

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32191
Docket No. MW-31937
97-3-94-3-304**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Chicago Central & Pacific Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier recalled junior employe C. C. Jacobsen from furlough status to fill a temporary vacancy pending bulletin assignment beginning March 2 through 22, 1993, instead of recalling and assigning senior furloughed employe S. R. Lumsden (Carrier's File BMWE 93-019).**
- (2) The Agreement was violated when the Carrier recalled junior employes S. T. Close and D. M. Millard from furlough status and assigned them to Group B Machine Operator positions beginning March 1 through 29, 1993, instead of recalling and assigning senior employes D. A. Rogers and F. E. Castle (Carrier's File BMWE 93-020).**
- (3) The Agreement was violated when the Carrier assigned Mr. T. S. Kaufman to perform Group B Machine Operator's work in the 'B' Yard at Waterloo, Iowa on March 15, 16, 17 and 18, 1993, instead of assigning Mr. H. L. Wilson (Carrier's File BMWE 93-018).**
- (4) As a consequence of the violation referred to in Part (1) above, Mr. S. R. Lumsden shall be allowed '*** eight (8) hours pay per day at the respective Trackman's rate of pay beginning March 2, 1993 and continuing until March 22, 1993, for a total of fourteen (14) days.
***'**

- (5) As a consequence of the violation referred to in Part (2) above, Messrs. D. A. Rogers and F. E. Castle shall each be allowed '*** twenty days pay at the respective Group B machine operator's rate of pay ***' for the work performed by the junior employees during the period in question.
- (6) As a consequence of the violation referred to in Part (3) above, Mr. H. L. Wilson shall be allowed the difference in pay of a track laborer and a Group B Machine Operator for the thirty-two (32) hours expended by Mr. Kaufman in the performance of the work in question."

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 were given due notice of hearing thereon.

The three claims herein advanced to this Board are procedurally accepted after due consideration. The Board finds the underlying dispute linking the three claims essentially equivalent.

On merits, this dispute centers upon the application of the Agreement with respect to seniority. The Organization argues that in each separate instance, the Carrier failed to live up to its negotiated Agreement to assign employees by seniority. The Organization alleges that the language of Rules 16 and 24 are the proper vehicles of assignment. These Rules state in pertinent part:

"Rule 16.

Employees covered by these rules shall be in line for promotion. Promotion, assignments and displacements...shall be based on management's determination of fitness, ability and seniority; fitness and ability being sufficient seniority shall prevail."

"Rule 24 (c)

Except as provided in paragraph (b) of this rule, when forces are increased or vacancies occur and are not filled pursuant to Rule 18, furloughed employees shall be returned and required to return to service in the order of their seniority rights pursuant to Rule 16...."

There is no dispute between the parties that in each of the three claims consolidated herein, a junior employee was given the position pending assignment while the senior employee became a Claimant herein. The Organization is alleging that the senior employee had preference to the disputed positions by virtue of the Rules, supra. The Organization argues that Carrier's assignment of junior employees cannot be sanctioned by the language of the Agreement.

The Carrier holds that it acted appropriately. In each instance the position to which the junior employee was assigned was a temporary position filled pursuant to Rules 18 and Rule 20. These Rules permit the Carrier to assign a junior employee without regard to seniority. In pertinent part, they state:

"Rule 18 (g)

Bulletined positions may be filled temporarily pending an assignment pursuant to Rule 20. In the event no applications are received from employee(s) pursuant to Rule 16, the position may be filled by management by appointment of the junior qualified employee; however if there are no such employees, the position may be filled by management by appointment without regard to seniority."

"Rule 20 (a)

Positions or vacancies of thirty (30) or less working days shall be considered temporary not subject to Rules 18 and 24 and may be filled at managements discretion. A senior employee currently qualified and

subsequently furloughed may replace the incumbent working such a temporary vacancy."

The Carrier holds that Rules 18(g) and 20(a) are applicable to this dispute. In each instance the Carrier argues that because each position was a short vacancy, its actions were permissible.

The Board carefully studied the arguments raised on the property and forcefully presented before us with the following conclusion. The crux of this dispute is whether the Rules permit the Carrier to fill a temporary position without consideration of seniority.

In Part (1) of the claim before the Board, the Carrier issued a February 25, 1993 bulletin for a Trackman position. A full reading of the record reveals that it was a bulletined position which was filled temporarily by a junior employee while awaiting bulletin assignment. The language of the Agreement permits such action. Rule 18(g) states that this Trackman position can be temporarily filled under Rule 20. Rule 20 permits the appointment not subject to Rule 18 or 24. Rule 24(c) is inapplicable and Rule 20 is guided by "management's discretion." Part (1) of the claim must be denied.

In Part (2) of the claim, there is no dispute on facts. The Carrier recalled junior furloughed employees to perform maintenance and repairs on a brushcutter instead of senior employees. The dispute is the same. The Organization argues that when returning from furlough Rule 24(c) holds and seniority rights prevail. The Carrier says it appointed the junior employees instead of Claimants in full compliance with Rule 20. The Board again studied the Agreement and is compelled by the negotiated language to deny this part of the claim. The probative evidence is that the positions were temporary. Rule 20 covers such positions. Rule 20 positions are not subject to Rule 18. Rule 24(c) which the Organization asserts was violated, includes the provision that when positions "are not filled pursuant to Rule 18..." Rule 16 is inapplicable. The language permits the Carrier's action and Part (2) of the claim must be denied.

The Board must also deny Part (3) of the claim for lack of Agreement support and proof. The Organization's argument is not persuasive that the Carrier is restricted by Agreement from its actions in assigning the junior employee to operate a Group B machine. The Organization argued that the junior employee was "non-qualified" and that the Claimant was previously qualified on the Group B machine. The Organization

argues that the Carrier violated the Rules previously presented (Rules 16 and 24) when it bypassed an employee with fitness and ability for a junior employee totally without experience. We considered all issues and again must conclude that proof of a violation is not in the Rule language or evidence of record. The Carrier determined that the junior employee had sufficient fitness and ability and there is no contrary proof. Rule 760 permits operation of the machine if the employee is "working under the supervision of a qualified employee." The record here, as in the former claims, indicates this was a temporary position or vacancy of less than 30 days. As indicated previously, we cannot find in the negotiated language a prohibition of the Carrier's action.

Accordingly, the Board is constrained to deny all parts of this claim. We can find no Agreement provision that has been violated.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 13th day of August 1997.