

NATIONAL RAILROAD **ADJUSTMENT** BOARD

**THIRD** DIVISION

Award **Number 20190**  
Docket Number CL-20350

Joseph A. Sickles, Referee

(Brotherhood of Railway, Airline and Steamship  
( Clerks, Freight Handlers, Express and  
( Station **Employees**

PARTIES TO DISPUTE: (

(Louisville and Nashville Railroad Company

STATEMENT OF CLAIM: Claim of the **Committee** of the Brotherhood (GL-7365)  
that:

(1) Carrier violated the Agreement when beginning March 7, 1972, it failed and refused to assign Pamela **Doleman** to the position of File Clerk as described and advertised in Bulletin Nos. 24 and 25, District No. 13, dated **March 3**, 1972.

(2) Carrier shall, because of the violation cited in (1) above, compensate Pamela **Doleman**, at the rate of \$30.32, for each assigned **work** day, **Monday** through Friday, inclusive, beginning March 7, 1972, and continuing until the violation ceased as of close of business April **14**, 1972.

(3) That seniority of Pamela **Doleman**, in District No. 13, shall date from March 7, 1972, the date her Rule 7 application **was** due to have been honored.

OPINION OF BOARD: In February, 1972, Claimant filed a Rule 7 Application for a position in District 13. Rule 7 states, in appropriate **part:**

"Rule 7 (a) Filing Applications - **Employees** holding group 1 seniority may file applications for group 1 positions on other seniority districts, such applications to be considered under Rule **6(k)**, with due regard to Rule **8**, when a vacancy occurs. Applications filed hereunder remain in force only 90 days from date received after which renewal is required if further consideration is wanted during the next 90 days."

On **March 3**, 1972, Carrier advertised, for bid, two positions in District 13. No bids were submitted by employees holding seniority in that District.

Rule 6(k) of the **Agreement** specifies:

"6(k) **Procedure** When No Applications Received **From** Regularly Assigned **Employees** - In the event no bids are received from regularly assigned **employees** in group and on district where vacancy is bulletined, the position will be filled in the following order of precedence:

1. By assigning the senior capable **employee** on **roster** who is then unassigned in group where vacancy exist, except as provided in **Note** (a).
2. By assigning the senior capable **employee** from another district who has application properly on file under Rule 7.
3. By new employment.

Note:

(a) Extra or **unassigned employees** of the group where vacancy occurs are not required to file bids, except **employees** assigned to a higher group active extra board desiring a lower group vacancy shall place a bid thereon.

(b) In making **assignment** under **items** above, where more than one position is to be filled, the senior shall have a choice.

(c) The terms of this rule shall in no case serve to cause award and assignment of a bulletined group 1, 2 or 3 vacancy to a **junior while** a qualified senior **employee** stands for the assignment.

(d) Failure to **responde** when called for **assignment** forfeits seniority in group where vacancy exists, except when **assignment** of **employee** in group 3 service to a position of messenger, etc., would cause a wage loss."

Claimant was not called to fill either vacancy.

Carrier denied the claim because; (1) an oral understanding precluded the necessity of filling the vacancies; (2) Claimant **was** not the senior employee with a Rule 7 Application on file and; (3) the Carrier is not required to fill vacancies under the Agreement.

Initially, we will consider the oral understanding. A review of the record shows that unquestionably there was an oral agreement dealing with necessity of filling certain vacancies due to a pending consolidation of one group into another bureau. However, the Board is unable to determine the full extent of the understanding of the parties.

On two occasions, during the handling of the matter on the property, the Organization stated that **it** had agreed only to hold open certain positions which **were** vacant at the time of the oral **un-** understanding, and the **March 3, 1972** vacancies **arose** subsequent co that the. In further correspondence on the property, Carrier never took issue with that description of the oral agreement.

Certainly, proper representatives of the Carrier and the Organization may alter the terms of the collective bargaining agreement under appropriate circumstances. But, when a party alleges an oral understanding as an affirmative defense to its actions, it is clear that said party has the burden of proving its reliance, and must establish the terms of the relied upon portion of the agreement by clear and convincing evidence. See Awards 17060 (Dugan), 12793 (Engelstein), 19337 (Edgett), 14982 (Ritter), 14735 (Dugan) and 12251 (Seff).

In this dispute, Carrier has the burden of proof. Under the record before us, **we** fail to find clear and convincing proof that the oral agreement relieved **Carrier** of any obligation it may have had to fill the vacancies in question. Accordingly, we are unable to agree **that** Carrier properly relied upon an oral **understanding** as a defense to this claim.

Secondly, we consider the **Carrier's** assertion that the Claimant was not **the** senior employee with a Rule 7 Application on file. The record appears to **confirm** that employees senior to Claimant would have been called to duty prior to the Claimant, if Carrier had utilized the procedures of Rule 6(k). While the record fails to indicate why senior employees remained silent, it does confirm that no claims **were** submitted by, or on behalf of, those senior individuals. Seniority is, of **course**, a right **which** accrues to each individual employee. This Board has noted on a number of occasions that the sole fact that another employee may have had a better right to a claim is of no concern to the Carrier, and does not relieve the Carrier of a violation of the **Agreement** when that right was not exercised. See, for example, Awards 19067 (Dugan), 18557 (Ritter) and 17801 (Kabaker). Claimant's requested relief may not be denied, under the facts and circumstances of this record, because of her seniority ranking.

Finally, the *Carrier asserts* that it ~~was~~ not required to fill the vacancies in any event; relying **upon** Award 12358 (**Dorsey**) and **Awards** dealing with a Carrier's ~~right~~ to abolish positions. See Awards 15379 (**Engelstein**), 16468 (**McGovern**), and 16876 (Cartwright). As we view the record developed on the property, we do not find that Carrier advanced this contention, but rather was content to rely upon **the al-**ledged oral understanding. Carrier did state, **in** its submission, "If it has been necessary to fill a vacancy...". However, Carrier went on to state that if there had been no bids from qualified assigned employees, then the position would have been filled in accordance with the provisions of Rule 6(k).

Regardless of the contentions advanced to this Board regarding the requirement to fill a vacancy, under this record, the Carries recognized the existence of a vacancy and attempted to fill **same**. On **March 3**, 1972, in two separate documents, the Carrier advised **all** concerned employees:

"The following position is hereby advertised for bids in accordance **with** clerical, station and storehouse employees agreement, as required under Rule **6...**"

Thus, instead of abolishing the positions in question, the Carrier attempted to fill same. Having failed to do so by bulletin, it was appropriate to then utilize the provisions of Rule 6(k).

**Claimant** seeks relief from March 7, 1972, with pay running through the close of business **on** April 14, 1972. In mid-March, the Organization **reminded** Carrier of Claimant's Rule 7 Application. **It** was not until March 29, 1972, that a claim was made on behalf **of** the **Claimant** for one of the two file clerks positions advertised on March 3, 1972.

We have noted above the fact that Claimant was not the senior individual with a pending Rule 7 Application, and concluded that said factor does not defeat her claim. At the same **time**, because of her relative seniority among those with Rule 7 Applications on file, we are reluctant to sustain the claim for any **period of time** prior to the Carrier having been specifically placed on notice of her claim. Accordingly, we will sustain the claim beginning March 29, 1972, rather than **March 7**, 1972.

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 Xct, 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.

A W A R D

Claim is sustained to the extent set forth in the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Paulsen  
Executive Secretary

Dated at Chicago, Illinois, this 15th day of **March 1974**.