Award No. 13141
Docket No. MW-13100

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY

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

(1) The Carrier violated the agreement when it failed to call and assign Mr. N. J. Minton to fill one of two newly established positions of B&B mechanic on April 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28 and 29, 1960 and used two junior mechanics instead.

(2) Mr. N. J. Minton be allowed the difference between what he was paid at the B&B apprentice's rate of pay and what he would have received at the B&B mechanic's rate of pay had he been properly assigned to the position of B&B mechanic on the dates set forth in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Messrs. N. J. Minton, A. Gooch and R. E. Snow all hold seniority as B&B Mechanics. However, Claimant Minton's seniority as a B&B mechanic is superior to that of Messrs. Gooch and Snow, the claimant's seniority as such dating from June 3, 1945 while Mr. Gooch's seniority as a mechanic dates from February 13, 1948 and Mr. Snow's seniority as a mechanic dates from September 1, 1948.

Account of extensive force reductions effected several years prior to April 11, 1960, Messrs. Gooch and Snow were laid off, while Claimant Minton exercised seniority rights to a position of B&B apprentice. This was the status of all three employes as of April 11, 1960.

In April, 1960, the Carrier organized a B&B gang to scale cuts and, effective April 11, 1960, Messrs. Gooch and Snow were used to temporarily fill two positions of B&B mechanics in said gang, pending expiration of bulletin. No effort whatever was made to call and use Claimant Minton to fill any positions of B&B mechanic in said gang, although he was senior as such to both Gooch and Snow, and was clearly available for service in such higher pay-rated rank.

Rule 19(b) provides that new positions or vacancies may be filled temporarily pending permanent appointment. The two here involved positions were so filled. A. Gooch and R. E. Snow were so used. The Carrier was not under any contractual obligation to take Claimant N. J. Minton off his regular assignment as B&B apprentice in gang WB-9 at Burnside, Kentucky, or off his assignment as B&B helper in gang WB-10, and place him on either of the positions of B&B mechanic pending permanent appointment as here contended by the Brotherhood. In this situation, the Board cannot do other than make a denial award, for the claim is not supported by the agreement in evidence .

OPINION OF BOARD: The question presented in this case is whether the Agreement permits the Carrier to assign a less senior employe to a temporary vacancy in a newly created B&B mechanic position pending permanent appointment where a more senior employe, although furloughed from that rank and classification, is working for the Carrier in a lower rated position, while the less senior employe is not working for the Carrier at all.

Organization argues that Rule 13 forbids such assignment of the less senior employe unless the more senior employe's qualifications or ability are insufficient; that, since such was not the case, Organization's claim should be sustained.

Carrier argues that it had the right, under Rule 19 (d), to fill the temporary position; that Rule 4 (i) requires that Carrier is obligated only to call the senior adequately able and qualified employe from among those furloughed totally from the Carrier's employ.

We cannot agree. In filling the vacancy under Rule 19 (d), Carrier was obligated to comply with the requirements of the rest of the Agreement. Rule 13 contains no exception to its requirement that promotions and transfers (qualifications and ability being sufficient), shall be based on seniority.

In the case of the filling of the permanent vacancy, the mechanics for complying followed a posting and bidding procedure, where the employe wanting the move had to bid for it. In filling the temporary vacancy, no such posting and bidding procedure was followed. Carrier called the senior totally furloughed employe, but did not call a more senior demoted employe. Organization contends that Rule 15 (b) obligates the Carrier to call such senior demoted employe. Carrier argues that Rule 15 (b) relates only to totally furloughed employes. There is nothing in the language of the Rule, nor did Carrier introduce any evidence of history or practice to indicate that the first two words of Rule 15 (b), "an employe" actually mean "an employe not working for the company, but who has complied with the requirements of the rules as to retention of his seniority" as argued by the Carrier.

In this case the difference between the senior employe totally furloughed and the more senior employe working for the Carrier in a lower ranked position was that, while the Carrier needed the home address of the former to call him, Carrier could reach the latter on its property to call him. This difference did not alter the rights of both to consideration for call to fill the temporary vacancy. By calling the less senior and failing to call the more senior, Carrier violated the Agreement.

Carrier argues that Claimant was not the most senior in a demoted position, and should not be allowed his claim on that account. He is the only employe who made a claim in this case. It is well established, as stated by the

Board in Award No. 4447: "That the claim might have been made in behalf of others having, as between themselves and Claimant, a prior right to the work is of no concern to the Carrier as long as Claimant was eligible and available to do the work. Others are not making any claim, and if they should, the Carrier will not be required to pay more than once."

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 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 11th day of December 1964.