

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30206  
Docket No. MW-28528  
94-3-88-3-348

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  
(Soo Line Railroad Company

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

- (1) The Carrier violated the Agreement when it recalled junior Assistant Ballast Gang Foreman B.P. Nilson to fill a vacancy on Sled Gang 2-16 on and subsequent to July 6, 1987, instead of recalling Assistant Ballast Gang Foreman K. Lemer, who was senior, available and willing to fill said vacancy (System File R499 #1498L/800-46-B-294).
- (2) Because of the aforesaid violation, Assistant Ballast Gang Foreman K. Lemer shall be allowed pay for all time lost from July 6, 1987, through August 6, 1987, with all overtime, vacation, fringe benefits and other rights restored to him."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The instant claim involves a temporary vacancy pending assignment by bulletin.

Beginning on July 6, 1987, Carrier assigned B.P. Nilson to fill a temporary ballast gang assistant foreman position pending bulletin and assignment. On July 15, 1987, B.P. Nilson was permanently assigned to the position by Assignment Bulletin No. 228. Claimant, who was furloughed at the time, was senior to Mr. Nilson, but had not bid the vacancy.

The Organization contends that Carrier should have recalled Claimant to fill the position in question in accordance with Rule 8(h), which provides:

"(h) When forces are increased or vacancies occur, furloughed employees shall be returned and required to return to service in the order of their seniority rights, except as otherwise provided in this rule. Furloughed employees failing to return to service within 7 days after being notified in writing, or failing to give satisfactory reason for not doing so, will be considered as out of the service."

The Organization argues that from July 6, to July 15, 1987, a temporary vacancy pending assignment existed. Under the provisions of Rule 8(h), Carrier should have recognized Claimant's seniority, recalled him from furlough, and permitted him to fill the vacancy until it was regularly assigned by the bulletining process set forth under Rule 7.

Carrier insists that its actions in filling the nine day vacancy at issue in this dispute were proper under the terms of the Agreement. Carrier maintains that the language of Rule 8(h) is not applicable to the present dispute as it does not address short term vacancies. Carrier points out that Rule 8(h) contemplates recall in writing, allowing the recalled employee 7 days after being notified in writing to respond. This is an impracticable and implausible method to fill an immediate need, Carrier points out.

In this case, Carrier argues, it desired to fill the position at issue somewhat earlier than the date the bulletined assignment was scheduled to be closed. The employee utilized was, at the time Carrier determined the need to fill the vacancy, the senior bidder and he was called to work effective July 6. Carrier stresses that although Claimant was senior to the employee utilized, Claimant had not bid the vacancy at issue here. Carrier asserts that it used the most practical and logical method in filling the vacancy by assigning the senior of the applicants for the bid position.

Carrier also contends that the Claim should be dismissed because it is lacking in specificity and does not have the necessary requirements to constitute a valid Claim. After careful review of the record in its entirety, the Board rejects the Carrier's threshold argument outright. The necessary information, including the vacancy involved, the identity of the junior employee who filled the position, and the circumstances under which he was assigned to do so, is easily discernible from the face of this Claim. Moreover, it is clear that Carrier was able to ascertain the nature of the Claim and respond accordingly during the handling of this dispute on the property. Carrier's asserted procedural objections, therefore, are unpersuasive.

Turning to the merits of the Claim, this Board is of the view that the plain language of Rule 8(h) is controlling here. Unlike some contract or rule provisions which specifically distinguish between short and long term vacancies, the rule at issue here makes no such distinction and instead refers generally to "vacancies". Compare Third Division Award 28047, in which the applicable rule required furloughed employees to be recalled in order of seniority only when there were vacancies of more than thirty days' duration.

Under the provisions cited herein, seniority must be considered when a vacancy occurs. In this case, a vacancy was created July 6, until July 15, 1987, when the permanent position was assigned. There is no language excepting vacancies pending assignment by bulletin from the requirements of Rule 8(h), nor is there any requirement that an employee must bid on the pending bulletined assignment in order to be recalled for the vacancy. If Carrier wished to establish a regularly assigned position which was scheduled to start July 6, 1987, it should have begun the bulletining procedures early enough to have accomplished this end without filling the vacancy temporarily. As the record stands, however, Carrier was obligated to comply with Rule 8(h) by recalling a furloughed employee in order of seniority for the interim period prior to assignment by bulletin.

The Claim will be allowed for the period of July 6 through July 15, 1987.

#### AWARD

Claim sustained in accordance with the Findings.

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By Order of Third Division

Attest: Linda Woods  
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.