NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20262
Docket Number CL-20296

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Pacific Fruit Express Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7386) that:

(a) The Pacific Fruit Express Company violated the Clerks' Agreement when it used an unassigned employe to fill portions of vacancies notwithstanding he was not qualified to fill all positions included in the relief schedule of such vacancies; and,

(b) The Pacific Fruit Express Company shall now be required to allow employe J. Hernandez eight (8) hours' compensation at the time and one-half rate of Clerk-Inspector each date July 13, 14, 27 and 28, 1970; and,

(c) The Pacific Fruit Express Company shall now be required to allow employe B. Dominguez eight (8) hours' compensation at the time and one-half rate of Clerk-Inspector August 20, 1970; and,

(d) The Pacific Fruit Express Company shall now be required to allow employe B. Aguilera eight (8) hours' compensation at the time and one-half rate of Clerk-Inspector each date August 24, 25, 31, September 21 and 29, 1970.

OPINION OF BOARD: The dispute in this case involves the filling of vacancies on two relief positions over a number of days. The job identified as Relief "M" included the positions of Clerk-Inspector and Chief Yard Clerk; the job identified as Relief "J" included the positions of Clerk-Inspector and Shift Foreman. Carrier called the senior unassigned employe to fill the Clerk-Inspector relief days on both Relief Position "M" and "J", but determined that this employe was not qualified to perform the duties of Shift Foreman and Chief Yard Clerk; for those two positions, the Carrier called and used the qualified incumbents who were on their rest days.

Part (c) of the Claim involves work on August 20, 1970. The record indicates that Carrier asserts the position in issue was blanked on that date, instead of being filled by an unassigned employe. We find no dispute with Carrier's assertion and no rebuttal thereof; we must assume therefore that the factual basis for this part of the Claim has not been established.

The essence of the dispute is the contention of the Organization that to be considered qualified for a call, an unassigned employe must be qualified to work the entire relief schedule. The relevant rules are as follows:

"RULE 6 - FILLING NEW POSITIONS AND VACANCIES

(a) Positions or vacancies of thirty (30) days or less duration may be filled without bulletining. Positions or vacancies over thirty days duration will be handled under provisions of Rule 7 of this agreement.

(b) New positions or vacancies of thirty (30) calendar days or less duration shall be filled, whenever possible, by the senior qualified unassigned employe who is available and who has not performed eight (8) hours work on a calendar day; an unassigned employe will not be considered as being available to perform further work on vacancies after having performed five (5) days or forty (40) hours of work at the straight time rate in a work week beginning with Monday, except when such unassigned employe secures an assigned position under the provisions of Rule 7 or returns to the extra list from a position to which he was assigned, in which event he shall be compensated as provided for in Rule 31, Sections (d) and (e).

NOTE:- 1. An unassigned employe placed on a vacancy or a new position having rest days of Saturday and Sunday will remain thereon until relieved by regular employe or displaced by a senior unassigned employe.

2. An unassigned employe placed on a vacancy or new position having rest days other than Saturday and Sunday shall, after having performed five (5) days or forty (40) hours of straight time work in a work week beginning with Monday, be released from the position only if by remaining thereon he would work in excess of five (5) days at straight time rate in his work week. An employe so released shall be privileged to return to the vacancy from which released at the beginning of the new work week if the vacancy is then filled by a junior unassigned employe, or he may displace any junior unassigned employe, or place himself available for subsequent vacancies. If no regular employe is available and an unassigned employe is used after having performed five (5) days or forty (40) hours of straight time work on vacancies in his work week beginning with Monday, he shall be compensated therefor at the overtime rate.

"(c) If a qualified unassigned employe is not available, position will be filled by the senior assigned employe who makes written application therefore and is qualified for such vacancy, and when assigned shall take all of the conditions of the position; if a qualified unassigned employe thereafter becomes available he may not displace the regular employe filling the temporary vacancy unless he is senior to such regular employe. Employes working in one class may file applications for and be used on new positions or vacancies in another class under the provisions of this section, when there are no qualified unassigned employes available in the class where the new position or vacancy occurs.

NOTE:- 1. A vacancy under preceding paragraph of this rule will not be considered a vacancy available to an assigned employe unless it is known in advance that the vacancy will exist for more than two (2) days or has existed for more than two (2) days.

2. In the event a vacancy of known duration of more than two (2) days is filled by a regular assigned employe and a senior qualified regular assigned employe desires to displace the junior regular assigned employe working the position, he may, upon giving at least four (4) hours' notice, do so providing such displacement notice is made within seventy-two (72) hours from the starting time of the position after vacancy is first filled and the employe making the displacement shall be required to fill the vacancy at the beginning of the next tour of duty on the vacancy.

