

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **23376**
Docket Number **CL-23397**

John B. **LaRocco**, Referee

PARTIES TO DISPUTE: (**Brotherhood of Railway, Airline and Steamship Clerks,**
(Freight Handlers, Express and Station Employees
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood
(GL-9293) that:

(1) The **Carrier** violated the established practice, understanding, provision:: **and** Rules of the Clerks' Agreement **when it arbitrarily** assigned the **position** of **Agent-Saginaw** to a **junior** employe (**Milton E. Montgomery**), to the exclusion of **senior** employe, **Jeffery H. Oberbillig**, who made request **for the position** in accordance with the **Agreement**.

(2) The Carrier-shall be required to **compensate** Mr. J. H. Oberbillig eight (8) hours pay, per day, as Agent-Saginaw, for the following days: **May 3, 4, 5, 8 and 9, 1979.**

OPINION OF BOARD: **Claimant seeks eight hours of pay per day for May 3, 4, 5, 8 and 9, 1979 alleging that he should have been assigned to the position of Agent-Saginaw on those dates.**

The **incumbent** holder of the agency at Saginaw went on vacation leaving the position **temporarily** open for five days. The Carrier selected an employe with **less seniority** than the claimant to **fill** the position during **May 3, 4, 5, 8 and 9, 1979.** The junior employe had **performed** as a relief agent at Saginaw for **one week** in April, **1.979.** Between January, 1978 and **March, 1979, claimant was regularly assigned** to a freight agent position at **Keenan Yard.** The dispute has been properly progressed to this Board.

The **Organization** contends the Carrier violated Rules **12(b)** and **12(c)** of the working **agreement** when it **assigned** the junior employe to the temporary agency opening at **Saginaw.** Rule **12(c)** gives **furloughed employes** the **right** to **fill short vacancies** on a seniority basis. According to the Organization, Rule **12(b)** triggers the **assignment** preferences in Rule **8(a)** requiring the **Carrier** to **assign** the most **senior** worker if he has sufficient fitness and **ability to perform** the duties of the position. Due to **claimant's** able **performance** of his duties as an agent at **Keenan Yard** for fifteen months, the **Organization** asserts claimant has amply **demonstrated** sufficient ability to perform the duties of **Agent-Saginaw.** On an **ancilliary** issue, the Organization states the Carrier should have provided claimant with training at

Saginaw in April, 1979 since he (as well as the junior employee) had requested an opportunity to perform relief work pursuant to Supplement No. 5 of the working agreement. The Carrier's arguments are **twofold**. First, **Rules 8 and 12** of the working agreement are inapplicable because Section 12(b) of the National Vacation Agreement specifically excludes temporary openings caused by a vacation from being construed as vacancies for purposes of assigning a replacement. Second, **regardless** of whether or not Rule **12(c)** of the working agreement applies, the Carrier exercised reasonable discretion in determining that the claimant lacked the requisite fitness and ability to fill the agency at Saginaw. The Carrier argues that each agency position inherently involves unique duties so that the claimant was unqualified to replace the vacationing incumbent. Since the junior employee received training at Saginaw in April, 1979, the Carrier maintains it was justified in using the junior employee on the dates in controversy. Lastly, the Carrier asserts that its **assignment** of the junior employee to Saginaw in April, 1979 was not a violation of Supplement No. 5.

Section 12(b) of the National Vacation Agreement states:

"(b) As employees exercising their vacation privileges will be compensated under this Agreement **during** their absence on vacation, **retaining** other rights as if they had remained **at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement.** When the position of a vacationing employee is to be **filled** and regular relief **employee is not utilized, effort will be made to observe the principle of seniority.**" (**Emphasis Added**).

From the express language in Section **12(b)**, the opening **at Saginaw** for five days in May, 1979 due to the incumbent's vacation did not constitute a vacancy under the working agreement. Third Division Awards No. **22416 (Yagoda)**; Award No. 20 of **Public Law Board 2035 (Seidenberg)**; But **See: Third Division Award No. 7176 (Carter)**. Thus, the Carrier need not strictly **follow** the preference requirements in Rule **12(c)** and Supplement No. 5 of the working agreement though the provisions of Rule **12(c)** **are** sometimes **consistent with** the obligations imposed on the Carrier by **Section 12(b)** of the National Vacation Agreement. Third Division Award No. **14621 (Engelstein)**; Award No. 55 of Special Board of Adjustment No. **169 (Wyckoff)**. The Carrier has a duty to exert a genuine effort to **observe seniority when assigning** replacements under Section **12(b)** of the Vacation Agreement. Third Division Award No. **22416 (Yagoda)**. However, the Carrier is given some latitude in filling vacation vacancies as long as it made an effort to observe seniority. The Carrier may properly consider other factors having a rational relationship to performance of the position. In this case, the Carrier decided not to strictly adhere to seniority because, in the Carrier's view, the junior employee was qualified and the claimant was unqualified to fill the Saginaw

position. From this record, we do not find sufficient proof that the claimant had sufficient **ability** to step into the Saginaw opening. The junior employe had worked et Saginaw and so he was qualified. **Even** though claimant performed es an agent et **Keenan** Yard, there is no evidence that he acquired sufficient ability to replace the incumbent et Saginaw. Thus, the Carrier did not abuse its discretion in filling the vacation vacancy with the junior employe.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record end all the evidence, finds end holds:

That the parties waived oral hearing;

That the Carrier end the **Employees** involved in this dispute are respectively Carrier end **Employees** within the meaning of the Railway Labor Act, es approved June 21, **1934**;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; end

That the Agreement **was** not violated.

A W A R D

Claim denied.

NATIONALRAILROAD ADJUSTMENT BOARD
By Order **of** Third Division

ATTEST:



Executive Secretary

Dated et Chicago, Illinois, **this 15th day of September 1981.**