NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22256

THIRD DIVISION Docket Number CL-22060

David P. Twomey, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8375) that:

"1. The Carrier violated the effective Clerks' Agreement when, commencing on December 20, 1975, it called a furloughed employe junior in service to Ms. Maureen Wesensten to fill a temporary position at a higher rate of pay than that of Ms. Wesensten's protected rate of pay, without affording Ms. Wesensten the opportunity to work the higher rated position..

2. The Carrier shall now compensate Ms. Wesensten for the difference between her protected rate of pay and the rate of the position assigned to the junior furloughed employe for December 20, 1975 and each subsequent day that the Carrier refused to permit her to work the higher rated position."

OPINION OF BOARD: In December of 1975, the Claimant, Ms. Maureen Wesensten, was regularly assigned to Position AC-212, Mail Clerk, with a daily rate of pay of $43.57. Her protected rate of pay was $45.7724 per day. She was listed on the seniority roster as Rank No. 141, with a seniority date of June 16, 1972. On December 20, 1975, and other dates thereafter, extra work existed in that the incumbent of Position AC-945, Correction Accounts Clerk, needed assistance to eliminate a backlog of tracing work. The Carrier called the senior protected furloughed Clerk, Mr. Lincoln, to assist the incumbent of Position AC-945, paying him a daily rate of pay of $50.6992. Mr. Lincoln was listed as Rank No. 142 on the seniority roster, with a seniority date of June 29, 1972.

The Organization contends that the Carrier had an obligation to offer the higher-rated position to the Claimant, and contends that failure to do so violated the Agreement. The Organization makes reference to Rules 3, 7, 8, 11 and 19 as having been violated. The Carrier disagrees.

Rule 29(g) states:

"(g) When forces are increased or vacancies occur, furloughed employes shall be returned to service in the order of their seniority rights. Such employes, when available shall be called in seniority order for all extra work, short vacancies or vacancies occasioned by the filling of positions pending assignment by bulletining which are not filled by employes' voluntary rearrangement of regular forces. When a bulletined new position or vacancy is not filled by an employe in service senior to a furloughed employe who has protected his seniority as provided in this rule, the senior furloughed employe shall be called and assigned to the position. Furloughed employes failing to return to service within seven (7) calendar days after being notified (by certified or registered mail, return receipt requested, sent to the address last given) or give satisfactory reason for not doing so will be considered as out of the service.

NOTE: Employes voluntary rearrangement of forces shall be confined to regular positions with identical starting times in a specific office or yard at one location, and in such a voluntary rearrangement only those employes reporting that day for work on their assignments shall participate."

The second sentence of the rule is of critical importance in this case. It states in part:

"...Such employes /furloughed employes/ when available shall be called in seniority order for all extra work, short vacancies or vacancies occasioned by the filling of positions pending assignment by bulletining which are not filled by employes' voluntary rearrangement of regular forces...." (emphasis added)

Rule 19(g), the second sentence, explicitly deals with the subject of how "all extra work" is to be filled. The first segment of the sentence clearly states that furloughed employes when available shall be called in seniority order for all extra work; however, the language

of the final clause of the sentence, underscored above, does not read with the same clarity of intent and thus detracts 'from the initial clarity of the first part of the sentence. It is imperative, therefore, to ascertain the intended meaning of this final clause to properly interpret Rule 19(g).

The Carrier states that amended Rule 19 was incorporated into the revised schedule effective January 1, 1974, with former Paragraph (c) of the rule becoming Paragraph (g) with just one change. The change, the Carrier states, was requested by the Organization, which insisted upon voluntary rearrangement of forces instead of the Carrier's former right to unilaterally rearrange forces, if necessary.

The Carrier asserted in its letter of June 25, 1976, that the use and assignment of furloughed employes pursuant to Rule 19 has been in effect continuously from January 1941 and that the Carrier is not obligated to offer a short vacancy or extra work to a senior employe unless there is no qualified furloughed employe. The Carrier states that its records do not show any claims filed by the Organization over the twenty-five year period of the rule.

The Organization does not deny the Carrier's statement concerning the one change in Paragraph (g) in the 1974 revised schedule. The Organization states in its Rebuttal that the reason there is no history of time claim settlements upon which to rely indicates that only recently has the Carrier made the assertions it makes in the instant case regarding the filling of short vacancies and extra work with the senior qualified furloughed employe. The Organization contends then that it is the Carrier who has changed its position.

The Organization desires, in effect, that the Board make a determination based on the principles of Rule 8 of the Agreement and the principles of Awards from other properties. Rule 19(g) contains specific language dealing with the filling of all extra work; this language cannot be ignored or deleted from the Agreement and must govern in the instant case. If it is true, as the Carrier asserted on the property and before this Board, that the use and assignemnt of furloughed employes to fill extra work without first offering the work to senior employes assigned to regular assignments has been in effect since 1941, then such a long standing practice coupled with the language of the second Sentence would establish a meaning for the language contained in the second sentence of Rule 19(c) and later Rule 19(g). If it is true, as the Organization

asserts, in its Rebuttal, that "only recently has the Carrier made the preposterous assertion that it need not regard seniority in filling short vacancies and performing extra work," then no practice exists . It is well settled that the Board does not resolve conflicts in the evidence and assertions before the Board. The practice (or lack of practice) of the parties for 25 years under a Rule is critical to ascertaining the proper meaning of the language of the second sentence of Rule 19(g). The burden of proof is on the Organization in this case. The Organization could have through statements of Clerks on this property demonstrated to this Board the manner in which extra work has been assigned over the years under the Agreement. Since it did not do so, and since Carrier asserts to the contrary based on a search of its records, we must dismiss this claim. It must be clear that this decision has no precedential significance as to the merits of the case; this Board just cannot make a proper determination of the merits of this case without the essential evidence on the practice of the parties over the 25 years of the existence of Rule 19.

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 claim be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day Of December 1978.