Award No. 12853
Docket No. SG-11430

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

WABASH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Wabash Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement, particularly the seniority rules and Article 12(b) of the Vacation Agreement of December 17, 1941, appended thereto, when it assigned Mr. S. Vitek to relieve Foreman H. Martin during his vacation period from May 26, 1958, through June 14, 1958, inclusive, and also during period from June 18, 1958, through June 21, 1958, in place of Mr. C. D. Law, who was the senior Signalman in Signal Gang S-2.

(b) The Carrier now pay Mr. C. D. Law for the difference between what he earned as Leading Signalman and what he would have earned had he been used as Signal Foreman during the periods of time cited in part (a). [Carrier's File: 116.4]

EMPLOYES' STATEMENT OF FACTS: Mr. C. D. Law was regularly assigned as Leading Signalman in Signal Gang S-2. Mr. Law's seniority date in the Signalman class is 6-27-47 and he was the senior employe working in Signal Gang S-2 under Foreman H. Martin.

Mr. S. Vitek was also regularly assigned as Leading Signalman in Signal Gang S-2 and had a seniority date in the Signalman class of 11-1-55.

During the period of May 26 through June 14, 1958, Foreman H. Martin of Signal Gang S-2 was absent on vacation and during the period of June 18 through June 21, 1958, he was also absent due to a death in the family. During both periods of Foreman Martin's absence, the Carrier assigned Leading Signalman S. Vitek, the junior employe, to fill the temporary vacancy of Signal Gang Foreman.

Inasmuch as Mr. Law was the oldest Signalman in seniority on Signal Gang S-2 and the Carrier was not going to fill the Foreman's position with

employe is to be filled and regular relief employe is not utilitzed, effort will be made to observe the principle of seniority."

With particular regard to the last sentence of that paragraph reading:

"When the position of a vacationing employe is to be filled and regular relief employe is not utilized, effort will be made to observe the principle of seniority."

First, that provision of the Vacation Agreement has no application to the vacancy on position of foreman during the period June 18 to 21, 1958, inclusive, when Mr. Martin, the regular occupant was absent **due to a death in his family.**

Second, that provision has no application to the vacancy which existed on the position of signal gang foreman during the period May 26 to June 14, 1958, inclusive, while Mr. Martin, the regular occupant was on vacation, in the absence of the claimant having seniority in the foremen classification; in the absence of the carrier having by agreement granted the claimant and all others in his class the right to be used to fill temporary vacancies of less than 30 days' duration on positions of foreman solely on the basis of seniority in the signalmen's classification; and when the facts indicate that the claimant had not familiarized himself with the circuit and wiring plans of the highly technical work in progress at Delphi so as to be fully qualified to carry out all phases of the work during the regular occupant's absence.

The claim should be dismissed for lack of jurisdiction and if not dismissed then denied for the reason that it is not supported by the rules of the agreement.

(Exhibits not reproduced.)

OPINION OF BOARD: At the outset the Board is confronted with the Carrier's contention that we are without jurisdiction to consider the dispute because no conference was held on the property as required by the Railway Labor Act and the Rules of Procedure of this Board, and that the claim was not appealed within the time limit imposed by Article V of the National Agreement of August 21, 1954.

On the conference question, two recent decisions of the Board are in point and deemed controlling. Awards 10675 (Referee Ables) and 10950 (Referee Ray). There it was held that failure to hold a conference on the property is not necessarily fatal unless there is evidence that one of the parties **wanted** a conference and **requested** it. We agree with this interpretation of the statutory language of Section 2, Second of the Act. Applied in the instant claim, it means that where, as here, the Carrier does not request a conference and there is nothing to show that it was denied the opportunity for such conference, it may not later properly challenge the jurisdiction of this Board on that ground. We hold, therefore, that the Board has jurisdiction over this dispute.

Insofar as the timeliness of the appeal is concerned, the record shows that this issue was not presented on the property. Under our rules of procedure, such an issue raised for the first time at this level of appeal comes too late. It will not, therefore, be considered. (See Awards 11617, 11939 and 12092.

Proceeding now to the merits, it appears that the claim is bottomed on the fact that the Carrier used an employe junior in the Signalman class to Claimant to fill a temporary vacancy of less than 30 days duration in the Foreman class. Neither held seniority as a Foreman. No other employes holding seniority rights as Foreman were available to fill the vacancy. Claimant was regularly assigned as a Leading Signalman and as such, was experienced in supervising the work of other employes. The employe selected to fill the vacancy, however, was familiar with the particular work involved, i.e., the installation of remote control interlocking and highway crossing protection, having been assigned as Leading Signalman with secondary supervision over the wiring work at the project.

