NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22416
THIRD DIVISION Docket Number CL-22346

Louis Yagoda, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Soo Line Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8524) that:

(1) Carrier violated Article 12(b) of the National Vacation Agreement, Rule 67 and Addendum B of the effective Agreement when it denied Mr. Richard E. Erickson his request to occupy the vacation vacancy of General Clerk-Grain from November 15, 1976 through November 19, 1976, and the Assistant Chief Bill Clerk position on November 26, 1976, and allowed a junior employe to exercise seniority to these vacation vacancies.

(2) Claimant shall now be compensated pro rata and time and one-half rate for the General Clerk-Grain position from November 15, 1976 through November 19, 1976, and Assistant Chief Bill Clerk for November 26, 1976, in addition to compensation received during the period.

OPINION OF BOARD: At the time of the circumstances giving rise to this claim, Claimant held a clerical position in Seniority District No. 32. On November 8, 1976, he requested that he fill two positions temporarily vacated by vacation absences, one of these the position of General Clerk-Grain from November 15 through November 19, 1976, the other that of Assistant Chief Bill Clerk on November 26, 1976. It is not disputed that both are in the same Seniority District as that of Claimant nor that Claimant was the senior qualified applicant for said vacancies.

Carrier did not comply with Claimant's request for filling of either of the two vacancies and allowed an employe junior in service to Claimant in the same Seniority District to fill these vacancies.

Organization relies on Article 12(b) of Addendum B of the Clerks' National Vacation Agreement and quotes therefrom:

> "When the position of a vacationing employe is to be filled and a regular relief employe is not utilized, effort will be made to observe the principle of seniority."

Rule 67 of the Agreement between the parties, also referred to in the Claim states that the Vacation Agreement of December 17, 1941 as "amended and/or interpreted" is made a part of the parties' Collective Agreement.

Organization cites a number of Awards which it regards as upholding such claims as the instant one under the same Rule.

Carrier responds by calling attention to the language in 12(a) and 12(b) of the Vacation Agreement preceding the words quoted from the latter by Organization. These sections read, in their entirety:

> "12. (a) Except as otherwise provided in this agreement a Carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employee were not granted a vacation and was paid in lieu therefor under the provision hereof. However, if a relief worker necessarily is put to substantial extra expense over and above that which the regular employee on vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing regular relief rules.
>
> "(b) As employees exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority."

Carrier contends that to have gone strictly by the seniority principle in this case would have caused a serious disruption of the force - the reason given by Carrier in its initial denial of the Claim. Such concern was, in part, prompted according to Carrier by Claimant's unfamiliarity with the duties of the positions involved, which would cause errors, loss of time, probabilities of overtime and additional burdens on other employes.

Carrier cites Awards purporting to show that a vacation absence is not a "vacancy" in the usual sense subject to being filled by strict seniority but, under Article 12, Carrier has significant latitude in selecting fill-ins for such limited spans in a way least disruptive to its operations.

The Board finds the parties in agreement that the temporary gaps in positions brought out by vacation absences are not "vacancies" in the sense of voids falling under the general requirement of automatic filling by seniority criteria.

Nor do we find disagreement between the parties concerning the fact that Article 12(b) of the Vacation Agreement (a) does not compel Carrier to assume a greater expense resulting from the vacation than would be incurred if the vacation were not taken but, (b) requires Carrier to make an "effort" to observe the principle of seniority when providing fill-ins for vacationers when, as here, a regular relief employe is not utilized.

Carrier contends that such "effort" would have been futile because it could not succeed in overcoming the problem of causing Carrier greater expense to use a senior employe (on account of the latter's unfamiliarity with the work, leading to costly impediments to efficiency and the need for overtime payments).

It is our opinion that the showing of such barriers is a probative burden to be borne by the Carrier in sustaining a case on such grounds. Carrier is mistaken in asserting that such burden is on Claimant inasmuch as he is the party seeking the change. When the controlling clause states particular conditions as requisites for Carrier action or inaction, it is Carrier who must show that such conditions were present or carried out when challenged thereon.

In this case:

1. We have nothing but assertion unsupported by proofs that to have made the temporary substitution by seniority would have been more costly to Carrier than the normal costs of the position.

2. There is, therefore, also missing (as a corollary to item 1) a showing that the "effort" to use seniority was made. In this connection, there was no indication of the management's having turned its mind to the possibility of using Claimant and then, for particularized reasons, finding such recourse sure to cause it more expense. For example, if the record contained a functional comparison between the greater aptitude of or familiarity with the work involved of the employe used over those of Claimant and how it would be likely to have cost more money to have used Claimant instead, it might contribute persuasive support of Carrier's position.

Because of the absence of such evidence, we must rule that Carrier has not demonstrated that it has made the required "effort...to observe the principle of seniority" in filling these vacation absences or was prevented from doing so by the result of greater expense to it if Claimant were used to do so.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of May 1979.