

Award No. 16692
Docket No. MW-16981

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
NORFOLK AND WESTERN RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement when it used G. H. Whitt to work on Section No. 5 from September 29, 1965 to October 29, 1965 instead of using Carlos M. Mullins for such service. (System Case M-1725)

(2) Mr. Carlos M. Mullins now be reimbursed for the amount of earnings lost because of the aforesaid violation.

EMPLOYES' STATEMENT OF FACTS: The claimant was the senior furloughed section laborer on Section No. 5.

Beginning on September 29, 1965, a temporary vacancy existed in a section laborer's position on Section No. 5. Instead of recalling the claimant to fill the temporary vacancy on his home section, the Carrier used Section Laborer G. H. Whitt, whose home section was Section No. 6.

Section Laborer Whitt worked on the claimant's home section from September 29 to October 29, 1965 inclusive. During this period the claimant was furloughed.

Claim was timely and properly presented and handled by the Employes 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 December 16, 1963, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: The instant claim is based upon the provisions of an agreement between this Carrier and the Brotherhood of Maintenance of Way Employes bearing effective date of December 16, 1963. Copies of that agreement are on file with your Board and are, by reference, made a part hereof.

Carrier declined the claim.

OPINION OF BOARD: The issue involved herein is whether or not Carrier violated the Agreement when it failed to fill a temporary opening in a section laborer's position, Section Force No. 5 with Claimant rather than Section Laborer G. H. Whitt, of Section Force No. 6.

The facts are that Claimant a Section Laborer was furloughed from Section No. 5, his home section. Section Laborer Whitt, whose home section was Section No. 6, was displaced on September 28, 1965 by a senior employe on said Section No. 6. Employe Whitt was instructed by Carrier to report to work on Section No. 5. There is no dispute that employe Whitt was senior to Claimant.

It is the position of the Organization that Carrier violated Rule 15(c) of the Agreement when it failed to fill the vacancy in question with Claimant, who was the senior section laborer of home section No. 5. Rule 15(c) provides as follows:

"Senior section laborers furloughed from their home section force will be recalled when it is desired to fill temporary vacancies occurring on such force not requiring bulletining and when it is desired to fill vacancies or new positions occurring on such force pending bulletining and assignment under provisions of Rule 8."

The Organization further contends that inasmuch as Claimant was not recalled to duty by Carrier, Claimant could not be displaced until first recalled to duty; that Employe Whitt was not obligated to displace Claimant or any other employe on another section and thus Carrier's argument that Employe Whitt would have displaced Claimant if Claimant had been called, is speculation and therefore without merit; that Employe Whitt did not exercise his seniority rights in this instance inasmuch as Carrier instructed him to fill the vacancy on Section No. 5.

Carrier contends that by virtue of Rule 16(b) of the Agreement Employe Whitt had the right to exercise seniority to other section gangs such as Section Force No. 5; that Rule 5(c) of the Agreement permits a senior employe to displace a junior employe when . . . vacancies occur . . . ; that it was unnecessary to fill the vacancy with a junior employe when the vacancy was going to be filled by an employe senior to Claimant.

Rule 16(b), the pertinent provisions thereof, reads as follows:

" * * * * *

Section Laborers shall have the right to exercise seniority as such to other gangs, but will not be required to do so. . . ."

The Organization rests its Claim solely on an alleged violation of Rule 15(c) of the Agreement. However we must also consider Rule 16(b) of the Agreement. As this Board has repeatedly held, we must consider the Agreement as a whole in arriving at proper interpretations. See Award No. 13570 (Engelstein). Therefore we must consider Rule 15(c) together with Rule 16(b) in order to decide this dispute.

Rule 16(b) clearly authorizes senior section laborers to exercise their seniority as to other gangs. In this instance Employee Whitt's seniority could therefore be exercised as to other section gangs, such as Section Force No. 5 involved herein.

The Organization raises a two fold objection in regard to the exercise of seniority by Employee Whitt in this instance. First, it says that Whitt did not exercise his seniority but that he was instructed by Carrier to take the job here in question. It is immaterial as to the manner in which Employee Whitt took possession of the job in question. He was free to reject the position if he so desired. The fact that he did accept the position indicates that he concurred with Carrier's instructions and therefore in effect he exercised his seniority which entitled him to the position due to being senior employee eligible for the vacant position.

Second, the Organization argues that Carrier was compelled to first fill the vacant position with Claimant and then Employee Whitt could if he so desired, bump Claimant. Inasmuch as Rule 16(b) of the Agreement permitted the Carrier to fill the vacant position in question with Employee Whitt rather than Claimant, it was not necessary for Carrier to first fill the vacant position with Claimant.

Therefore, it is the opinion of this Board that the Agreement was not violated, and the Claim must 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 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 not violated by the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1968.