

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22922
Docket Number m-22898

Martin F. Schei-, Referee

PARTIES TO DISPUTE: ((Brotherhood of **Maintenance of Way Employees**
(The Denver **and Rio Grande** Western Railroad **Company**

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

(1) The Agreement was violated when the Carrier laid off senior Machine Operator D. M. **Grinde** instead of junior Machine Operator T. L. Caviness from 5th of December through 9th of December, 1977 (System File **D-2-78/MW-11-78**).

(2) Claimant Grinde now be compensated equal to what was earned by **Machine** Operator Caviness account of referred to violation."

OPINION OF BOARD: The Organization **claims** that Carrier violated the Agreement **between** the parties when **it** laid off senior Machine Operator D. M. Grinde instead of junior Machine Operator T. L. Caviness from the 5th through the 9th of December, 1977. Carrier, on the other hand, denies that it violated the **Agreement**.

Both **Grinde and** Caviness were furloughed at the close of work on December 2, 1977. On Monday morning, December 5, 1977, Carrier was notified by regularly assigned Work Equipment Operator, S. A. Crespin, that he would be unable to work on December 5, 1977. Crespin was assigned to operate a **machine known** as Tamper-PT 24, located **in** Denver, Colorado.

Carrier filled this vacancy by calling in Machine Operator Caviness who lives in the Denver area. Caviness worked **Crespin's** position from December 5-9, 1977. Carrier argues that it acted **in** accordance with Rule **11(g)**1 when it called Caviness as he was the senior **employee** at **the location**.

It is uncontested that the vacancy created was a temporary vacancy of less than thirty (30) calendar days duration. As such, Rule **11(g)** is the applicable work rule. A resolution of this matter, therefore, requires an interpretation of Rule **11(g)**. In relevant part, Rule **11(g)** states:

**RULE 11--ASSIGNMENT OF NEW
POSITIONS--VACANCIES**

* * *

Temporary Assignment--(g). New positions and vacancies **under-**going bulletining and assignment **and** temporary vacancies of less than **thirty** (30) calendar days' duration that are to be filled shall be filled in the **following** order:

1. By the **senior** employe working in the gang **or** at the location who holds **seniority** in the class of the position to be protected who through force reduction is working in a lower class or furloughed account force reduction.
2. By the senior employe working in the gang or at the location who has qualified for **promotion** in accordance with the provisions of Rule 9.
3. To the senior unassigned employe of the class **on** the seniority district who is working in a lower class or furloughed account force reduction.
4. To the senior employe awaiting promotion who has qualified in accordance with the provisions of Rule 9.
5. By promotion of the senior employe in the succeeding lower class or classes in the **subdepartment** who has applied for promotion in accordance with **the** provision of Rule 9 **but who has not been** qualified for or held an **assignment** in such class.

Rule 11(g) sets forth the procedure, in **numerical** order for filling **temporary vacancies**. **Rule 11(g)1** requires that the **vacancy** first be filled by an "employe working **in** the gang or at the **location** who holds seniority in the class . . . to be protected."

Carrier's reliance on Rule **11(g)1** is incorrect. Rule **11(g)1** is operative when an employe is **either working** in the **gang** or **working** at the location. Neither **Grinde** nor **Caviness** were **working** at the time the **vacancy** arose. **Both were** furloughed. Thus, Rule **11(g)1** is simply not applicable.

Similarly, Rule **11(g)2** is not apposite. It is also predicated **on** an employe **working** in the gang or **working** at the location. Moreover ,

Rule 11(g)2 addresses the situation of an employee who has qualified for a promotion. This has nothing to do with the facts here.

Since **11(g)1** and **11(g)2** are not appropriate for determining which of the two **employees** should have been offered the temporary vacancy, under the numerical procedure of **Rule 11(g)**, **11(g)3** must be resorted to. It requires that the vacancy go to the "senior unassigned employee of the class on the seniority district who is working in a lower class or furloughed account force reduction." (Emphasis added).

Rule 11(g)3 is clear and unambiguous. Its import is unmistakable. The senior unassigned employee of **the** class who was furloughed account of force reduction is to be offered the vacancy. The distance from the vacancy is not a relevant factor.

Here, as between Grinde and **Caviness**, Grinde is the senior unassigned employee who was furloughed account of work reduction. **As** such, **Grinde**, under the plain meaning of **Rule 11(g)3**, should have been offered the vacancy. See Third Division Award 1862. When Carrier failed to offer Grinde the temporary vacancy, it violated the Agreement.

The final question that remains is the appropriate remedy. Given the lateness of **Crespin's** call on December 5, 1977, it was not unreasonable for Carrier to have determined that **Claimant**, who resided 277 miles away in **Grand Junction**, Colorado could not possibly have reported promptly on December 5th. For this reason, we are convinced that Carrier did not violate **the** Agreement when it called the closer man for that day only. It had the right to assure that the position was filled. Therefore, we will **sustain** the claim for December 6-9, 1977, but not for December 5th. See **Third** Division Awards 2391, 2690.

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

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That the **Agreement** was violated.

A W A R D

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

AW Pauls
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of July 1980.