The effective Agreement in evidence here contains no bar to the selection by the Carrier of an employe it considers best qualified to fill a temporary vacancy in another class of service when no other employe holding seniority in that class of service is available. Article 4, setting out seniority rules of the Agreement, is an effective bar to the exercise of such discretion by the Carrier only in these situations where a specific rule applies, as in cases of reductions in force, recalls to service, displacements, etc. None of these rules was violated here because neither the Claimant nor the employe selected to fill the temporary vacancy in the Foreman's class held any seniority rights in that class. The distinction between classes is made very clear under Rule 38 which specifies four separate classes of service, and states that "temporary service in a higher class does not establish seniority in that class." Accordingly, the Board finds no violation of the seniority rules of the basic Agreement.

The Employes also cite and rely upon Article 12(b) of the National Vacation Agreement of December 17, 1941, as support for the claim. That rule (effective on this property) reads:

> "(b) As employees exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. 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."

In relying on the foregoing, the Employes refer the Board to Award 5285, with Referee Wyckoff participating, which resolved a similar dispute between the Brotherhood of Railroad Signalmen and the Pennsylvania Railroad by sustaining the claim. There the Carrier conceded that the Claimant was qualified to perform the duties of the Foreman's job; here no such concession is made by this Carrier. There the Board's conclusions were based squarely upon a rule of the basic Agreement [Article 2, Section 18(b)] which required the selection of the **senior** qualified applicant for promotion to the Foreman class. The Board found that temporary service in a higher class was in fact a promotion and that since both applicants were admittedly qualified, the Carrier should have selected the senior employe. No such rule requirement appears in the Agreement in evidence here. The selection of employes it considers competent and qualified to perform certain tasks is an established managerial right unless management has abridged or relinquished that right by Agreement. It did not do so under the effective Agreement in evidence here. Since there is no rule of the basic Agreement which required the Carrier to select the senior of the two employes

here involved, Article 12(b), standing alone, lends no support to this claim because the vacation plan is subject to the working rules of the basic Agreement (See Referee Morse's answer to Question 1, Article 6 of Vacation Agreement ,at pages 70-71).

Accordingly, the Board finds no rule support for this claim. It will, therefore, be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of September 1964.

SPECIAL CONCURRENCE TO AWARD 12853, DOCKET SG-11430

The majority here properly denied the claim on the basis that "The effective Agreement in evidence here contains no bar to the selection by the Carrier of an employe it considers best qualified to fill a temporary vacancy in another class of service when no other employe holding seniority in that class of service is available."

The majority is in error, however, as to the conference question raised by the Carrier since this issue was brushed aside in reliance on Awards 10675 and 10950, with the more recent Awards 11136, 11434 and others, ignored. These latter awards hold that this Board is without jurisdiction to entertain a claim where the petitioning organization has failed to comply with the statutory mandate that they seek to meet and confer on the property concerning the claim. This prerequisite has been determined not alone by this Board, but by the Supreme Court of the United States in **Locomotive Engineers v. Louisville & Nashville Railroad Company,** 373 U.S. 33.

For these reasons, we must dissent to the portion of Award 12853 as related to the question of the jurisdiction of this Board to determine a dispute which has not been the subject of conference on the property.

/s/ D. S. Dugan
/s/ R. E. Black
/s/ P. C. Carter
/s/ T. F. Strunck
/s/ G. C. White

DISSENT TO AWARD NO. 12853, DOCKET SG-11430

The Majority, consisting of the Referee and the Carrier Members, very properly rejected the Carrier's attempt to have this dispute dismissed on procedural grounds. Considering the unprecedented backlog of undecided cases, it is unfortunate that the Third Division must take the time to deal with the conference issue where as here the issue was so obviously injected for the sole purpose of diverting attention from the real issue.

With regard to the merits, it has long been recognized even before the National Railroad Adjustment Board came into existence that the principle of applying seniority in service, which guarantees to senior employes the right of preference in employment when other conditions of fitness and ability are equal, is not only a matter of justice in the dealings between the carrier and employes but is as well an important factor in the shaping and ratification of the agreements between the parties. In light of which the Majority's holding that Claimant cannot prevail because the Agreement does not contain a specific rule permitting him to use his seniority to obtain the type of position involved, is completely unrealistic. The better view is that expressed in Fourth Division Award 1390 that:

> "* * * If the employe possesses the requisite seniority and if the position is available no express language is required to entitle him to take it. Stated conversely, the employe with seniority will not be denied the right to exercise it, unless the positive and unequivocal language of the Agreement so requires."

Having recognized that Claimant was experienced in supervising the work of other employes, the Majority committed further error in subscribing to Carrier's contention that the junior employe was best qualified in a particular phase of the overall project. After all, by the clear terms of the parties' Agreement the function of a foreman is to supervise the work of other employes and not the performance of the work over which he has supervision.

/s/ G. Orndorff

G. Orndorff
Labor Member