

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26106

Docket Number MW-26023

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(Southern Pacific Transportation Company (Western Lines)

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

(1) The Carrier violated the Agreement when, on November 1, 1982, it failed to allow Mr. R. N. Mills to displace Mr. R. D. Dupree and instead directed Mr. Mills to displace Mr. D. J. Johnson, who was in turn required to displace Mr. C. L. Duwell (Carrier's File MofW 36-233).

(2) Regional Engineer J. W. Ferguson failed to disallow the claim (presented to him under date of November 24, 1982) as contractually stipulated within Rule 44(a).

(3) As a consequence of either (1) and/or (2) above:

'We, therefore, respectfully request that Mr. D. J. Johnson now be allowed the differential in the rate of pay between that of Steelman and System Steel Bridge Gang Foreman 1004 beginning November 1, 1982 through November 19, 1982, and Mr. C. L. Duwell be allowed five (5) days pay at rate applicable to the position of Steelman, System Steel Bridge Gang account of the five days lost in making his displacement on System Bridge Gang 1002 located at Davis, California.'

OPINION OF BOARD: The case at bar centers upon a complex case of seniority displacement under the Agreement in which the Organization maintains Carrier contravention of Rule 13(b). That Rule reads in selected and pertinent part:

"Displacements.

(b) An employee losing his position... through being displaced...shall, within ten (10)...days...exercise his seniority in the following order:

1. First, displace any employee in the same class who is junior to him in seniority.
2. Second, if there is no junior employee in that class, displace any other class in which he has established seniority."

The Organization argues that the following displacements occurred. Mr. Mills assigned as a Welder lost his position due to force reduction in his Department. In exercising his displacement rights, Mr. Mills was contractually obligated to displace Mr. Dupree, a junior employee holding the position of Welder. As stated by letter of November 24, 1982, the Carrier "would not allow Mr. Mills to displace Mr. Dupree and instead instructed Mr. Mills to displace Mr. D. J. Johnson." As such, Mr. Johnson was displaced from his assigned position as Foreman and in turn displaced Mr. Duwell whose assigned position was Steelman. Organization proffers that Johnson and Duwell have suffered loss of pay due to Carrier violation of the Agreement. As such Claimants should be made whole for incurred losses. The Carrier denied Agreement violation in its letter of December 3, 1982, which subsequently gave rise to a procedural issue.

Considering the procedural issue, the Organization argues a violation of Rule 44(a) which reads in pertinent part that:

"...Should any such claim or grievance be disallowed, the Carrier shall within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified the claim or grievance shall be allowed as presented...."

The Organization maintains that the Carrier failed to deny the Claim to General Chairman Foose within sixty (60) days. This Board has carefully reviewed the procedural issue and finds that the Carrier timely denied the Claim by letter of December 30, 1982. The letter of denial was sent to District Chairman Tie stating "reference your letter of November 24, 1982..." and not directly to General Chairman Foose who "filed the claim" of November 24, 1982. This Board is very sensitive to contractual language and its clear obligation to uphold the dispute resolution procedures as agreed upon by the parties. The record however, indicates that the General Chairman was notified "in writing" of the denial which he acknowledges in his letter of February 8, 1983. The denial occurred and it was received by the General Chairman transmitted presumably via the District Chairman. There is no evidence of record that the denial was untimely received in that the General Chairman who filed the Claim was not notified.

Turning to the merits, this Board has systematically followed the events as developed on property. The Organization has probative evidence to substantiate that Mr. Mills failed to displace a junior employee who was also in his same class as Welder (Mr. Dupree). The Carrier in defence of its action points out that "Mr. Mills was not instructed to displace Mr. Johnson as foreman on system steel Gang #1004, at the time he inquired as to whom he could displace, the steel gang positions were all that were open to him; ..."

In point of fact the record indicates that Mr. Mills was informed by the Carrier of a sequence of events that the Carrier believed would occur when two senior employees exercised their displacement. As one of those employees was on vacation, the Carrier made what it considered reasonable decisions. It assumed that when Mr. C. L. Tie, senior to Mr. Mills returned from vacation, he would, on November 1, 1982, bump Mr. Stanton who would bump Mr. Dupree. The problem occurred when Mr. Tie returned and waited two days before placing his bump against Mr. Stanton allowing junior employee Dupree to continue working.

As this Board has carefully reasoned out events there can be no doubt that the Carrier made an error and that the contract was violated. Mr. Mills under the Agreement should have displaced Mr. Dupree. The Carrier informed Mr. Mills of the possibility that a Welder's position might be bulletined, but such was not done by the time the decision was made. Mr. Mills chose not to lose time, and the Carrier making reasonable assumptions allowed Mr. Mills to bump Mr. Johnson who then displaced Mr. Duwell. Those assumptions were wrong and the Carrier technically violated the Agreement.

This Board, having found for the Organization that the Carrier violated the contract as per Part (1) of the Claim, will deny Part (3) which requests compensation. It denies compensation because the Carrier's technical violation in the circumstances at bar cannot be construed as either circumvention of intent to comply with the Agreement or devoid of reasonable and sensible action. In the case at bar this Board finds that the technical violation under the circumstances does not mandate a penalty to either uphold the contract or remedy an injustice. As such, we sustain Part (1) of the Claim and deny Parts (2) and (3) of the Claim. This is consistent with past Awards in this Division (see Third Division Award 21691).

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 violated.

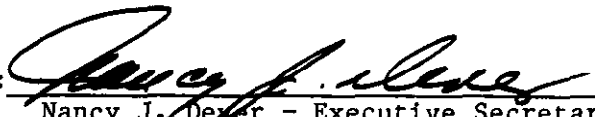
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Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of August 1986.

