

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19707
Docket Number MW-19601

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(Missouri-Kansas-Texas Railroad Company

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

1. The Carrier violated the Agreement when, on November 2, 1970, it required or permitted D. O. Tucker, B&B Foreman, to leave his B&B Foreman's position on Seniority District No. 6, Gang 725, and place himself on B&B Gang 727, Seniority District No. 4.

2. The Carrier further violated the Agreement when, on November 4, 1970, it required B&B Lead Mechanic H. B. Cooley, Gang 727, Seniority District No. 4, to place himself on Seniority District No. 6 as B&B Foreman on Gang 725.

3. As a consequence thereof, the Carrier shall be required to:

- (a) Return D. O. Tucker to his original position on Seniority District No. 6 where he holds seniority as a B&B Foreman on B&B Gang No. 725;
- (b) Return H. B. Cooley to Seniority District No. 4 where he holds seniority in B&B Gang 727 to fill the position of B&B Foreman;
- (c) Compensate P. E. Lambert B&B Mechanic, Seniority District No. 4, Gang 727, for the difference in what he received as B&B Mechanic and what he should have received as B&B Foreman from November 2, 1970 until the rule violations are corrected.
- (d) Compensate I. L. Boatman, B&B Lead Mechanic, Seniority District No. 6, Gang 725, for the difference in what he received as B&B Lead Mechanic and what he should have received as B&B Foreman from November 4, 1970 and continuing until the rule violations are corrected (System File 500-112/2579-3).

OPINION OF BOARD: On November 1, 1970, a vacancy was created for the position of Foreman on B&B Gang No. 727, Seniority District No. 4 by the transfer of the incumbent to another department. There were no other employees with seniority in the foreman's classification on Seniority District No. 4. D. O. Tucker, Foreman of B&B Gang No. 725, Seniority District No. 6, requested temporary assignment to the vacant position during the posting period and was granted a thirty day leave of absence from his position of B&B Gang No. 725 Foreman for this purpose. On November 4th, the vacant position on B&B Gang No. 727 was advertised, and at the close of the bidding on November 13th no bids had been received from any employee with seniority in the Foreman's classification. Tucker requested the vacant position and by Bulletin was assigned to the position on November 16th giving up his seniority in District No. 6 at that time.

When Tucker moved to B&B Gang No. 727 a vacancy was created for the position of Foreman on Gang No. 725 in Seniority District No. 6. There were no employees with seniority as Foreman in District No. 6. On November 4th, at his request, H. B. Cooley, Lead Mechanic in B&B Gang No. 727, who had served as a Relief Foreman, was temporarily assigned to the position of Foreman, B&B Gang (Seniority District No. 6). On November 19, 1970 the vacancy for Foreman, B&B Gang No. 725, was advertised and on December 1st when the bids closed there were no bids from any employee with seniority in the Foreman's classification on Seniority District No. 6. Cooley requested and was granted transfer (by Bulletin dated December 7, 1970) from B&B Lead Mechanic, District No. 4 to B&B Foreman, District No. 6, relinquishing his seniority in District No. 4.

Claimants in this matter are P. E. Lambert, B&B Mechanic, Gang 727, District No. 4 and I. L. Boatman, B&B Lead Mechanic, Gang 725, District No. 6.

Both parties agree with the above statement of facts, except that Petitioner contends that Tucker and Cooley were required to accept the temporary transfer and then the ultimate assignments. However, no evidence has been submitted in support of Petitioner's contention, while Carrier has submitted some evidence in support of its position; therefore we shall reject Petitioner's contention.

The pertinent Rules include the following:

"ARTICLE 3. SENIORITY

Rule 1. Seniority begins at time employee's pay starts in the respective branch or class of service in which employed, transferred or promoted and when regularly assigned. Employees are entitled to consideration for positions in accordance with their seniority ranking as provided in these rules.

Steel Bridge Gangs
Welding Gangs
Pile Driver Gangs
Steam Shovel Gangs
Ditcher Gangs
Spreader-Shaper Gangs
Bulldozer Operators
Pole Driver Operators
Crawler Crane Operators
Rail Derrick Operators
Rail Straightening Foremen
Dragline Operators

(*) It is understood that if this equipment is to be used at other points on the System the position will be advertised to System Ditcher Operators and Firemen if ditching service is to be performed, and to System Pile Driver Operators and Firemen if pile driving work is to be performed. It is further understood that in emergencies the Operator assigned to this equipment on Western Sub-Division may be used at any point on the System pending bulletining and assignment.

Rule 3. Seniority rights of employees above the rank of track laborer, except those provided for in Rule 2 of Article 3; will be restricted to Seniority Districts as outlined below:....."

"Rule 14. Seniority for Bridge and Building Department employees shall be separated into four (4) groups as follows:

"Group 1
B&B Department Foremen
Group 2
B&B Department Lead Mechanics
Group 3
B&B Department Mechanics
Group 4
B&B Department Helpers"

"Rule 17. Employees temporarily transferred by the direction of the management from one seniority district to another, or assigned to temporary service, may when released return to the position from which taken without loss of seniority."

