NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22544
Docket Number MW-22496

THIRD DIVISION

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Duluth, Missabe and Iron Range Railway Company

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

(1) (a) The Agreement was violated when the Carrier failed and refused to allow Track Foreman Daniel Maloney time for traveling between his home station (Keenan) and Steelton from January 12 to January 23, 1977

and

(b) The Agreement was further violated when the claimant was not paid mileage allowance for the use of his personal automobile therefor (System File 28-77).

(2) As a consequence of the aforesaid violations, the claimant shall be allowed thirty (30) hours of pay at the track foreman's time and one-half rate and a total mileage allowance of $208.00 (1300 miles @ 16¢ per mile)."

OPINION OF BOARD: Before proceeding to a substantive discussion of this dispute, the Board will consider the jurisdictional arguments raised by Carrier regarding mileage reimbursement.

Carrier contends that since Rule 25, Part II, paragraph C represents portions of the Award of Arbitration Board 298, that were adopted intact by the employes by Section V of that Award, only the Arbitration Board or a subcommittee thereof has the authority to resolve this question. We do not agree.

In Third Division Award 21273 we held that,

"However, although unquestionably, the agreement language had its genesis in Award 298, it is incorporated here as contractual language, and under that circumstance, and the basic nature of the dispute, we do not feel that this Board is

> "divested of its obligation of exercising its obligation to determine the dispute. Rather, we feel that the dispute is properly before us for adjudication based upon the results of Awards 19945 (citing Award 19074) and 20180."

We do not believe this ruling to be inconsistent with the fact specifics herein and thus find it dispositive of this question.

On the other hand, we find that claimant's assertion that Agreement Rule 17(a) provides the overtime compensatory justification for the first part of this claim is without standing, since it was not raised or discussed on the property in contravention of Circular No. 1. We believe carrier's argument that Rule 25 II D is inapplicable to this part of the claim, since it refers only to the time an employe travels or waits during regular working hours. This was not what occurred in this case and we must reject this portion of the claim.

Conversely, the question of whether or not claimant's action was an "exercise of seniority" or was in "recognition of seniority" must be assessed within the context of specific agreement language, our decisional law and the precise fact developments herein.

It is undisputed that claimant voluntarily requested to be placed on the list respecting assignments to temporary vacancies away from his headquarters point pursuant to Agreement Rule 4(c). This provision states in pertinent part that,

> "Employes desiring to fill positions of thirty (30) days or less away from their headquarters point will so indicate in advance in writing to the Roadmaster with a copy to the General Chairman."

Carrier argues that claimant's compliance with this requirement was an explicit volitional act or exercise of seniority which subjected claimant to Agreement Rule 4(j). This rule states that "Employes accepting any position in the exercise of seniority will do so without expense to the Company." Since claimant's determination was an "exercise of seniority" Carrier avers that he is precluded from expense reimbursement.

In reviewing this case, we take judicial notice of our many and varied holdings on this issue. In some cases we have construed one set of facts to be an "exercise of seniority" while in other cases, we construed them to be a "recognition of seniority." The benchmark decision which provides the most intelligent and workable interpretative framework for approaching this question is Third Division Award 12003, where Referee Stark articulated the principles and parameters governing these distinguishing seniority terms. In that Award, Referee Stark wrote,

> "From these decisions the following principles emerge: (1) When an employe receives a temporary assignment by virtue of his contractual seniority rights, and he has no real choice regarding the acceptance of such assignment, he is not exercising his seniority; (2) If he bids off a position, or uses his seniority to displace another man in a different location, he is exercising his seniority; (3) If he has a real choice in accepting or rejecting a temporty assignment he is exercising his seniority when he makes his decision."

In the instant case, if claimant did not place his name on the Rule 4(c) list, but was unexpectedly assigned to fill a temporary vacancy at his headquarters point by virtue of his contractual seniority he would not have a real choice regarding its acceptance. It would be in recognition of his seniority. If he bid for a particular position or assignment or exercised displacement rights, it would be an exercise of seniority. The difference between these examples being choice.

Where as here, claimant asked to have his name placed on a list to fill temporary positions of thirty (30) days or less, he was not required by this status to bid off a position or use his seniority for displacement purposes. The assignment would be made by the Carrier.

The crux of this matter narrows down to the preception, that even though claimant volunteered to have his name placed on the list to fill temporary vacancies away from headquarters point, he did not specifically choose to bid for a particular position or assignment.

In the previously decided cases, the choice or lack of choice was related to a specific assignment, rather than a list of interested employes and it was theoretically conceivable that his name might have remained on the list for some time before he was assigned a temporary vacancy.

He was not bidding against other employes to get on this list or exercising his seniority for displacing other employes on this list, but merely placing himself in a position where he could be assigned to fill a temporary vacancy much like an employe being assigned to a temporary vacancy at his headquarters point. He did not bid for a specific position or assignment, but was assigned in recognition of seniority. We do not think that placing your name on a list for future temporary assignments is the same as a voluntary bid for a specific identifiable position.

Because of our findings and conclusions herein, we will reject the first part of this claim because it was not handled on the property and sustain the secondary portion for mileage reimbursement.

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 in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: G.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1979.