

Award No. 11959
Docket No. MW-11454

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

William N. Christian, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
GULF, MOBILE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when, in lieu of notifying and using Second Class B&B Mechanic P. T. Kizer to fill a temporary First Class B&B Mechanic's position on Foreman A. Wallace's gang beginning June 9, 1958, it notified and used a junior employe to fill that position.

(2) Second Class B&B Mechanic P. T. Kizer be allowed the exact amount lost because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The claimant has established and holds seniority as a First and Second Class B&B Mechanic on the Carrier's J. O. District, but was regularly employed as a Second Class B&B Mechanic on Foreman J. L. Smith's B&B gang, because of insufficient seniority to hold a First Class B&B Mechanic's position.

Commencing on June 9, 1958, First Class B&B Mechanic W. K. Hurst, who was regularly assigned as such on Foreman A. Wallace's B&B gang on the same seniority district, was absent from duty account of illness for a period of forty-three working days.

The Carrier, instead of notifying and using the Claimant, who was the senior available eligible employe on the seniority district, to fill the aforementioned temporary vacancy, assigned the position to a junior employe.

The agreement violation was protested and the instant claim filed in behalf of the claimant as follows:

"August 14, 1958

Mr. S. A. Cooper, Chief Engineer
Gulf, Mobile and Ohio Railroad
Mobile, Alabama.

CONCLUSION

The Claimant has failed to comply with the agreement and the claim that he should be paid as though he worked as a First Class Mechanic should be denied.

OPINION OF BOARD: Exhibits as to past practice and suggesting physical impairment of Claimant are attached to Carrier's Ex Parte Submission. The exhibits show by the date thereof that they could not have been exhibited to Employees during handling of the claim on the property. The exhibits are excluded from our consideration. Circular No. 1 of this Board; Award No. 11887.

The pertinent part of Rule 20 of the effective Agreement provides:

"(c) Temporary positions, or vacancies of 30 days or less duration, need not be bulletined, but will be filled by senior available eligible employe, . . ." (Emphasis ours.)

Carrier filled such position with an employe junior to Claimant. Carrier's defense of past practice fails of proof. Carrier's remaining defense is that Claimant had actual (unofficial) notice of the vacancy and waived his right to fill the vacancy by his failure to leave the J. L. Smith Gang on his own motion and report to the A. Wallace Gang for work. Employees rely on the obligatory language of the rule and evidence of past practice that notice and acceptance customarily was through Foremen.

There is no question as to Claimant's seniority or geographical availability, or as to his eligibility.

The rule involved is clear. It is not ambiguous. By its own terms it is obligatory on Carrier. The burden was on Carrier to either comply with the plain mandate of the rule or, in the alternative, to show an affirmative good faith effort to meet the obligations of the rule, using such reasonable procedure as might be designed by the exercise of its sound discretion to implement the rule instead of ignore it.

Carrier's defense of waiver is not well founded. Waiver pre-supposes knowledge of all material facts. Here, Claimant had actual knowledge of the vacancy; but Claimant had no knowledge either express or implied, of how Carrier desired Claimant to manifest his wish to fill the vacancy. It was within the province and duty of Carrier to prescribe and make known in a reasonable manner the fact of how it desired employes so situated as Claimant to manifest their wish. Having failed to exercise this managerial prerogative, Carrier cannot defend on the ground of waiver.

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 Employees involved in this dispute are respectively Carrier and Employees 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 was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1963.