"ARTICLE 5. BULLETINS AND ASSIGNMENTS

* * * * *

Rule 4. Vacancies or new positions that are definitely known to be of twenty (20) days or less duration will not be bulletined. The senior unassigned employee above the rank of track laborer will be notified at last available address of such vacancy and will be required to protect the vacancy as early as possible. Pending the senior employee getting on the job, the vacancy may be filled in the most practicable manner."

* * * * *

Rule 6. In filling positions temporarily, as referred to in Rule 4, the following shall be observed:

(a) By individuals then employed in a lower classification in the gang or unit in which the vacancy occurs or the new position is created and who hold seniority rights on the district concerned, in the classification in which the vacancy occurs or the new position is created.

(b) By furloughed employees who hold seniority rights on the seniority district concerned and in the classification in which the vacancy occurs, or in which the new position is created.

"(c) By individuals then employed in a lower classification in the gang or unit in which the vacancy occurs or new position is created and who do not hold seniority rights in the classification to be filled and who are eligible and qualified for promotion.

(d) If the vacancy or new position cannot be filled by means of any of the three foregoing methods, position may be filled by new employee."

"ARTICLE 21. CONSENT TO TRANSFER

Rule 1. Except for temporary service, employees will not be transferred to another district unless they so desire. Such transfers to be handled in accordance with Article 3, Rule 17."

We come first to the question of whether the case should be dismissed, as contended by Carrier, because the claim as originally presented to Carrier was enlarged by the inclusion of four more Rules (with the identical factual circumstances) allegedly violated, in the appeal step to the Chief Engineer. Carrier cites Award No. 13235 for support of this position. In that Award in addition to the material relied on by Carrier we also said: "We are of the further opinion that Section 3 First (i) of the Act contemplates that the claim denied by the chief operating office, on the property, is the claim which 'may be referred' to the Board." An examination of the record indicates that the original claim and the final claim submitted to the Board differ only in that the original refers to two rules and the claim referred to the Board recites identical facts and refers to violation of the "Agreement" without mention of specific rules. In the course of the handling on the property, as correctly stated by Carrier, Petitioner in its letter to the Chief Engineer alleged that there were violations of four additional Rules. We do not believe that there is any appreciable difference between the Claim as presented on the property and as it is presented here (See Awards 11906 and 18373). We do not believe that Carrier's right to defend itself was impaired by the changes above described, under these particular circumstances. Hence we will deny the motion to dismiss.

Petitioner claims that the clear and unambiguous language of Article 3 Rules 1, 2 and 3 restrict the seniority of Tucker and Cooley to their original seniority districts (prior to the transfers). We concur. Petitioner then contends that Carrier had no right to temporarily assign these employees to positions in other seniority districts and refers to Article 5 Rule 6(c); Petitioner urges that under this Rule employees in a lower classification may fill a position temporarily even though they do not hold seniority rights in the Classification to be filled. Again, we concur, except that a careful reading of the Rule

does not indicate that it is mandatory for a temporary position to be filled in this fashion, unless the employees in question are eligible and qualified for promotion. In fact Section (d) of the Rule indicates that such positions may be filled by new employees. Certainly, then, transferred employees have at least the same standing as new employees. Petitioner has presented no evidence to indicate that Claimants herein were either eligible or qualified for promotion, other than by merely holding seniority in lower classifications in the Districts. The Organization urges the principle that seniority rights are a valuable property right which must always be respected; we have consistently supported this principle and continue to do so in this case. However, Petitioner cites a series of cases in support of its arguments, many of which deal with assignment or transfer of work (6856, 6938, 4987, 9647, 4667, 4490, 4076, 13326, 4584, 8093) and are not directly applicable to this matter. Petitioner also cites a series of cases (18785, 2864, 5348, 16830, 19432, 11279, 8034, 1058, 17931, 2675) which are related more directly to this case, but are factually so far different and with such different rules that they do not cast light on the issues herein.

Primarily Petitioner is concerned with the alleged violation of the clearly established seniority by District in Article 3 Rule 3, but makes little note of the provisions of Rule 14 of the same Article and largely ignores Article 21. Everyone familiar with this industry recognizes the desirability of promotion from within; but contrary to Petitioner's argument, seniority in a lower classification does not automatically ensure promotion to a vacancy in a higher class. Rule 1 of Article 5 states: "Promotions shall be based on ability and seniority; ability being sufficient seniority shall govern." An examination of the seniority lists of the two gangs in question do not reveal available employees for the vacancies in question having seniority as foreman. No evidence in the record reveals qualification of any of the employees listed. No employees in either Gang bid for the vacancies in question. Rule 1 of Article 3 as well as a number of other Rules cited contemplate transfers.

We affirm the seniority principles enunciated in the Agreement in this case, particularly those dealing with seniority by District and for B&B employees, seniority by Group. At the same time, on the assumption that the transfers were voluntary, we do not find that the transfers in this dispute infringed on the seniority rights of any other employees or adversely affected any other employees. Therefore we shall dismiss the claim.

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;

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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 Claim be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Killian
Executive Secretary

Dated at Chicago, Illinois, this 13th day of April 1973.