

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Atchison, Topeka and Santa Fe Railway Company

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

(1) The Agreement was violated when the Carrier called and assigned junior Trackman G. L. Greg instead of Trackman J. L. Arevalo to fill a temporary vacancy on the Galesburg Section Crew beginning December 23, 1985 (System File 20-10-868/11-2340-59).

(2) As a consequence of the aforesaid violation, Mr. J. L. Arevalo shall be allowed forty (40) hours of pay at the trackman's straight time rate."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was employed as a Trackman on Carrier's Illinois Division on March 16, 1977. As of December 23, 1985, when this dispute arose, he was in off-in-force-reduction status because he did not possess enough seniority to hold a permanent assignment. While in furloughed status, he was subject to recall for a permanent position and also for temporary vacancies of 30 days or less.

According to the Carrier, recall for permanent positions is handled by notifying the furloughed employee in writing that he is being recalled to service and that he must, within 15 days after being notified, report for work or forfeit his seniority in the class in which called. Temporary vacancies, on the other hand, are handled by telephoning the employee and advising him of the location of the vacancy and the probable duration thereof. If he rejects the temporary work while on furloughed status, the employee will not suffer a loss of seniority.

During the period December 23 through December 27, 1985, Carrier had a temporary vacancy on a Trackman position at Galesburg, Illinois, due to the vacation of the regularly assigned occupant of that position. Temporary vacancies were filled in accordance with the provisions of Rule 10(a), which states:

"10 - (a) - Vacancies on Positions Under Advertisement and Temporary Vacancies of Thirty Calendar Days or less. Vacancies on positions under advertisement and temporary vacancies of thirty calendar days or less, that are to be filled, shall be filled in the following sequential order.

- (1) By the senior employee of the class at the location who is working on a lower rated position or off in force reduction;
- (2) By the senior available qualified employee of the class working on a lower rated position at the nearest location or off in force reduction;
- (3) By promoting a qualified employee of a lower class working at the location nearest to the location where the vacancy occurs or off in force reduction;

NOTE: In the event there are no qualified applicants ready for promotion to a position as provided for in Items (1) through (3), and Carrier determines that the contingencies of the service make it possible to protect the vacancy of 30 calendar days or less with an employee who would not otherwise be considered as qualified for assignment in the Class, the Carrier may use, pursuant to Rule 10 - (b), an employee on the seniority district whom it deems is able to meet the contingencies of the service to fill the vacancy, pending the availability of an employee pursuant to Items (1) through (3) above. The status of the employee used to fill a vacancy pursuant to this provision will not be changed, except that he will be compensated at the rate of the position filled while protecting the vacancy.

Upon completion of temporary service under this Section (a), an employee will resume his former position or status unless his position has been abolished or taken by a senior employee through the exercise of seniority displacement rights, in which event the employee may exercise his seniority as provided in Rule 3 - (c)."

There is no dispute that, in accordance with the foregoing provisions, Claimant was the senior employee of the class at the location where the vacancy occurred in an off-in-force reduction status. What is in considerable dispute, however, is whether Claimant was notified of the vacancy. Claimant, on the one hand, maintains that he knew of the possibility of a vacancy and so he waited at home for a telephone call from the Carrier on Friday, December 20, 1985. When he received no call, Claimant stated that he telephoned the Carrier at about 3:00 P.M. that day and was told that no vacancy existed. Claimant later learned that a junior employee had filled the vacancy.

Carrier employees, on the other hand, submitted statements attesting to a different sequence of events on December 20, 1985. The Payroll Clerk stated that on that date she made three unsuccessful attempts to reach the Claimant between the hours of 8:00 A.M. and 11:00 A.M. The Roadmaster Clerk stated that she tried to call the Claimant on three occasions that same afternoon, without success. Both clerks also submitted their notes made contemporaneously with the calls. In addition, the Chief Clerk submitted a statement indicating that Claimant did call the Carrier's office after 4:00 P.M. on the date in question and was told by the Chief Clerk that she could not advise him about the vacancy and that the clerks who were responsible for the assignment had already gone home.

After careful review of the record in its entirety, it is clear that while there are no procedural grounds which warrant dismissal of the Claim, the Organization's position cannot be sustained on the merits and therefore the Claim must be denied. It is apparent that there is an irreconcilable conflict on the crucial facts of this case. Carrier alleges that attempts were made to telephone the Claimant to notify him of the vacancy; Claimant denies receiving any calls. Since the Board functions as an appellate body, it has no way of resolving such evidentiary conflicts or factual disputes. Third Division Award 21436, 21423. Accordingly, we must hold that the Organization failed to meet its burden of proof.

As a final matter, we note that additional argument raised by the parties for the first time before this Board have not been considered, as it is well established that we may entertain only those arguments and contentions which have been raised during the handling of this dispute on the property.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 15th day of May 1991.