

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Southern Pacific Transportation Company
(Western Lines)

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

(1) The Carrier violated the Agreement when it failed to recall furloughed Welder Helper S. Dooley to fill a temporary vacancy as welder helper on Welding Gang No. 24 November 23 through December 3, 1982 (Carrier's File MofW 147-70).

(2) Because of the aforesaid violation, Welder Helper S. Dooley shall be allowed seventy-two (72) hours of pay at his straight time rate."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

At the time this claim arose, Claimant held seniority as a Welder Helper in the Carrier's Track Welding sub-department. Employees assigned to that sub-department maintain system-wide seniority rights in a territory extending from El Paso, Texas, to Portland, Oregon, and San Francisco, California, to Ogden, Utah. Claimant was furloughed by the Carrier effective June 9, 1982, in a force reduction, and remained on furlough at the time in question. He had placed his name, address and telephone number on file with the Carrier, however, to be available for recall under Rule 14 of the governing Agreement.

Claimant had entered service with the Carrier as of June 9, 1978, and that was his applicable seniority date. He resided at Tracy, California. On or about November 1982, Welder Helper D. Grizard, employed by the Carrier on its Welding Gang No. 24 at Alturas, California, bid on and was awarded a

Welder Helper position at Sparks, Nevada. On November 15, 1982, the Carrier posted a bulletin dated November 22, 1982, announcing its intention to fill Grizard's position on Gang No. 24 at Alturas. At the same time, the bulletin was mailed by the Carrier to all furloughed employees, including Claimant, on the seniority roster. Under the governing Agreement, the bulletin had to remain posted for ten days from the date it bore, before the Carrier could fill the position from among the employees who bid the position.

Alturas, in northeastern California, is approximately 375 miles from Claimant's home in Tracy. Prior to Grizard's position becoming vacant, the Carrier had received a letter from Welder Helper Jon Elwood, who resided at Alturas and was then also on furlough, expressing his interest in any work becoming available on Gang No. 24 in Alturas or, as a second preference, on another gang in Oregon. After receiving the Carrier's bulletin mailed November 15, 1982, Elwood submitted a request to fill Grizard's vacancy on a temporary basis. Elwood was junior in seniority to Claimant, having a seniority date in 1981. Nevertheless, because the Carrier needed to fill the position on an interim basis during the posting period, the Carrier called Elwood to work Grizard's position until a regular assignment could be made from among employees submitting bids. As a result, Elwood worked nine days in the posting period, which ran from November 23 through December 3, 1982, for a total of 72 hours. Thereafter, Elwood returned to furloughed status and another employee, J. H. Flanagan, was awarded the position based on the bids. The record indicates that Claimant never requested assignment to Grizard's position.

The Organization contends that the Carrier was required to call Claimant, as the more senior Welder Helper on furlough, rather than Elwood, to temporarily fill Grizard's position in these circumstances. The Organization therefore seeks compensation for Claimant in the amount of the wages he would have received for the 72 hours worked by Elwood. The Carrier argues, on the other hand, that nothing in the Agreement obliged it to call Claimant, who had not requested the assignment, when Elwood had made such a request. The Carrier also asserts that Claimant's failure to request the assignment, together with the fact that the assignment was of short duration and was located so far from his home, makes it unlikely that Claimant would have accepted it even if it had been offered to him.

The Organization contends that Rule 15 of the Agreement controls in this instance. Rule 15 provides, in pertinent part:

"RULE 15 - RECALL TO SERVICE

Forces Increased. - (a) Furloughed employees shall be called back to service in their seniority order and shall be so notified by registered or certified mail sent to their last address as recorded in compliance with Rule 14.

* * *

Vacancies to be Filled. - (b) New employees shall not be brought into the service to fill new positions or vacancies in a class on a seniority district until employees in the service and furloughed employees in that class on that seniority district have been given an opportunity to take the positions."

The Organization also argues that Claimant's failure to affirmatively request the temporary assignment cannot be held against him because the Carrier's bulletin did not advise that Grizard's position was going to be filled for the interim of the posting period.

