

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Duluth, Missabe and Iron Range Railway Company

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

(1) The Agreement was violated when the Carrier, beginning June 3, 1986, failed and refused to allow Machine Operator J. A. Engelmier to displace junior Machine Operator P. Bergman on the machine operator position advertised by Bulletin No. 66 (System File 43-B-86).

(2) Mr. J. A. Engelmier shall be assigned to the position in question and compensated for all wage loss suffered beginning June 3, 1986, including but not restricted to reimbursement for all losses sustained as a result of loss of coverage under the Health and Welfare Agreements."

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 employee 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.

At the time of this claim, Claimant held seniority with the Carrier as a B Machine Operator in the Track Subdepartment. However, Claimant was on furlough due to the seasonal nature of the Carrier's business when the facts occurred giving rise to the claim.

While on furlough, in May 1986, Claimant requested and was granted ten days of vacation. Claimant had earned the vacation time during the previous year. In accordance with his request, Claimant was treated as being on vacation for the two-week period between May 19 and May 30, 1986. This meant Claimant received ten days' pay for those dates, even though he was on furlough before and after the two week vacation period.

On May 21, 1986, the Carrier posted a bulletin advertising a B Machine Operator position to be assigned to an AFE Gang headquartered at Keenan, Minnesota. The bulletin bore a closing date of May 28, 1986. This posting was pursuant to Rule 4 of the Agreement, which states:

"(a) Except as provided in these rules, all new positions or vacancies of more than thirty days, except those in Group D classification, will be bulletined and posted for a period of five (5) calendar days at headquarters of all gangs in the subdepartment of employees entitled to consideration in filling the position, during which time the employees may file their applications with the officials whose names appear on the bulletin. Each bulletin will show its consecutive number, title of position, date of posting, and date of expiration; and for each position thereon will specify whether temporary or permanent, location and rate of pay, assigned hours, and nature of work. Appointments will be made in accordance with Rule 3 within ten (10) calendar days from the date bulletin is posted. Such notice of appointment will be given in similarly numbered bulletin form showing name and seniority date of successful applicant for each position filled. Copy of bulletin, also notice of appointment will be furnished the General Chairman."

The Organization argues that, had Claimant not been away on vacation from May 19 to May 30, he would have seen the bulletin and would have applied for the advertised position. However, Claimant did not apply and the position was awarded to a junior employee who had filed a timely application in accordance with the Rule. The position was awarded on June 3, 1986. Shortly thereafter, Claimant sought to displace the junior employee pursuant to Rule 8(a) which states:

"An employee returning after leave of absence, vacation, or when relieved from official position will return to former position, provided it has not been abolished or senior employee has not exercised displacement rights thereon, or may, upon return or within five days thereafter, exercise seniority rights on any position bulletined during such absence that he could have obtained had he not been on leave of absence, vacation or an official position, subject to qualifications."

The Carrier denied Claimant's attempt to displace and this claim ensued.

The Organization relies on Rules 8(a) and 6(e) of the Agreement. The Carrier insists that neither rule applies to this claim. Having considered the record and the Parties' submissions, the Board must agree with the Carrier.

The language of Rule 8(a) makes clear that it applies only to employees who take vacation while in active service for the Carrier. Vacation is a benefit designed to permit an employee to get away from his job briefly for relaxation or recreation. Rule 8(a) obviously was intended to protect an active employee against forfeiting an opportunity while he is away from the property to enjoy his vacation. An employee who claims his vacation entitlement while on furlough is not in the same position. His "vacation" is really

nothing more than his claiming of the vacation pay he has earned. Just because a position happens to be bulletined during the period to which his vacation pay is attributed, the employee is no more disabled from applying than if the posting had occurred at any other time while he is furloughed. An employee on furlough is normally away from the property anyway. A furloughed employee must keep himself informed of any positions bulletined regardless of whether he is receiving vacation pay or any other type of income at the time, and Rule 8(a) was not designed to alter that proposition.

Rule 6(e) is similarly inapplicable. It applies to the procedure for recalling furloughed laborers, but does not forbid the filling of Machine Operator positions in the customary way which the Carrier followed in this case. In its entirety, Rule 6 states:

"Retaining Seniority

(a) Employees laid off account reduction in force will retain full seniority under the provisions of paragraph (b) and (c) of this rule.

(b) When an employee laid off by reason of force reduction desires to retain his seniority rights without displacing a junior employee, he must within ten calendar days file his name and address through his foreman with the Roadmaster or the Supervisor of Bridges and Buildings with a copy to the General Chairman, and notify them of any future change of address.

(c) When there is an increase in forces of laborers, the Company will call back in seniority order on the particular gang or section the laborers who have indicated a desire to return where the force is to be increased. If the required number of men cannot be secured, the Company may fill such positions by placing at work any employees holding seniority in the group. Any such employee can be displaced at any time by any employee who is out of service holding seniority in the same group and who has protected his rights under paragraph (b) of this rule.

Employees will be notified in seniority order and will return to service within ten calendar days thereafter; failure to return to service within ten calendar days, unless prevented by sickness or other unavoidable cause, will result in loss of all seniority rights. Employees will be forced back in reverse seniority order.

In the application of this rule, it is understood that it is permissible to fill positions by assigning senior men who have signified their desire to be assigned to such positions in accordance with paragraph (f) of Rule 4 and paragraph (g) of Rule 5 before calling back men who were laid off on the particular gang or section where the force is to be increased.

(d) Laborers in section crews laid off account reduction in force who have complied with the provisions of paragraph (b) of this rule can have the option of remaining out of service if their services are not needed until they can be returned to the particular crew or gang where they desire to work, or they can exercise their seniority under paragraph (c) of this rule.

(e) Employees may be recalled by telephone. Any employee not contacted by telephone will be given a written notice of available work."

Because laborer positions are not bulletined, but instead are filled by the Carrier by first contacting furloughed laborers in seniority order, Rule 6 goes to extra lengths to assure that senior furloughed personnel have notice before a junior person is called back. It is clear that this requirement is confined to the filling of laborer positions, since paragraphs (c) and (d) of Rule 6 are addressed explicitly to laborers. The Carrier made this point during consideration of the claim on the property, without rebuttal by the Organization. Consequently, it cannot be held that Rule 6(e) required the Carrier to contact Claimant by telephone or written notice before awarding the B Machine Operator position at Keenan, Minnesota.

Since no rule of the Agreement is shown to have forbid the Carrier to do what it did in this case, the claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Decker - Executive Secretary

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