

The Third Division consisted of the regular members and in addition Referee John C. Fletcher 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 Agreement was violated when the Carrier permitted Machine Operator L. Vizuet to displace Track Foreman T. Robledo on Extra Gang No. 38 on October 9, 1984 (Carrier's File MofW 36-239).

(2) As a consequence of the aforesaid violation, Messrs. T. Robledo, R. N. English and J. L. Ramos shall be compensated for all wage loss suffered and for travel expenses incurred beginning October 9, 1984 and continuing until the claimants are returned to their respective positions which they occupied immediately prior to October 9, 1984."

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.

The Backhoe Machine Operator position occupied by L. Vizuet was abolished on October 1, 1984, while he was absent because of a back injury sustained earlier on the job. On October 9, 1984, his treating physician stated that he was able to return to work with certain restrictions. These restrictions rendered him unfit to work as a Machine Operator. Carrier permitted him to displace a Track Foreman who in turn displaced another Track Foreman who in turn displaced yet another Track Foreman who, unable to displace on a Track Foreman's position, took a Truck Driver-Crane Operator position on an Extra Gang. A Claim was filed on behalf of the three Track Foremen, seeking wage losses and travel expenses, on the contention that the Agreement was violated when Carrier allowed Vizuet to exercise seniority in the Track Foreman class without first exhausting seniority in the Machine Operator class. Carrier contends that Vizuet's medical restrictions precluded him from working in the Backhoe class thus it was proper to allow him to exercise seniority in the Track Foreman class.

Rule 13(b) of the Agreement provides, in part:

"Displacements. - (b) An employe losing his position through force reduction, position abolished, being displaced or returning to service from disability retirement under the provisions of the Railroad Retirement Act, shall within ten (10) calendar days following loss of position or release for return to service, exercise his seniority in the following order:

1. First, displace any employe in the same class who is junior to him in seniority.
2. Second, if there is no junior employe in that class, displace any junior employe in any other class in which he has established seniority."

The evidence is conclusive that when Carrier allowed Vizuet to displace into the Track Foreman class, machine operators with less seniority were working in the class in which he had been assigned at the time his job was abolished. Under the Agreement, Vizuet's entitlement to a displacement came about only because his job was abolished. It is that abolishment which must govern subsequent displacements as well as entitlements and protections provided himself and others under the Agreement, not other coincidental conditions occurring at the time - in this case physical lifting restrictions.

As we understand Rule 13(b), and the Agreement, Vizuet was not entitled to a displacement on the basis of his on-duty injury nor would he secure such a privilege on the basis of temporary or permanent physical work restrictions imposed by his doctor. These latter conditions, while coincidental in time, are not dealt with in Rule 13(b). Employees unable to perform the full duties of their regular assignments are discussed in Rule 32(c).

Accordingly, the procedures of Rule 13(b), requiring exhaustion of seniority in the class in which assigned, before being allowed to exercise seniority in other classes, were not followed in this case. Rule 13(b) has no other options stated therein. The Rule does not contain an exception to exhaustion of seniority in the class in which working in situations where an employee is not physically qualified for an assignment held by a junior employee. This Board, under well defined authority, cannot provide one by a Board award.

Rule 32(c), as mentioned above, deals with employees unable to perform the full duties of their regular assignments - Vizuet's situation on October 9, 1984, when his doctor placed lifting restrictions on his conditional return to duty. Rule 32(c) reads:

"Light Duty, Incapacitated Employees. - (c) By Agreement between the Company and the General Chairman or his authorized representative, employees subject to the scope of this agreement who have been disqualified because of physical condition from performing the full duties of their regular assignments may be used to perform such light work within their capability to handle, as is or can be made available."

Noticeably absent from the language of the Rule is an option allowing displacement to positions held by junior employees on which the full duties could be performed or displacement in a different class also where the full duties of a position could be performed - the bump improperly allowed Vizuet.

It is clear that Claimant Robledo was improperly displaced by Vizuet which resulted in the other Claimants also being bumped. Part 2 of the Organization's Claim seeks compensation for wage losses suffered as well as reimbursement for travel expenses incurred. When this matter was under consideration on the property, payroll records were checked to determine if Claimants incurred losses. In a letter written over a year after the displacements occurred, Carrier advised the Organization that:

"A joint check of Form 201-E revealed that claimants lost no earnings as a result of the displacements nor have any requests for expenses incurred been received by the Company as a result of Vizuet's displacement."

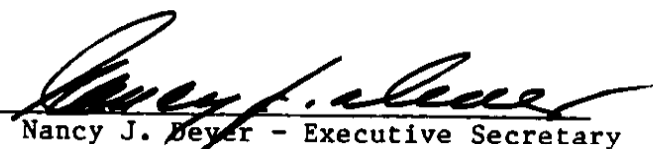
This contention, it appears from the record, remained unanswered in further handling on the property and is not adequately overcome in the Organization's presentation before this Board. The Organization not only has the burden of establishing the basis of its Claim with respect to an Agreement violation it also is required to develop certain basic entitlements for the reparations sought. This has not been done in this record.

Accordingly, Part 1 of the Statement of Claim will be sustained and Part 2 will be denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 1st day of February 1990.