

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
(Terminal Railroad Association of St. Louis

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

(1) The Agreement was violated when, effective March 20, 1987, the Carrier assigned Mr. T. Whitley, Jr. instead of Mr. C. Jefferson to the Group 2 Machine Operator position advertised on Bulletin No. 5 (System File 1987-6 T.R.R.A./013-293-18).

(2) As a consequence of the aforesaid violation, Mr. C. Jefferson shall be:

(a) Immediately assigned to the Class 2 Machine Operator position advertised on Bulletin No. 5 dated March 12, 1987.

(b) Allowed Group 2 Machine Operator seniority dating from March 20, 1987.

(c) Allowed the difference between the hourly rate he was paid and the higher hourly rate he would have received had he been assigned to the Group 2 Machine Operator position beginning March 20, 1987 and continuing until the violation is corrected."

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.

On March 12, 1987, Carrier posted Job Bulletin No. 5 advertising a Seniority Group 2 - Machine Operator position for seniority bids until March 20, 1987. At the close of the bids on March 20, 1987, Track sub-department employee T. Whitley was awarded the position in preference to Claimant C. Jefferson. These two individuals had the following relative seniority standing, according to the Organization.

T. Whitley

Track Laborer: 4-7-71
TMO-MTO-WMO: 8-1-72
Foreman: 0
Machine Operator: 0

C. Jefferson

Track Laborer: 8-9-76
TMO-MTO-WMO- 6-16-79
Foreman - 7-11-79
Machine Operator: 0

The foregoing establishes that T. Whitley has greater relative length of service with the Carrier, while Claimant has greater track foreman seniority. The Organization contends that there is a long-standing practice on this property to grant preference for further promotion to higher-rated positions, and in particular to Group 2 large machines, on the basis of the highest rank achieved on the Group 1 rosters. Since Claimant had the higher ranking when the Group 2 position was posted, the Organization argues that Mr. Whitley's assignment to the Group 2 Machine Operator position violated this well-established practice.

Cited by the Organization are the following Rules as pertinent to this dispute:

"RULE 8
ASSIGNMENTS

(a) Vacancies or new positions will be filled by employees holding seniority in the rank in which the vacancy or new position occurs. If not so filled, they will then be filled by employees in succeeding lower ranks in that seniority group, subject to the provisions of the promotion rule.

* * * *

RULE 9
PROMOTION

A promotion is an advancement from a lower rank to a higher rank. Promotions will be based on ability and seniority; ability being sufficient, seniority will prevail.

* * * *

RULE 13
BULLETIN NOTICE

* * * *

(h) An employee promoted from a lower to a higher rank will rank above an employee declining promotion. An employee accepting promotion will have priority in consideration for further promotion."

It is the Organization's position that Rule 8(a), quoted above, does not provide a method for applying accrued seniority in a group where none has yet been established. In other words, the Rule is silent on the method of filling vacancies when no applicant or bidder possesses seniority within the group in which the vacancy occurs. In addition, the Organization asserts that the provisions of Rule 9 are inconsistent with those of Rule 13. While seniority is given preeminent consideration in Rule 9, the language of Rule 13 (h) indicates that "an employee accepting promotion will have priority in consideration for further promotion." Given this patent ambiguity in the interpretation and application of the two Rules, the Organization stresses, past practice provides an essential guidepost in determining the parties' intent. On that point, the Organization argued on the property that the 1987 Seniority Roster for employees in Group 2 demonstrated on its face that employees holding seniority as Foreman in Group 1, Rank A were promoted before employees holding seniority in Group 1 - Rank B, C or D. Further, the Organization points to several employees who were awarded Group 2 Machine Operator positions based on their foremen seniority in Group 1 rather than their overall seniority with the Carrier. This suggests to the Organization that the parties themselves have reconciled the ambiguous provisions of their Agreement through custom and practice, and that the practice of promoting those holding foreman seniority should be upheld.

Carrier urged on the property that the Rules governing promotion and assignment as they pertain to the instant matter are clear and unambiguous, and therefore, it is unnecessary and improper to look outside the four corners of the Agreement to ascertain the meaning of the contract language at issue here. In particular, it asserted, since neither Mr. Whitley nor the Claimant hold seniority in Group 2, Rule 5 applies, as follows:

"Rights accruing to employees under their seniority entitled them to consideration for positions in accordance with their relative length of service with the Railroad as hereinafter provided."

Mr. Whitley was the senior employee, Carrier maintains. He was properly awarded the position; therefore this claim must be denied.

Before addressing the substantive issues in the case, it is necessary to reiterate an established principle that arises so frequently in these cases that the parties surely need no reminder. This Board has repeatedly held that the parties are bound by the way the case was handled on the property. See, Third Division Awards, 19722, 11986, 11939, 12388. Consequently, the new line of argument advanced by the Carrier for the first time in its Submission before this Board concerning the relative machine operator seniority of the Claimant and Mr. Whitley cannot now be considered. By the same token, additional evidence proffered by the Organization on that point and others and attached to its Submission has been disregarded.

