Award Number 17939
Docket Number CL-18242

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6573) that:

(1) The Carrier violated the Agreement between the parties during the period of November 27, 1967 through December 8, 1967, when it used a person without Seniority rights thereto for the purpose of filling a position of a vacationing employee.

(2) The Carrier be required to compensate at time and one-half rate of their positions the following named claimants for the dates set out below:

CLAIMANT	DATES OF CLAIM
Mr. Bill Mau	November 27 and 28, 1967 December 4 and 5, 1967
Mr. Vance Fulks	December 1 and 8, 1967
Mr. R. V. Melton	November 29 and 30, 1967 December 6 and 7, 1967

EMPLOYES' STATEMENT OF FACTS: This dispute had its inception on November 22, 1967. Due to this fact, in order to place the facts in chronological order it is necessary to review the happenings up to the actual date the violation began on November 27, 1967.

Under date of November 3, 1967, one Mr. James H. Kennedy, Gateman-Passenger Department, was afforded an investigation on charges of insubordination and dismissed from the Carrier's service effective retroactively to October 23, 1967 (See Employees' Exhibit No. 1). This decision was appealed to the Superintendent, Mr. W. R. Apple, on a leniency basis and the hearing was held on same November 22, 1967. After discussing the case at some length the Superintendent announced his intent to restore Kennedy to service on a leniency basis effective on or about December 9, 1967, and that during the interim period of November 27, 1967 to December 8, 1967, he would use Kennedy to relieve the Messenger position in the Communication (telegraph) Department while the incumbent Mr. Joe Johnson was on vacation. The position of the vacationing employee (Mr. Joe Johnson) was a Monday through Friday assignment with Saturday and Sunday rest days.

Accordingly, on November 27, 1967, leniency was extended to J. H. Kennedy. He was called back to service, and he was first temporarily assigned to cover the messenger position in the Communication Department while the incumbent, J. B. Johnson, was on vacation from November 27th to December 8, 1967.

On January 25, 1968, claim was initiated by Vice General Chairman B. D. Lynch on behalf of the claimants referred to in the Employes' Statement of Claim.

OPINION OF BOARD: On November 7, 1967, Gateman Kennedy was notified of his dismissal from the service of the Carrier retroactive to October 23, 1967. He had been withheld from service on this latter date pending investigation for insubordination. A formal hearing was held on November 3, 1967. The Organization appealed the dismissal on a plea of leniency at a conference on November 22, 1967 resulting in his restoration to service after December 8, 1967 with seniority and vacation rights unimpaired, but without pay for time lost.

On November 27, 1967 and continuing to and including December 8, 1967, Carrier employed Kennedy as a vacation relief employe to relieve an employe for vacation.

Because of Carrier's employment of Kennedy for vacation relief purposes, the Organization filed a claim on behalf of Claimant on the grounds that they were deprived of their seniority rights to the vacation work and further that they should have been used on their rest days at time and one-half to replace the vacationing employe.

Both sides agree that Kennedy in this instance held no seniority and was not "called back to service" until December 9, 1967, the effective date of his reinstatement. He in effect was a discharged employe without any service connection until December 9, 1967.

The Petitioner relies principally upon Appendix "F" of the Agreement between the parties. They argue that when the position of the vacationing employee was required to be filled, it was incumbent on the Carrier to do so in accordance with the provisions of the National Vacation Agreement, as amended and Rules of the Agreement pertaining thereto, i. e. Appendix F. Further that when the necessity to fill the position became apparent, the Carrier was required under the terms of Appendix F to use the employes on the Master Roster entitled to the work as specified in paragraphs (A) and (E) of Appendix F. Paragraph (E) or Appendix F states:

> "(1) When vacation relief positions are not established or when vacation relief employes are absent the rules of this Agreement shall apply."

Arguendo Petitioner states that there was no vacation relief position established, hence paragraph (A) of Appendix F would be the controlling rule. This paragraph provides that:

> "(A) Short vacancies occurring because of absence of an employe having a regular assignment (other than a regular relief assignment):
>
> (1) Call an available furloughed employe in seniority order who does not have 40 hours work in his work week.

(2) Call the senior employe on a rest day working in the department having home roster seniority where the vacancy occurs.

"(3) Call the senior employe on a rest day working in the department having no seniority on the home roster of the department.

(4) In event short vacancies cannot be filled as provided in paragraphs (1), (2) and (3) and it is necessary to double employes, preference will be given in seniority order first to employes working in the department having home roster seniority and second to employes working in the department having no seniority on the home roster in the department. Doubling as provided above shall be assigned first to the employe working on the nearest immediately preceding shift to the shift where the vacancy occurs and second to the employe working on the nearest succeeding shift to the shift on which the vacancy occurs."

Since there were no available employes as specified in (A) (1) or in (A) (2), the Claimants falling into the category of employe specified in (A) (3) should have been called. These are the essential points of Petitioner's claim.

The Carrier contends that paragraph (E) of Appendix F is inapplicable to this case because a relief position was established. Furthermore they contend that even if Appendix F was applicable, paragraph H thereof, which provides.

"Short vacancies, except vacation short vacancies protected by a regularly assigned vacation relief worker, shall be filled on a day to day basis, that is, not for the duration of the vacancy."

recognizes that a vacation "vacancy" is different than other vacancies such as those due to illness, etc; that under the rule a vacation vacancy is not to be filled on a day to day basis such as involved in this claim, but is to be filled for the duration of the vacancy, if it is filled.

Carrier further contends that Appendix F is a general agreement concerned with various types of vacancies while the Vacation Agreement of December 7, 1941, is a special agreement concerned specifically with the subject of vacation and hence the latter will have to prevail on the general principle that special agreements have precedence over general agreements.

Carrier avers that Article 12 (b) of the Vacation Agreement specifically provides that absence from duty for vacation reasons will not constitute a "vacancy" in any position under any agreement and quotes several awards of the Board to sustain its position, that under the Vacation Agreement absences due to vacations are to be treated differently than absences due to other causes, and finally that the provisions of the Vacation Agreement pre-empt the field where a vacation absence is involved.

Carrier refers us to the Vacation Agreement itself, Article 12 (b) and (c).

"ARTICLE 12 (b)

". . . 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."

"ARTICLE 12 (c)

"A person other than a regularly assigned relief employe temporarily hired solely for vacation relief purposes will not establish seniority rights unless so used more than 60 days in a calendar year. . . ."

Carrier contends that the provisions of 12 (b) relating to the principle of seniority are not mandatory and that 12 (c) contemplates the hiring of a temporary employee such as was done in this case without resort to the seniority roster.

We agree in principle with the arguments propounded by the Carrier and will accordingly deny the claim.

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 21st day of May 1970.

Central Publishing Co., Indianapolis, Ind. 46206 Printed in U.S.A.