

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23156
Docket Number MW-22875

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

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

(1) The Carrier violated the Agreement when it failed to recall furloughed employe Elton P. Freier to fill a vacancy as section laborer at Yankton, South Dakota on October 24, 25, 26, 27 and 28, 1977 (System File C #120 - Minnesota-Dakota Elton P. Freier/Case No. D-2092).

(2) The Agreement was further violated when the Carrier assigned and used R. A. Nicholson instead of Elton P. Freier to fill a vacation vacancy of section foreman at Yankton, South Dakota for three (3) weeks beginning October 31, 1977.

(3) As a consequence of the violation described in Part (1) above, Elton P. Freier shall be allowed forty (40) hours of pay at the section laborer's straight-time rate.

(4) As a consequence of the violation described in Part (2) above, Elton P. Freier shall be allowed three (3) weeks of pay, including all overtime worked by R. A. Nicholson during said three week period, at the section foreman's rate."

OPINION OF BOARD: The Claimant was on furlough status, and during that period of time, the Carrier utilized the service of a junior employe to fill certain vacancies.

The Organization has submitted a claim asserting a violation of the Agreement, which specifies that senior available employes have certain preferences.

The vacancies in question were at Yankton, South Dakota. In denying the claim on the property, the Carrier noted that the Claimant had been asked to perform work at Canton and Sioux Falls, but that the Claimant advised that he was "not going to leave home" because he was "drawing unemployment" and that he "had another job lined up." Further, the Carrier asserts that the Claimant was called at different times, but did not respond.

The Claimant asserted, on the property, that he did not exercise seniority to work in Sioux Falls and Canton, South Dakota because, concerning the job at Canton, he was "on vacation the week of October 3rd - 1977."

In response, the Carrier repeated its assertion that the Claimant had declined to accept the work, and stated that he was "not going to leave home, he was drawing unemployment and had another job lined up."

In the record, the Claimant makes significant issue over the fact that his failure to exercise seniority at Sioux Falls and Canton has no bearing on his claim for work at Yankton, and he repeats that there is no connection between the various locations. We disagree.

Certainly, this Board is not constituted to resolve credibility issues, and we must be guided by certain concepts, such as burden of proof, while resolving claims. Nonetheless, it seems to be unrefuted that the Claimant did, in fact, refuse to take certain assignments in Sioux Falls and Canton, and thus there is a degree of confirmation that the Employee did not desire to leave his home area.

We find it impossible to issue a ruling which is equally applicable to all cases and all circumstances, and the parties must be guided by the circumstances in each individual case. Certainly, we can envision many instances where the Carrier is required to contact an employee and notify him of vacancies even though the employee may have declined a prior vacancy. At the same time, if there has been a refusal to travel to a vacancy, we feel that the employee has certain obligations to assure that the Carrier is aware that he will travel to other locations and that time and circumstances may alter his willingness to travel.

Under all the circumstances of this case, we are unable to find that the Carrier violated the Agreement when it failed to contact this individual for the vacancies in question.

We have considered Award 22672, cited by the Organization. But, that Award referred to a positive act as the "last measurable event." Here, the last "measurable event" is construed to be a negative action on the part of the Employee.

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January 1981.