalf of Mr. C. R. Chatman with **Mr. D. F. Apple, Division Engineer**, for the difference between Mr. Chatman's rate of pay as Signal Helper and the rate of pay of the

Obviously there has been no breach of that provision in the instant case. Chatman was given opportunity to go into the assistant class upon his return from military service. He also had later opportunities to bid into the assistant class, but failed to do so. The rule makes it plain that the Carrier could not force him to the assistant class until he had worked as much as 130 days as helper.

Conclusions

The Carrier has shown that nowhere in the three rules relied on by the Employes [Rules 5(c), 28 and 46], or elsewhere in the agreement, is there any provision whereby Chatman had claim to the Orcutt vacancy. On the contrary, the rules provide that vacancies of less than 30 days' duration are not to be bulletined leaving the Carrier free to fill such vacancies by appointment to the best advantage.

The Carrier's full good faith in the handling can scarcely be questioned. Vergne was available on the ground to fill the job. Chatman was on a camp car force working 125 miles away. Chatman had declined to accept work as assistant upon his return from military service some ten months earlier and had subsequently failed to bid on bulletined vacancies in the assistant class.

Hence, there is no basis in the rules or in equity for the claim, and it should be denied in its entirety.

All data contained in this submission have been discussed in conference or by correspondence with the employe representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: C. R. Chatman, the Claimant, was employed in a permanent position of Signal Helper assigned to the Division Signal Gang with camp car headquarters at Russell, Kentucky, his seniority date being November 20, 1951.

J. N. Vergne entered the service of the Carrier on August 6, 1956, and was assigned to the position of temporary Signal Helper at C S Cabin, Stevens, Kentucky, 125 miles distant from Russell, Kentucky. On September 21, 1956, due to the regular incumbent returning to his position, Vergne was displaced there from his position as Signal Helper. On Monday, September 24, 1956, Vergne was assigned by the Carrier to work the position of Assistant Signal Maintainer Orcutt at Stevens Hump, immediately adjacent to C. S. Cabin, Orcutt having asked for permission to be absent from his position for personal reasons; Vergne worked on this assignment from September 4 to October 5, 1956. No protest was made of the assignment until November 30, 1956, at which time a claim was filed in behalf of Claimant.

It is the contention of the Petitioner that, the position of Assistant Signal Maintainer being a higher rated position, the Carrier failed to recognize Claimant's seniority in filling the position at Stevens Hump and should have afforded to Claimant the opportunity to fill that position; that the Carrier violated Rules 5c, 46 and 28 of the effective Agreement; it is the further contention of the Petitioner that while Carrier is not required to bulletin temporary vacancies, it, still, may not disregard seniority in filling vacancies whether they be regarded as regular bulletined positions or as temporary vacancies of lesser duration in time.

Carrier, to the contrary, denies that the assignment of Vergne was in the nature of a promotion or that any of the Rules cited by the Petitioner,

or otherwise, apply to this situation. It is the further contention of the Carrier that seniority applies under the Rules only to the positions which are required to be bulletined; that there is no Rule in regard to the exercise of seniority in filling temporary vacancies, and in the absence of such a Rule, there can be no violation of the Agreement as this Board cannot supply a Rule where none exists.

It is the further contention of the Carrier that, under all of the circumstances of the instant case, it was justified in assigning the temporary vacancy in question to Vergne; that there had been opportunities in the past for the Claimant to bid for, accept and be awarded Assistants' positions but that up to the date of this claim he had failed at any time to do so; further, Carrier maintains that at the time Orcutt, the Assistant Signal Maintainer, made request for permission to be absent from his position for personal reasons, Vergne was present, physically, and available at an immediately adjacent point at Stevens and that Claimant was positioned at a point 125 miles distant; that, as Vergne was available at the immediate point to furnish relief without additional expense to Carrier, Orcutt was given permission to be absent during this period; further, that no protest was made by Petitioner so as to afford Carrier the opportunity to replace Vergne with a senior man before the temporary assignment was terminated.

The General Chairman in his appeal to the Assistant Vice President-Labor Relations for the Carrier said (in referring to Rules 5c, 46 and 28)—“Though the above excerpts may not fully cover this claim, nevertheless, it can be more than assumed that in filling higher rated positions the senior available employe should be used at all times.”

The question for us, then, to answer is—“Was the Carrier under all the circumstances of this case required to fill on a seniority and promotion basis the vacancy occasioned by permitting Orcutt to be absent for personal reasons?”

In Award 6546—(Donaldson) we find the following:

“We have held that, under rules providing for the exercise of seniority in case of vacancies, the Carrier may not disregard seniority in filling short vacancies. See Award No. 4571. There is no such rule in this Agreement. We have also held that employes were entitled to exercise seniority rights to short vacancies on the basis of promotion rules. See Award No. 5255. However, the filling of a vacancy in a lower rated position is certainly not a promotion.

Since there is no rule in the Agreement which supports the claim, it must be denied.”

It is questionable whether or not this award supports Carrier's position as the position to be filled there involved was a lower rated position.

Award 3232 (Thaxter) more nearly reflects the attitude of this Board, the pertinent part of which is:

“... This particular problem has been before this Board on a number of occasions and the awards are not harmonious. Awards 1124, 1150 and 1177 hold that a carrier is not, in the absence of a specific rule so requiring, obligated to fill on the basis of seniority temporary vacancies not subject to the bulletining rule of the agreement. There is much to be said for not restricting the carrier's freedom of choice in filling a temporary vacancy.

To cite just one consideration, the senior employe may not be readily available and it is argued that the carrier should not have to act at its peril in assigning a junior employe. The awards which hold that the carrier must recognize the seniority rule concede that there of necessity must be exceptions. Award 2931. And it is undoubtedly true that to place the burden on the carrier to determine in advance whether there is justification for calling a junior employe enlarges the area of controversy. But a number of well considered awards have held that it is within the spirit, even though not within the letter of an agreement, that seniority should be recognized in filling temporary vacancies as well as permanent ones. Awards 132, 2341, 2426, 2490, 2716, 2931, 2994. Such having been the consistent holding of the later opinions of this Board we do not feel that we should now attempt to lay down a different rule."

We are not inclined to disagree with the holdings expressed by the majority of the decisions of this Board but feel that the Carrier should not have to act at its peril under all circumstances in assigning temporary work to a junior employe. In the instant case it appears from the Record that Claimant on a number of occasions had passed up opportunities for promotion to an Assistant Signalman's position; that Vergne was present at Stevens at the time Orcutt made his request for permission to be absent and Vergne's presence there was at least part of the consideration for giving Orcutt permission to be absent, that Orcutt's absence was for the benefit of the employe and not for the benefit of the Carrier, that Claimant was not immediately available as he was stationed 125 miles distant from Stevens; as was said in Award 10298—(Bonebrake)—"It would be unreasonable and unrealistic to fill the job, or at least attempt to do so with an employe 113 miles away." While we must recognize the seniority rule in filling vacancies we must concede there must of necessity be exceptions. Under all the facts and circumstances of the instant case, in the absence of any showing that the action of the Carrier was arbitrary, capricious or unreasonable, we must find that what occurred here comes within the exceptions noted in Award 3232 and that the Agreement has not been violated.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January 1963.

DISSENT TO AWARD 11030, DOCKET SG-10044

The majority, consisting of the Referee and the Carrier Members, recognize that seniority is not to be ignored in filling temporary vacancies; nevertheless, they proceed to set up an unrealistic obstacle course for no other reason than to uphold Carrier in its depriving Claimant of the use of his superior seniority. Therefore, I dissent.

G. Orndorff
Labor Member