

Award No. 16130
Docket No. MW-16637

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement when it used an employee who has no foreman's seniority to relieve Foreman E. Black on May 7, 1965. (System Case No. SG-1-65/MW-3-65.)

(2) Mr. G. Thomasino now be allowed eight (8) hours' pay at his time and one-half rate because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant and Mr. E. Black were both regularly assigned as motor car repair foremen at Gary, Indiana. Their respective work weeks extended from Monday through Friday (Saturdays and Sundays were rest days). The claimant's assigned hours were from 7:00 A. M. to 3:30 P. M., while Foreman Black was assigned to work from 3:30 P. M. to 12:00 Midnight.

Foreman Black was granted permission to be absent from work on May 7, 1965. Instead of notifying and using the claimant to relieve Foreman Black, the Carrier used Motor Car Repairman W. M. Kavarie, who does not hold seniority as a motor car repair foreman. Mr. Kavarie worked eight hours as a motor car repair foreman on the aforementioned date.

The claimant's ability and availability to perform the subject work have not been questioned by the Carrier.

Claim was timely and properly presented and handled by the Employees at all stages of appeal, up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated August 1, 1952, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: On the claim date, Friday, May 7, 1965, Mr. G. Thomasino was the regularly assigned day shift Motor

"ARTICLE IV.

NATIONAL AGREEMENT OF 8-21-54

... The Carrier shall have the right to use furloughed employees to perform extra work, and relief work on regular positions during absence of regular occupants provided such employees have signified in the manner provided in paragraph 2 hereof their desire to be so used. **This provision is not intended to supersede rules or practices which permit employees to place themselves on vacancies on preferred positions in their seniority districts, it being understood, under these circumstances, that the furloughed employee will be used, if the vacancy is filled, on the last position that is to be filled. This does not supersede rules that require the filling of temporary vacancies.** It is also understood that management retains the right to use the regular employee, under pertinent rules of the agreement, rather than call a furloughed employee."

(Exhibits not reproduced.)

OPINION OF BOARD: On the property each party argued that the case be decided as contended by it because of alleged procedural lapses by the other under Article V of the National Agreement dated August 21, 1954; these contentions, which were without merit, were not seriously pressed in the Submissions as a basis for our decision; we will deal with the matter on its merits.

By prearrangement, and not due to his illness, on May 7, 1965, Motorcar Repair Foreman Black was absent from his shift (3:30 P. M. to 12 Midnight). Motorcar Repairman Kavaris, who was assigned to Foreman Black's gang, but who held no foreman's seniority, was assigned to fill the temporary vacancy. There were no unassigned foremen available. Claimant, who was the regularly assigned foreman on the preceding shift (7 A. M. to 3:30 P. M.), was available. Brotherhood contends that under the terms of Rules 3 and 6, Claimant should have been assigned to double over onto the vacancy. Carrier argues that Kavaris was properly assigned under the terms of Rule 6 and 12 (h).

Rule 3 reads:

"Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad as hereinafter provided."

Rule 6 (a) and (b) read:

"(a) Except as provided in paragraphs (b) and (c) of this rule, vacancies or new positions will be filled first by employees holding seniority in the group and rank in which the vacancy or new position occurs; if not so filled, they will be filled by qualified employees in succeeding lower ranks in that seniority group in accordance with Rule 8. In the event that vacancy or new position is not so filled by employees in the seniority group in which it occurs, then it will be filled by qualified employees from other seniority groups in the respective sub-department desiring it before employing new men. Employees so assigned will retain their seniority rights in their respective groups from which taken.

(b) Vacancies or new positions, except those of motor car repairmen (permanent vacancies in motor car repairmen positions shall be filled in accordance with Memorandum of Understanding of November 8, 1939, between committees representing Shop Craft and Maintenance of Way Employees, and the EJ&E Railway Company), in the Scales and Work Equipment Sub-department will be filled first by employees holding seniority in the group and rank in which the vacancy or new position occurs. If not so filled, they will be filled by qualified employees in succeeding lower ranks in that sub-department. In the event the vacancies or new positions are not so filled by employees in the Scales and Work Equipment Sub-department, they will be filled by qualified employees from Group 2 Track Sub-department desiring same, or qualified employees desiring same from the Bridge and Building Sub-department and the Track Sub-department in that order before hiring a new employee. Employees so assigned will retain their seniority rights in the respective other groups and sub-departments from which taken."

Rule 12 (a), (c) and (h) read:

"(a) When it is known fifteen (15) calendar days in advance that a position is to be established or that a vacancy of thirty (30) calendar days or more is to be open, such position or vacancy will be bulletined at once.

(c) New positions or vacancies of thirty (30) calendar days or less duration shall be considered temporary, and may be filled without bulletining except that senior unassigned employees in the seniority rank will be given preference in assignments, if available. Such assignment not subject to displacement.

(h) It is understood and agreed that where preferred positions occur, which are not bulletined, the senior employees in the gang capable of performing the duties shall be entitled to the position."

Our recent Award No. 14946 (Ives) deciding a similar dispute between the same parties is cited as dispositive of the issues here; examination of it and of the record on which it was based shows that both the facts and the arguments in the case were different enough so that our decision there does not dispose of the central issue presented here; we decided that case in part on the basis of the unavailability of the claimant there, and there is no claim that the Claimant here was unavailable.

If Rule 6 alone were the applicable specific rule, it would not support Carrier's position, but Brotherhood's: it clearly provides that in filling vacancies, positions will be filled "first by employees holding seniority in the group and rank in which the vacancy . . . occurs", (emphasis ours), and only if not so filled, then "by qualified employees in succeeding lower ranks . . ." Brotherhood asserts that the only exceptions to Rule 6 are in Rules 12 (c) and 36; but we find that in Rule 12 (h) there is another exception. And this case turns on whether that exception in Rule 12 (h) is or is not the applicable rule in this case.

On this question, Brotherhood argues (R. pp. 9 and 10):

"It will be particularly noted that the application of the afore-quoted Rule 12 (h) extends only to positions which are not required to be bulletined. Since the position of motor car repair foreman is subject to bulletin, said rule does not have any application whatever in this instance. The intent and sole purpose of that rule is to insure that preferred and/or desirable work of a gang, such as operating motor cars, performing flagging service, etc., will be assigned to members of the gang qualified to perform same on the basis of seniority rather than favoritism."

There is no evidence in the record to support Brotherhood's restricted definition of the word "preferred" or its assertion as to the intent and sole purpose of Rule 12 (h). As to Brotherhood's argument in the first two sentences quoted above, we find Brotherhood's reading strained and incorrect: In the context of the entire Rule, "where preferred positions occur, which are not bulletined" clearly refers to vacancies in such positions which may be filled without bulletining as provided in 12 (c), and does not refer to positions with vacancies of 30 days or more which are required under 12 (a) to be bulletined; thus the reference is to kind of vacancy, and not to the general existence of the position.

Since we find nothing in the record to show that Rule 12 (h) is inapplicable to this case, and it sets up a specific exception to the provisions of Rule 6, we find that Carrier properly applied it in assigning Kavaris to the preferred non-bulletined vacant position on his shift.

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 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of March 1968.

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