Turning, then, to the merits of this dispute, we are persuaded upon careful examination of the Agreement provisions and the Rules cited by the parties that there is an inherent ambiguity among the Rules cited. Rule 8 sets out the initial procedure to be followed in assigning employees: vacancies or new positions are first filled by "employees holding seniority in the rank in which the vacancy or new position occurs." If the position cannot be filled in that manner, then it is to be filled by "employees in succeeding lower ranks in that seniority group, subject to the provisions of the promotion rule." (emphasis added.) Rule 9 speaks of promotions as an advancement from a lower rank to a higher rank, based on seniority when ability is deemed sufficient. It does not address the issue of "succeeding lower ranks" set out in Rule 8. However, Rule 13(h) explains that an employee accepting a promotion will rank above an employee declining a promotion and will have priority in consideration for further promotion.

At issue here is how these Rules are to be construed so as to form a harmonious whole. Since their interrelationship is not clear on its face, and given the plausible interpretations advanced by both parties as to these meanings which should be attached to these provisions, we find that evidence of past practice is highly relevant in ferreting out the parties' intent. On that point, it is significant, in our view, that in addition to the specific examples cited by the Organization where an employee with foreman's seniority was promoted to Group 2 over other employees with greater overall seniority, it also appears from the evidence of record that one employee filed a grievance on this same issue which was ultimately granted by the Carrier. It is significant, too, that though Carrier termed "meaningless" the Organization's evidence on this point, it never directly refuted the factual information set forth by the employees during the handling of this matter on the property.

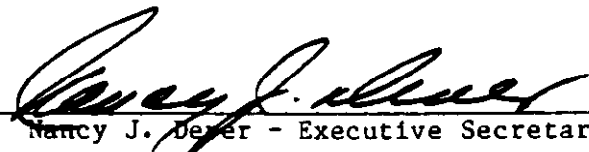
We find that the evidence of past practice is consistent with a reasonable interpretation of the disputed provisions and supports the conclusion that the parties in the past have first considered employees who have been promoted track foremen for promotion to Group 2 Machine Operators. Accordingly, we rule to sustain the claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of June 1992.

CARRIER MEMBERS' DISSENT
TO
AWARD 29261, DOCKET MW-28286
(Referee Goldstein)

Neither Claimant Jefferson nor employee Whitley possessed Group 2 seniority. The Organization, on the property, in their Submission, and in argument to this Board, have asserted that, "The Agreement was violated" (note Item No. 1 of the Statement of Claim). The Organization specifically argued that Rules 8, 9 and 13(h) were applicable.

Rule 8 indicates that vacancies will be filled by employees holding seniority in the rank. Since neither individual possessed seniority in the rank, Rule 8 does not apply and nor do the other rules cited by the Organization.

On the property, Carrier argued that it applied Rule 5 which is quoted at page 3 of the Award. Instead of applying Rule 5, the Majority concludes that there is ambiguity in the rules that were relied upon by the Organization. Again, ignoring Rule 5, the Majority then adapts the past practice contention advanced by the Organization. Past practice cannot supersede clear rule provisions and there is no ambiguity pointed to in rule 5.

Fourth Division Award 2015 - Dolnick (1965)

"It is well established principle of this and the other Divisions of this Board that evidence of past practice may be considered only where a Rule is unclear and ambiguous, and where such a practice will give meaning and intent to such a Rule. But, where no Rule exists there can be no ambiguous or unclear provision and, therefore, evidence of past practice may not be considered. If we did so we would be writing an agreement between the parties, which we have no right to do. We may only interpret the meaning and intent of an existing agreement. See Awards 501, 895, 1070 and 1362."

Third Division Award 16328 - Heskett (1968)


"This claim is based solely upon Carrier having allowed veterans to take off with pay, for more than forty (40) years' duration on November 11 to attend Veterans' Day parade. The record discloses that the same was granted only after permission was requested and obtained. Carrier thereby retained its managerial prerogative in the matter and there were no rights established in the form of past practice."

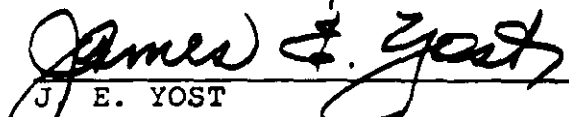
Second Division Award 10240 - Dennis (1985)

"Petitioner contends that for decades, Carmen have been paid for the noon meal when working away from their home point regardless of the work performed. We do not doubt that statement. In spite of it, that practice cannot be raised to the level of a practice that modifies the clear language of the Agreement." (Emphasis added)


We dissent.


P. VARGA


R. E. HICKS


J. E. YOST


M. W. FINGERHUT


M. C. LESNIK

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 29261, DOCKET MW-28286
(Referee Goldstein)

The award in this Docket is correct and nothing contained in the Dissent distracts therefrom. The Majority considered the arguments raised on the property, the rules cited and properly found for the Organization. The Majority properly found that "At issue here is how these Rules are to be construed so as to form a harmonious whole. ***" and "We find that the evidence of past practice is consistent with a reasonable interpretation of the disputed provisions ***"

The award is correct and stands as precedent.

Respectfully submitted,


D. D. Bartholomay
Labor Member