3. Under the provisions of this Rule an assigned employe shall not be permitted to work a temporary vacancy, or return from a temporary vacancy to his regular assigned position, or work another temporary vacancy on the same calendar day."

The Organization bases its claims on the assertion that for twenty years the parties have had a mutual understanding and a practice interpreting Rule 6; that understanding provided that an employe will not be used to work a relief assignment unless he is qualified to work all positions encompassed within that assignment. Petitioner further asserts that Carrier did not deny the existence of the understanding and practice during the handling on the property and hence is estopped from raising that issue in its submission to this Board.

Carrier asserts that the past practice argument was not properly handled with Carrier's highest officer and is barred from further consideration. Further, the Carrier's Manager Personnel, in the applicable letters on the three Claims all dated January 16, 1973 said:

> "Once more in our conference of January 11, 1973, your Senior Vice General Chairman and the undersigned reviewed the entire record of this case and examined all of the underlying facts and the application of our Agreement thereto. Throughout, I could find no departure from any rules or other violation."

We find that the foregoing letter constitutes a denial on the property of any argument concerning understandings or practices interpreting Rule 6, since it records the result of the final conference on the property in the handling of these claims. Thus, if the Organization's representative raised the issue of the mutual understanding in the interpretation with the highest officer of Carrier, it was rejected.

With respect to the alleged practice and understandings concerning the meaning of Rule 6 we find no evidence in the record to indicate the nature or specifics of such understanding and further no evidence with respect to practice - merely assertion. In Petitioner's rebuttal the following statement appears:

> "....the complaint under consideration here by your Board is one that has cropped up occasionally in the past. Since the issue does recur from time to time, the Employes have progressed the instant case in an effort to obtain a determinative ruling to settle the dispute once and for all."

The above statement and correspondence presented by the Organization alluding to an identical dispute in 1960 would seem to negate the allegation that a twenty year practice had been abrogated by the actions of Carrier in the instant dispute. Even if Petitioner's position were wholly sound the claims are deficient in that Claimants failed to file for the vacancies under the provisions of Rule 6(c), which provides:

> "If a qualified unassigned employe is not available, position will be filled by the senior assigned employe who makes written application therefor and is qualified for such vacancy...."

We conclude that Petitioner has failed to establish the existence of a mutual understanding or practice interpreting Rule 6. The provisions of Rule 6(b) are clear and unambiguous and do not contain any language indicating that an unassigned employe must be qualified to work all positions encompassed within a relief schedule in order to qualify for such vacancy. For all the foregoing reasons the claims must be denied.

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 Employes involved in this dispute are respectively Carrier and Employes 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

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May 1974.

LABOR MEMBER'S DISSENT TO AWARD 20262,
DOCKET CL-20296 (Referee Lieberman)

The logic of the majority of the Board in denying the claim involved in this Docket is defective. Rule 6 (b) of the Parties Agreement requires that, in the first instance, vacancies, such as the one involved in this Docket, be filled by "***the senior qualified unassigned employe***." Never has it been established that the individual used on part of the two vacancies was a qualified employe. Fact of the matter is, on January 16, 1973, the Company's Manager of Personnel wrote:

> "In filling the type of vacancy which occurred in this claim, we first sought an unassigned qualified employe, but without success."

The Rule clearly requires that an unassigned employe be qualified for the vacancy prior to assignment to the vacancy. If he is not qualified, he cannot be assigned to the vacancy. If he cannot be assigned to the vacancy he has no right to work any part thereof.

The Rule uses the term "vacancy" in its usual sense. Rule 6 does not contemplate that the vacancy be split among the several positions involved when a relief vacancy is to be filled, nor does it contemplate a vacancy be split among the various functions of work assigned to a non-relief vacancy. (For example: a non-typist would not be qualified for assignment to a vacancy in a non-relief assignment requiring two hours of typing per day even though the individual was qualified for the remainder of the work of the vacancy.)

The penultimate sentence of the Opinion is ridiculous:

> "The provisions of Rule 6(b) are clear and unambiguous and do not contain any language indicating that an unassigned employe must be qualified to work all positions encompassed within a relief schedule in order to qualify for such vacancy."

We agree the Rule is clear and unambiguous. The Rule requires that an unassigned employe be qualified to work the vacancy. To hold that such an employe is now required to be qualified on only a part of the vacancy is to amend the Rule, something the Board and this Referee are well aware is beyond our scope of authority.

The Award is in error and, I dissent.

J. C. Fletcher

J. C. Fletcher, Labor Member
6-3-74