

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former Seaboard System
(Railroad)

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

(1) The Carrier violated the Agreement when it assigned and used junior employes K. F. Jones and E. P. Horton instead of Mr. J. F. Turner, Jr. to fill a vacation vacancy in the foreman inspector position on Force 5S04 from December 4 through December 20, 1985 [System File JFT-86-10/12-13(86-169) I].

(2) Claimant J. F. Turner, Jr. shall be allowed the difference between what he should have received as a foreman inspector and what he was paid at the apprentice foreman rate for each work day from December 4 through December 20, 1985 and he shall be compensated for all overtime wage loss suffered as a result of the violation referred to in Part (1) above."

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.

Claimant established seniority as Trackman on the Savannah-Florence Division Seniority District on April 19, 1971. He was promoted through the ranks and was elevated to Foreman, establishing seniority on July 2, 1973. The Organization asserts that because of the Carrier's reduction in force and because the Claimant's seniority was not sufficient to allow him to hold a regular assignment as a Track Foreman or Assistant Foreman, he placed himself in a regularly assigned position as an Apprentice Foreman on Force 5S13.

A vacation absence occurred on December 4, 1985, when a Foreman Inspector, assigned to Force 5S04 at North, South Carolina, began his scheduled vacation which extended through December 31, 1985. Claimant requested to fill the vacation absence of the Foreman Inspector, but was not permitted to do so based on Carrier's determination that he was regularly assigned and working his assigned position. Instead, Carrier filled the vacation absence by recalling from furlough junior employees. In its correspondence concerning this Claim on the property, Carrier asserted:

"It has never been our policy to search the Seniority Roster and locate the senior person to protect a vacancy for vacations, but rather to use qualified furloughed employees or qualified persons working close by the vacancy if it is necessary to protect the vacancy. This was the procedure followed in this instance."

The Organization contends that Carrier acted improperly and in violation of the Agreement by failing to assign Claimant, the more senior employee, to fill the vacation absence. In support of its position, the Organization relies upon Rule 8, which states as follows:

"Rule 8

BULLETINING VACANCIES AND NEW POSITIONS

* * *

Section 2

Vacancies of seven (7) calendar days, or less, may be filled by using any eligible employee of the group and seniority district; however, preference will first be given to employees of the rank in which the vacancy exists who may be out of work or working in a lower rank account reduction of forces.

This section will not apply to temporary vacancies due to vacations provided for in the 'Vacation Agreement' signed at Chicago on December 17, 1941.

Section 3

All temporary vacancies of more than seven (7) calendar days' and less than thirty-one (31) calendar days' duration will be filled as follows:

First, by using the senior employee of the rank and group on the district who has seniority in the rank in which the vacancy occurs, who may be out of work or working in a lower rank account reduction of forces."

In its submission before the Board, the Organization also cites "Appendix C" of the National Vacation Agreement, which reads in pertinent part:

"APPENDIX 'C'

NATIONAL VACATION AGREEMENTS

* * *

(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. (emphasis added)

* * *

After careful review of the record in its entirety, the Board is of the view that the Organization has not met its burden of proving a Rule violation. Rule 8 is the applicable Rule with reference to the filling and bulletining of vacancies and new positions. Because the vacation absence at issue here was for more than seven days, we must refer to Section 3 of Rule 8. That section specifies that vacancies of more than seven calendar days but less than thirty-one calendar days shall be filled, first, by using the senior employee of the rank and group on the district who has seniority in the rank in which the vacancy occurs, who may be out of work or working in a lower rank because of a reduction in force, and, secondly, if no such employee is available, the vacancy is filled through the general promotion rules.

In the instant case, the Organization argued that Claimant should have been used to fill the temporary vacation absence because he was the senior available qualified employee working in a lower rank on account of force reduction. However, no evidence was ever forthcoming, as we view the record, to support that contention. Moreover, Carrier vigorously asserted that Claimant had worked a temporary position as a Foreman Inspector, but returned to his regular assignment at the end of the temporary vacancy and, accordingly, he was not working in a lower rank due to force reduction as alleged by the Organization. Absent some evidentiary basis to support its allegation and the rebuttal offered by Carrier on this crucial point, we can only conclude that the Organization's mere reiteration of argument cannot substitute for proof. Therefore, its contention that Claimant should have been selected cannot be deemed persuasive. Carrier acted properly and in accordance with Rule 8, we find, by using employees to fill the temporary vacancies who were furloughed due to a reduction in force and held seniority in the rank and group in which the vacancy occurred.

Nor does the reference to "Appendix C" of the National Vacation Agreement dictate a different result. During the handling of this dispute on the property, there was no reference made by the Organization to this particular contractual provision. Under these circumstances, it is well settled that the failure to raise the issue on the property now bars its consideration by

this Board. Equally important, even if we were to consider the contractual provision cited, it would not be deemed controlling. Appendix C simply expresses the general intention of the parties to fill vacation absences by seniority. The more specific application of that principle, found in Rule 8, is what governs in the instant case.

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 25th day of June 1991.