NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25137

THIRD DIVISION

Docket Number NW-23910

Wesley A. Wildman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 and refused to reimburse Laborer H. W. Gaskell for lodging, meal and mileage expense incurred while he was required to be away from his headquarters (Ryegate, Montana) from March 25, 1979 through April 20, 1979 (System File C#81/D-2361).

(2) Laborer H. W. Caskell shall now be allowed $361.85 because of the violation referred to in Part (1) hereof.

OPINION OF BOARD: Claimant in this case is a Laborer who, as of March 20 of the year here in question, was working a temporary laborer position at Ryegate, Montana. On that date, Claimant's Roadmaster informed him that a regularly assigned position had opened at Forsyth, Montana, saying, according to both Roadmaster and Claimant, "... there's a job there if you want it...". According to the Roadmaster, Claimant replied that he definitely was interested. Subsequently (on approximately March 23) it was determined, as between Claimant and Roadmaster, that Claimant would report for work at Forsyth on March 26. There is some mildly conflicting evidence on the record as to precisely what transpired on March 23. The Roadmaster maintains unequivocally that Claimant initiated inquiry as to whether he should (or could) report to Forsyth on the 26th and was told "yes", but was not ordered to so report. Claimant's evidentiary statement in this regard is somewhat more equivocal, but leaves the clear impression that he felt he had been directed by Carrier to fill the Forsyth position as of March 26 with, presumably, no choice on his part. Subsequently, Claimant bid on tie Forsyth opening and became the permanent incumbent on the job effective April 20.

The sole issue before us is whether Claimant is entitled to reimbursement for lodging, meal and mileage expenses incurred from March 26 to April 20. The position of Organization representing Claimant is that Ryegate had been, and remained, Claimant's headquarters until Claimant assumed incumbency at Forsyth on April 20 and that Claimant's assignment at Forsyth from March 26 to April 20 constituted the filling of a temporary vacancy away from headquarters at the direction of the Carrier. Accordingly, asserts the Organization, clearly controlling in this case should be Rules 26 and 27 in the Agreement between the parties which provide for reimbursement when an employe is away from his headquarters location because "required" by, or "by direction of", Carrier, and not simply as a result of the employe exercising his seniority rights to his own 'advantage.

We have carefully considered the many cases presented to us by the parties which discuss the important distinction between exercise of seniority rights by an employe (the employe initiates move to his own advantage) and recognition of employe's seniority rights by a carrier (contract "forces" observation by carrier of seniority rights in the filling of a vacancy). Also, we have found enlightening those cases which discuss the principle that meaningful employe choice in either filling or not accepting a vacancy per seniority is (or should be) the critical factor in determining whether or not an employe is "exercising his seniority'. These cases hold, of course, that if there is real choice, there is "exercise of seniority' and, thus, no reimbursement for expenses and, conversely, that if there is no *choice', there is no "exercise" (although there may be "recognition") of seniority, and, thus, reimbursement for expenses is appropriate.

We find here that the filling of the temporary vacancy by Claimant from March 26 to April 20 was in implementation of an election (choice) by Claimant to fill the regularly assigned position which was about to become available and for which he was clearly eligible. It is a quite reasonable interpretation of the entire record in this case that the temporary position at Forsyth was filled voluntarily by Claimant only because the position was imminently to ripen into a regular assignment which Claimant had already indicated he desired. In resolving the issue of whether the March 23 discussion between Claimant and Roadmaster amounted to "direction. by Carrier to report involuntarily to Forsyth or, rather, constituted permission to report as an essentially voluntary follow-up by Claimant to his already expressed interest in the job, we find that the Roadmaster's perception of what transpired gains considerable inferential credibility from the established facts that Claimant, by his own acknowledgement, was offered the position on March 20 • . . . if you want it..: and that Claimant did subsequently bid on and receive the job in question.

One additional issue raised by Carrier remains to be considered. The grievance here objecting to Carrier's refusal to reimburse Claimant was filed on June 26. Rule 47(a) in the agreement between the parties provides that grievances must be filed "... within 60 days from the date of the occurrence on which the claim or grievance is based...". Since the last day for which reimbursement is claimed was April 20, Carrier argues that the grievance in this case must be dismissed as a threshold matter by the Board as not timely filed. We disagree. The rejection by Carrier of the reimbursement request was not communicated to Claimant or Organization until May 4 of the year in question. It is, of course, this May 4 communication of refusal to reimburse which constitutes, pursuant to Rule 47(a), the "occurrence on which...the grievance is based= which begins the 60 day filing period. Accordingly, we hold that the June 26 grievance filing was indeed timely, and that the merits of this case, as dealt with above, are properly before this Board.

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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 9th day of November 1984.