NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25526

THIRD DIVISION

Docket Number CL-25717

James R. Cox, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-98591 that:

(1) Carrier violated the Agreement between the parties when it ran around senior qualified available employes R. 0. Johnson and R. A. Lahti when filling short vacancies in the Agent's position at Proctor, Minnesota on October 15, 18, 19, 21, 22, 23, 25, 29, 30, November 1, 3, 8, 15, 23, 24, 26, 27, 29 and December 6, 1982, utilizing instead junior employe W. A. Clark.

(2) Carrier shall now be required to compensate Claimant R. 0. Johnson and R. A. Lahti eight (8) hours pm rata at the Proctor Agency rate for each of the following claim dates:

R. 0. Johnson	Employe No. 4235	October 15, 19, 21, 22, 25, 29, 30, November 1, 3, 15, 23 24, 26, 29 and December 6, 1982
R. A. Lahti	Employe No. 1918	October 18, 23 and November 8 and 27, 1982

OPINION OF BOARD: The Carrier filled short vacancies by assigning an Employe junior to Claimants to the Supervisory Agent's position at Proctor, Minnesota October 15, 18, 19, 21, 22, 23, 25, 29, 30, November 1, 3, 8, 15, 23, 24, 26, 27, 29 and December 6, 1982. They rely upon what they contend is their right of selection under Rule 1 of the Agreement which identifies this position in its Subsection (f) as a Class 2 position which "may be filled without regard to seniority rules but will be advertised...'.

The Organization argues that Claimants were improperly denied the assignment under Rule 12(c) which reads:

> 'Furloughed employees who do not possess sufficient seniority, fitness and ability to hold a regular position shall be given preference on a seniority basis to all extra work, short vacancies and/or vacancies occasioned by the filling of positions pending assignment by bulletin, which are not filled by rearrangement of the regular force."

The Parties agree that the vacancy filled was a short vacancy. Rule 12(a) allows for the filling of all such vacancies without bulletining.

The question before the Board is whether the Agreement requires the Carrier to fill short vacancies in Class 2 positions by seniority. Heretofore, the Organization argues, filling Class 2 jobs without regard to seniority has been confined to situations where permanent appointments were involved.

Under Rule 1 no distinction is made between filling a Class 2 position on either a temporary or permanent basis and we find that the Carrier has the right of selection without regard to seniority in both instances. The same reasons which provide a basis for the exercise of Rule 1 in filling such jobs permanently also justified such a determination for short assignments.

Class 2 positions have been specifically exempted from seniority application and the general seniority reference of filling vacancies in 12(c) has no application. See Third Division Awards 12285, 14332.

While practice is helpful in clarifying what is ambiguous, here the exemption of Class 2 positions from seniority application is clear.

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 ate 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 28th day of June 1985.

LABOR MEMBER'S DISSENT TO

AWARD NO. 25526, DOCKET NO. CL-25717)

(REFEREE JAMES ROBERT COX)

The Majority opinion has erred in their decision.

Both parties to the dispute agreed that all short vacancies and/or extra work flow to furloughed employes in seniority order in accordance with Rule 12(c) other than when a regularly assigned employe expresses a preference. Thus the parties were in agreement on that question, but the Carrier argued that Rule 1 of the Agreement makes an exception to that rule in the filling of short vacancies on Class II positions. The Majority incorrectly adopted that reasoning when they state:

> "Under Rule 1 no distinction is made between filling a Class 2 position on either a temporary or permanent basis and we find that the Carrier has the right of selection without regard to seniority in both instances. The same reasons which provide a basis for the exercise of Rule 1 in filling such jobs permanently also justified such a determination for short assignments." (Emphasis theirs).

The aforementioned rationale overlooks the undisouted and unrefuted fact on the property that:

1) The filling of Class II positions in accordance with Rule l(f) had been limited on the property to the permanent appointment of an individual;and

2) That temporary vacancies of Class II positions had historically been filled in accordance with Rule 12(c); and

3) That the Proctor Agent Position had always been filled in seniority order in accordance with Rule 12(c).

The Majority decision would have been correct if Rule 1(f) merely stated:

> "The following positions may be filled without regard to seniority rules."

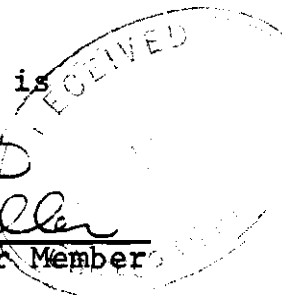
But, it does not - it goes on to say:

> "..., but will be advertised."(Emphasis ours).

Clearly, that phraseology was the answer to this dispute. It explicitly proclaims the fact that the parties to the dispute understood that Rule l(f) pertained to the filling of permanent vacancies on Class II positions only. Rule 1 does not discuss the filling of short vacancies because Rule 12 covers that subject. If the parties had intended for Rule l(f) to pertain to short vacancies on Class II positions, as well as permanent positions, the language would have been included. Neither rule is in conflict with the other as they address different questions nor can one logically assume that there is an unwritten exception built into Rule 1. The Carrier's assertion of such does not make it fact.

Award No. 25526 is in direct conflict with the record presented and the explicit language of the Agreement. Rule 12 was violated and the Majority has erred in reasoning that it wasn't.

We vigorously Dissent to Award No. 25526 as it is contrary to the facts and precedential Awards.



William R. Miller, Labor Member

Date: July 1, 1985