



Award Number 17591

Docket Number SG-18088

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Gladden, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(CHESAPEAKE DISTRICT)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railroad Signalmen on the Chesapeake and Ohio Railway Company (Chesapeake District) that:

- (a) The Carrier violated the current Signalmen's Agreement particularly Addendum 6 and past practice, when it used other than the senior Signalman as relief Foreman while position was vacant from September 16, 1967 to October 9, 1967.
- (b) The Carrier now pay Signalman Clifford H. Johnson the difference between Signal Foreman rate of pay and that of Signalman rate of pay, for the violation cited in part (a) of this claim.

EMPLOYEES' STATEMENT OF FACTS: This dispute arises from Carrier's failure and/or refusal to assign Signalman Clifford H. Johnson as relief Foreman of Signal Force #703 when Foreman position was vacant from September 16, 1967 to October 9, 1967.

The Foreman's position on Signal Force #703 was vacant, due to the promotion of Mr. W. H. Allen from Foreman of Signal Force #703 to Assistant Supervisor Signals.

Mr. Clifford H. Johnson is regularly assigned as Signalman with headquarters on Signal Camp Cars, Force #703, stationed at Huntington, West Virginia. The assigned hours are 7:00 A.M. to 4:00 P.M. with rest days, Saturday and Sunday. Mr. Johnson is senior Signalman in Signal Force #703.

Mr. W. V. Estep has a permanent assignment as Traveling Signal Mechanic with headquarters at Huntington, West Virginia. On September 15, 1967, Mr. Estep was instructed to take over the Foreman's duties on Signal Force #703 due to the promotion of Mr. W. H. Allen. Estep's position as Traveling Signal Mechanic was blanked.

Mr. Estep is not assigned to Signal Force #703 and holds no seniority in the Signal Foreman's class.

As a result, Local Chairman J. H. Butler entered claim with Division Engineer J. G. Smith on October 15, 1967, asking that Signalman Johnson be paid the difference between Signal Foreman rate and Signalman's rate of pay from September 16, 1967 to October 9, 1967, due to Carrier using

signal foreman. He contends that he should have been assigned to fill foreman's position during the aforesaid period. In support of his position he relies upon the provisions of Addendum 6 and "past practice". That part of Addendum 6 to which the claimant has reference reads as follows:

"In our conversations, we discussed relieving the gangs as a whole for vacations. The Carrier clearly has this right under the vacation agreement, and without in any manner waiving the right the Carrier has under the vacation agreement to give the force as a whole their vacations, we are endeavoring this year to work out a plan for individual vacations, following the principles laid down in the Mediation Agreement.

"In relieving foremen, if there is a qualified man on the force he will be used to relieve the foreman for the week and will be paid the foreman's rate, establishing no seniority or rights of any kind as foreman."

The instant claim was initiated by the local chairman on October 15, 1967. The division engineer declined it on October 24, 1967. The division engineer was never notified that his decision was unacceptable to the Organization. On January 6, 1968, seventy-four days after the division engineer rendered his decision, the general chairman appealed the claim. Carrier replied on February 6, 1968. The general chairman wrote the carrier further on June 2, 1968 to which it replied on June 14, 1968. No conference was held in regard to the instant claim.

Rule 59, paragraph 1(b) provides as follows:

"If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60 day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose."

Carrier's Exhibits 1 through 6 depict the handling of this dispute on the property.

(Exhibits not reproduced)

OPINION OF BOARD: In addition to the merits of this claim, certain alleged procedural violations of Rule 59 of the controlling agreement have been raised by the Carrier as follows:

1. The Organization did not notify the Division Engineer that his decision was not acceptable;
2. The General Chairman failed to appeal the claim within sixty days;
3. No conference was held on the claim.

All of these failures are cited for the first time in the Carrier's submission to this Board. It appears from the record that the Carrier failed to raise the timeliness issue on the property and therefore it is waived. It further appears in the record that after the Carrier raised the question of conference, the General Chairman executed an affidavit stating that a conference was held in connection with other matters on February 13, 14, and 15, 1968, and that during that conference the instant claim was considered. The Carrier did not respond to that affidavit insofar as is reflected in the record before this Board.

Carrier's request for dismissal is therefore denied.

We now come to the merits of the case. Claimant contends that by reason of past practice he was entitled to hold position as "relief foreman" while the position was vacant from September 16, 1967 to October 9, 1967. Claimant relies upon the Vacation Agreement (Addendum No. 6) and "past practice" of the carrier as the basis for his contention.

The facts of the instant case as related by the record reflect that the foreman of Claimant's crew was promoted and the Carrier, pending bulletining of the position, filled the vacancy with an employee not a member of the crew.

The Carrier relies upon the last sentence of Rule 52 of the controlling agreement which reads as follows:

"New positions or vacancies may be filled temporarily pending permanent appointment."

The controlling agreement makes no reference as to the manner of filling these "new positions or vacancies".

It is contended by the Organization that the Carrier, over an extended period of time, has followed a practice of filling such vacancies with the senior member of the crew and that this "past practice" should govern in the assignment of the temporary foreman position.

Inasmuch as Addendum No. 6 is limited to filling positions during vacation periods, it has no application in the instant case. The Organization submitted statements by four persons as to "past practice". The past practice referred to in these statements, however, applied to "relief" situations rather than vacancies. There is no evidence showing a "past practice" of the Carrier as to the manner followed in temporarily filling vacancies or new positions pending the bulletining of such positions.

In view of the foregoing we need not resolve the other issues raised in the submission.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of November 1969.