The Carrier asserts that Rule 15 has no application to this situation because, as the caption of the Rule reflects, it applies only to transactions which involve recalling a furloughed employee to service. According to the Carrier, protecting an interim vacancy with a furloughed employee pending the bulletin assignment of a replacement is not a "recall to service" under the terms of the Agreement.

The language of Rule 15, read in conjunction with other provisions of the Agreement, supports the Carrier's position. Rule 15 is specifically directed to the selection of employees to fill vacancies in existing positions or positions created when forces are increased. The instant situation did not involve an increase in the Carrier's forces. Nor did it involve the filling of a "vacancy" within the meaning of Rule 15.

On the other hand, Rule 10(a) of the Agreement states:

"Temporary vacancies shall be bulletined within 25 days previous to or 10 days after they occur, except that vacancies of 30 days or less need not be advertised." (Emphasis added)

The present situation, involving the protection of a vacancy during only the 10-day period of a bulletin posting, falls within the emphasized language. Rule 12 of the Agreement speaks even more directly to this sort of situation:

"RULE 12. VACANCIES

Positions undergoing advertisement and assignment or vacancies of thirty (30) calendar days or less duration that are to be filled shall be filled in the following order:

- (1) By the senior employee of the class in the gang or at the location who through force reduction is working in a lower class;

(2) By calling in seniority order employees in the class who through force reduction are working in a lower class and are within a reasonable distance;

(3) In the event the vacancy cannot be filled in accordance with the procedures set forth above, an employee of the sub-department may be transferred to fill such vacancy."

Finally, Rule 13(d) of the Agreement states:

"Protecting Positions or Vacancies. - (d) An employee losing his position through force reduction . . . and unable to exercise seniority as provided in this rule, shall assume the status of a furloughed employee.

Furloughed employees and employees who have been displaced in a lower class shall be considered available to protect positions and vacancies in all higher classes in which he holds seniority as provided in Rules 12 and 15."

The Agreement thus provides that furloughed employees like Claimant and Elwood are available to secure work via either Rule 12 or Rule 15. Rule 12, however, is tailored specifically to the present situation: the filling of a position while that position is "undergoing advertisement and assignment," and the filling of a position for less than 30 days. Rule 15, on the other hand, clearly contemplates the filling of longer-term vacancies, with longer lead time, since it requires that the furloughed employee be notified by registered mail sent to his last known address.

Rule 12, which expressly addresses the present situation, provides for filling such interim positions with active, current employees. It also recognizes a preference for the employee who is available in closest geographical proximity to the vacancy. Rule 12 does not specify, however, what procedure the Carrier must follow if it is unable to secure an employee in any of the three methods the Rule mentions.

It is well settled, as the Carrier points out, that seniority rights are creatures of contract and employees enjoy seniority preferences only as dictated by the governing Agreement. See, Third Division Award 5520. Consequently, in pressing a claim of seniority preference, the Organization must point to a contract provision which clothes the employee with that seniority right. Third Division Award 16288.

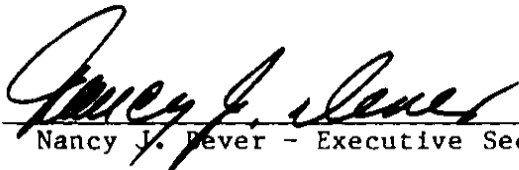
In the instant case, the Agreement simply does not require that interim assignments like the one at issue be filled, after Rule 12 procedures have been exhausted, by calling all furloughed employees in order of their seniority. In fact, such a requirement would be manifestly impractical and would be inconsistent with the recognition implicit in Rule 12 that time and distance considerations must be paramount in such cases.

The procedure utilized by the Carrier in this case, resulting in the assignment of J. Elwood to the interim position, was necessary to enable the Carrier to protect the position during the brief posting period, and was not contrary to any express provision of the Agreement. Accordingly, the Board cannot conclude that the Carrier violated the Agreement as alleged.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of March 1988.