

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20514
Docket Number CL-20443

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway Airline and Steamship Clerks
(Freight Handlers, Express and Station Employees
(
(Southern Pacific Transportation Company (Pacific
(Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7381) that:

(a) The Southern Pacific Transportation Company violated the current Clerks' Agreement when it failed and refused to allow employee F. F. Kinisky to displace Junior employee W. C. Allred from position of Agent at Salinas, California; and,

(b) The Southern Pacific Transportation Company shall now be required to allow employee F. F. Kinisky eight (8) hours' additional compensation at rate of Agent, Salinas, November 11, 12, 15, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, December 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 1971; January 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 31, February 1, 2, 3, 4, 7, 8, 9, 10, 11, 14 and 15, 1972, and each date thereafter that the violation continues.

OPINION OF BOARD: After Claimant was displaced by a senior employee from a Star Position at Monterey, he attempted to displace a junior employee from a Star Position at Salinas but was refused by Carrier. Rule 33 (h), part of the Rule relating to Advertising and Assigning Positions, reads as follows:

* * * * *

"RULE 33

ADVERTISING AND ASSIGNING POSITIONS

(h) Star Positions -

Positions designated by a star (*) in the wage schedule, shall be advertised, when vacancies occur, in accordance with the provisions of this Rule: however, such positions shall, after the expiration of notice, be filled with the best qualified employee

"(having five (5) or more years seniority) selected by the proper officer of the Carrier from the basic seniority roster or Master Roster (in that order) on which the vacancy occurs. Where a suitable employee for the position cannot be found on such seniority rosters, the Carrier is privileged to make a selection from the Master Roster of one of the other regions of an employee (having five (5) or more years seniority), and if this is done such employee shall be governed by the provisions of Rule 45(f)."

Petitioner relies largely on Rules 27 and 41 and contends that Rule 33(h) does not supersede those rules. Rules 27 and 41 read in pertinent part as follows:

"RULE 27

PROMOTIONS, ASSIGNMENTS, DISPLACEMENTS

Employees covered by these rules shall be in line for promotion. Promotions, assignments and displacements shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

RULE 41

POSITIONS ABOLISHED, DISPLACEMENTS AND
REDUCTION IN FORCE

(a) An employee whose position is abolished, or who is displaced under conditions not otherwise provided for in these rules, may, within five (5) calendar days, or if on vacation, leave of absence, or absent by reason of illness or other physical disability, within five (5) calendar days from date of return, displace a junior employee. An employee will not be permitted to work as a Guaranteed Extra Board employee during the five (5) day allowable displacement period, unless he becomes a Guaranteed Extra Board employee during the five (5) day displacement period by displacing a Guaranteed Extra Board employee"

Carrier first argues that the Claim is procedurally defective with respect to the damages claimed. We do not agree with Carrier's position since it is evident that at no time was Carrier misled with regard to any aspect of the Claim..

The Organization argues that "...Carrier's action is arbitrary and capricious and that their reliance on Rule 33(h) is a device to favor one employee over another at their discretion, rather than placement of an employee based on seniority, fitness and ability." Basically, Petitioner's argument is: 1. Rule 33(h) contemplates advertising new positions and vacancies only, not displacements. 2. Rule 33 has no bearing on displacements. 3. Rule 41 is applicable in the event of positions being abolished, displacements or reductions in force.

Carrier asserts that the clear language of Rule 33 (h) provides that at all times, continuously, and without any qualification after expiration of the notice, the position shall be filled with the best qualified employee. Carrier argues that Petitioner's position in this case would modify this language in that the best qualified employee would fill the position only until some senior employee desired to displace him. Carrier also asserts that under the predecessor TCU agreement the same rule had been in effect since 1944 and Carrier's interpretation and application of the rule had never been questioned.

Petitioner argues that the past practice relates to a predecessor agreement, prior to the consolidation of clerks and telegraphers agreements, and hence is not applicable. Further, that no past practice which is contrary to the clear language of the agreement is controlling and finally Carrier's past practice argument is unsupported by proof and hence is invalid. We do not agree with Petitioner's position with respect to past practice. First we have held (Award 19800) that the consolidation of clerks and telegraphers agreements did not affect the meaning and application of existing rules and practices. Further, we note that there was never a denial by the Organization of Carrier's assertion of previous practice; even more significantly, we do not believe it is necessary to "prove a negative." As to the matter of the clear language of the agreement, we have two problems: first, if we accept Petitioner's point of view, we would be modifying Rule 33(h) by inserting the phrase, "except in the event of displacement"; if we accept Carrier's position we would be forced to modify Rule 41(a) by adding to the first sentence "except for Star Positions."

Petitioner cites Award 11335 in support of its position. We note that the rules in that dispute were quite different than those herein; in that Award, additionally we said that there was adequate rule protection against the filling of a position similar to a Star Position through displacement by an employee considered unacceptable by management. If we accepted Petitioner's position, such would not be the case in this dispute; moreover the rule herein provides for the "best qualified employee". We think more in point the position taken in Award 6723. In that matter, with closely parallel rules and facts, we said:

"To apply the general displacement rule to asterisk positions as contended for by the Organization, would render Carrier's free choice in making appointments thereto a mockery. We say this because under such theory, any such appointee could immediately thereafter be swept from the position by a senior employee irrespective of his qualifications,We should not assume that the parties intended to do a useless act in negotiating Rule G-II, nor should we so interpret an Agreement so as to result in an absurdity when a path is open to effectuate an expressed intent...."

We find that the meaning of Rule 33 (h) is clear and unequivocal: it does not provide for an exception via the displacement route. The parties evidently wished to cede to the Carrier the right to determine and designate the best qualified employee for a limited number of positions, with only the qualification that such employee must have a minimum of five years of seniority. This evident intent of the parties is buttressed by the unchallenged practice under the TCU predecessor agreement and the reasoning in Award 6723 above. We have repeatedly held that the conduct of the parties over a period of time is the best evidence of their intent (See Award 19959 and many others).

For the reasons indicated above, the claim 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 Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

Award Number 20514
Docket Number CL-20443

Page 5

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: *A.W. Paulina*
Executive Secretary

Dated at Chicago, Illinois, this 8th day of November 1974.