

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24266
Docket Number MW-24220

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
 { Seaboard Coast Line Railroad Company

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

(1) The Carrier violated the Agreement when it assigned an employe (M. H. Allen) holding no seniority in the Bridge Tender's class to fill vacation vacancies of bridge tender on September 16, 17, 18, 19, 25, 26, October 2, 3, 9, 10, 11, 12, 13, 30, 31, November 1, 2, 3, 6, 7, 8, 9, 10 and December 4, 5, 6, 7, 8, 10, 11 and 12, 1979 (System Files C-4(36)-DC/12-5 (80-15)H and C-4(36)-DC/12-5 (80-27) G).

(2) Bridge Tender D. Clement, Jr. be allowed two hundred forty-eight (248) hours of pay at his time and one-half rate because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: This claim arises from Carrier's failure to assign Claimant, D. Clement, Jr., a Group D Rank I Bridge Tender in Carrier's Maintenance of Way-General Subdepartment to relieve other Bridge Tenders during their vacation periods in the months of September, October, November and December 1979. Instead, Carrier utilized the services of Trackman, M. H. Allen, who holds no seniority in the Maintenance of Way-General Subdepartment.

The Organization asserts that Carrier's actions violates Article 12(b) of Rule 49 of the Agreement. That provision reads:

"(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 employee is not utilized, effort will be made to observe the principle of seniority."

According to the Organization, since a regular relief employe was not utilized to fill the vacation vacancies at issue, Carrier was obligated to observe the principle of seniority by assigning, at a punitive rate, the senior qualified bridge tender in the Maintenance of Way-General Subdepartment. Since M. H. Allen, the employe who actually filled the positions, is a Trackman, he exercises no seniority as a Bridge Tender, in accordance with Rule 5 - Seniority Groups and Ranks. Thus, the Organization concludes that the senior qualified Bridge Tender, Claimant D. Clement, should have been assigned to fill these vacancies.

Carrier, on the other hand, argues that the language of Article 12(b) does not require it to assign Claimant to the temporary vacancies at issue here. It contends that Claimant was unavailable to fill these vacancies since he was fully employed as a second trick bridge tender when they arose. Furthermore, Carrier contends that its past practice has been to fill such positions in exactly the same manner as it did here - i.e. by assigning Trackmen, Apprentice Foremen or other employees who do not have Bridge Tender seniority to fill vacation vacancies of Bridge Tenders. Carrier further asserts that the Organization has never protested this practice. Thus, Carrier concludes that the Organization has acquiesced in its interpretation of Article 12(b) of Rule 49. Accordingly, Carrier asks that the claim be denied.

The crux of this dispute centers on the language of Article 12(b). If its language is clear and unambiguous, then any past practice to the contrary is irrelevant. However, if the language is reasonably subject to different interpretations, then a consistent past practice is helpful in determining how the parties themselves intended the language to be interpreted.

Here, we are persuaded that the language of Article 12(b) is sufficiently ambiguous so as to take into account the past practice on the property. The requirement that "effort will be made to observe seniority" may logically mean, as the Organization contended, that senior, qualified Bridge Tenders already on full time assignment will be utilized to relieve on temporary vacancies when there are no relief Bridge Tenders available. However, it may also logically mean that seniority is utilized only when employees with Bridge Tender seniority are available account of their not being assigned to full time Bridge Tender positions. Simply stated, the "effort" to observe seniority may not extend to reassigning full time Bridge Tenders to temporary vacation vacancies so as to grant them the punitive rate for filling such positions.

Since the language of Article 12(b) of Rule 49 is ambiguous, we look to the past practice for an indication of the proper interpretation of the provision. The record evidence clearly reveals that Carrier has repeatedly and consistently assigned employees who do not hold seniority as Bridge Tenders to temporarily fill vacation vacancies where regular relief employees were not utilized. In addition, the record also indicates that the Organization has never protested this practice, thereby acquiescing to it. As our Board ruled in Award No. 10834:

"We find that a practice extending over this period of years, through negotiation of subsequent Agreement, is an established practice showing the intent of the parties as to the application of the rules involved."

Here, too, the parties' conduct is an established practice manifesting their intent with respect to the application of Article 12(b) of Rule 49. Accordingly, the claim must be denied in its entirety.

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;

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: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of March 1983.