

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36060
Docket No. MW-35366
02-3-99-3-245**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway
(former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier recalled junior Sectionman R. W. Cogger, instead of senior furloughed Sectionman J. E. Mohn, to fill a sectionman vacancy at Cass Lake, Minnesota beginning February 3 through 12, 1997 (System File T-D-1328-B/MWB 97-06-26AA BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. E. Mohn shall now be compensated ‘ . . . for eight (8) hours straight time per day for each workday, February 3, 4, 5, 6, 7, 10, 11 and 12, 1997. Also for five (5) hours time and one-half worked by the junior employe during this period of time.* * *’”**

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.

This dispute concerns seniority rights to an eight-day temporary vacancy under the parties' Agreement. In support of its position, the Organization relies primarily on Rules 2, 9 and 19A, as well as certain general principles of seniority that it believes have

been recognized in other railroad industry arbitration Awards. Rules 2, 9 and 19A read, in pertinent part, as follows:

“RULE 2. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS

- A. Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided.**

* * *

RULE 9. RETENTION OF SENIORITY BY LAID OFF EMPLOYEES

When an employee laid off by reason of force reduction desires to retain his seniority rights, he must within ten (10) calendar days of date so affected file his name and address in writing on the form supplied for that purpose, with his foreman or supervisor with copy to General Chairman, receipt of which will be acknowledged in writing by the Company. He must advise in writing of any subsequent change of address, receipt of which will be similarly acknowledged. When new positions of more than thirty (30) calendar days' duration are established, or when vacancies of more than thirty (30) calendar days' duration occur, employees who have complied with this rule will be called back to service in the order of their seniority.

* * *

RULE 19. TEMPORARY VACANCIES AND VACATION RELIEF NOT BULLETINED

- A. A new position or vacancy of thirty (30) calendar days or less duration, shall be considered temporary and may be filled without bulletining. * * * If such vacancy is on any other position and is filled, preference will be given to the senior qualified employee who is not assigned in the rank in which the vacancy occurs and who has on file a written request to fill such vacancy.” (Emphasis added)**

* * *

The Carrier, on the other hand, maintains that no Rule requires that the temporary vacancy in question had to be filled by the Claimant. Under this Agreement and on this record, we agree. Rule 2 rather clearly provides that seniority rights apply “... as hereinafter provided ...” in the Agreement. It is also clear that Rule 9 does not apply to the disputed temporary vacancy because its duration was less than 30 days. See Award 66 of Public Law Board No. 3460 between these same parties. Finally, it is

undisputed that the Claimant did not have a written request on file to fill the temporary vacancy pursuant to Rule 19A. Accordingly, Rule 19A does not mandate that he be chosen nonetheless.

In light of the foregoing, the claim lacks Rule support. The Carrier was not required by the Agreement to offer the vacancy to the Claimant. Nevertheless, it did make an attempt to do so. The Claimant was called for the vacancy in seniority order but he was not available at the time. A message was left on his answering machine but the Claimant did not return the call until between one and three hours later. By that time, the Carrier had moved on to fill the vacancy with a junior employee. On this record, no Rule prohibited the Carrier's action.

The several Awards cited by the Organization for general seniority principles are inapposite. They involve different parties, Agreement provisions and facts.

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 21st day of May, 2002.

LABOR MEMBER'S DISSENT
TO
AWARD 36060, DOCKET MW-35366
(Referee Wallin)

The findings of the Majority in this dispute has left a gaping wound in the Agreement. The Claimant here was furloughed at the time this dispute arose and was awaiting recall to service. The Carrier determined that it was necessary to fill a temporary vacancy at Cass Lake, Minnesota. The Agreement provides that temporary vacancies of less than thirty (30) calendar days shall be filled by employees who have a written request pursuant to Rule 19A. The Carrier, however, has taken the position that it would only honor Rule 19A requests from employees who are currently in service. In other words, the Carrier does not honor Rule 19A requests from furloughed employees.

Nevertheless, the Carrier called the Claimant to fill the vacancy at Cass Lake, Minnesota. The Claimant was not at home at when the call was placed, however, the Carrier left a message for the Claimant to return the call. As the Award reflects, the Claimant returned home, retrieved the message left by the Carrier and returned the call. By the time the Claimant returned the call, merely a few hours later, the Carrier had assigned the vacancy to a junior employee. The Majority strained at a gnat and swallowed a camel when it tried to reason its way around the provisions of Rule 2, which states:

"RULE 2. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS

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

Ignoring the above-cited general consideration rule, the Majority then launched into a search for specific language in the Agreement that would support the Organization's position here. Rather than reinforcing Award 20120 cited within our submission as Employees' Exhibit "D-2", it made the unbelievable conclusion that the Carrier was not obligated to contact anyone in seniority order, much less the Claimant. Again, the pertinent language of Award 20120 held:

"Rule 3 of Article 2 reads:

'Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Railway, as hereinafter provided.'

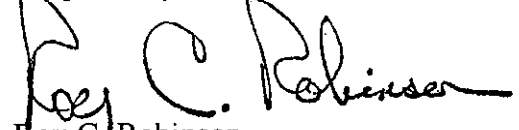
We have consistently held that this rule applies to all positions, whether it be a regular bulletined position, a temporary position or one that is required to be

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"performed only with overtime work. Seniority provisions are included in agreements for the benefit of the senior employes. They seek to protect and give preference in jobs, promotions and other opportunities to employes with greater seniority. By analogy, this view is supported by Awards 2490, 2716, 2994, 4531, 6136, 15640 and 19758."

Rather than following the well reasoned precedent, cited above, the Majority embarked on its campaign to mete out its own form of industrial justice. For the above reasons, I respectfully dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is fluid and cursive, with the first name "Roy" and last name "Robinson" clearly legible.

Roy C. Robinson
Labor Member