

The Third Division consisted of the regular members and in addition Referee William E. Fredenberger, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (Conrail):

Claim on behalf of Vince Kalen, for payment of \$146.16, account of Carrier violated the current Signalmen's Agreement, as amended, particularly, Article 12, paragraph (b), when it filled a vacation vacancy with a junior employee from December 18, 1987 thru January 4, 1988." Carrier file SD-2536.

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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 Claimant held a regular Signal Maintainer position headquartered at Libernois Yard, Detroit, Michigan. From December 18, 1987, through January 4, 1988, the incumbent of a Signal Inspector position at that location was on vacation. The Carrier utilized another regular Signal Maintainer who was junior to Claimant to work the Signal Inspector's position. The claim in this case followed.

The Organization maintains that the Carrier violated Section 12, Paragraph (b) of the National Vacation Agreement which provides in pertinent part that "[W]hen the position of a vacationing employee is to be filled and a regular relief employee is not utilized, effort will be made to observe the principle of seniority." The Organization cites Second Division Awards 5365 and 5734 which it claims stand for the proposition that under Article 12(b) the record must show affirmatively that the Carrier actually has made an effort to observe the principle of seniority. The Organization argues that there is no such showing on the record in this case.

The Carrier maintains that its action in this case was proper under Rule 2-A-3 of the Agreement which provides in pertinent part that certain types of vacancies, including those created by vacation, "... shall be filled by the senior available employees reduced or furloughed who have signified their desire to be so used." The Carrier argues that the junior employee utilized to fill the vacancy, but not Claimant, indicated his desire to fill it. Accordingly, urges the Carrier, it properly did not consider Claimant for the work.

While the Carrier attacks the Organization's sufficiency of proof, we believe it is the Carrier which has failed with respect to its burden in this regard. Section 12(b) of the National Vacation Agreement has been interpreted to require an affirmative showing by the Carrier that it has made an effort to observe the principles of seniority in filling a vacation position. No such showing has been made on the record in this case. Moreover, we believe the Organization's point is well taken that Paragraph 2-A-3(a) of the Schedule Agreement is inapplicable to the facts of this case. The Rule by its terms applies to vacancies "... filled by the senior available employees reduced or furloughed...." The record in this case establishes that neither Claimant nor the junior employee the Carrier used to fill the vacationing inspector's position were reduced or furloughed. Again, it is incumbent upon the party urging the applicability of a rule to prove facts which affirmatively demonstrate such applicability. In this case inasmuch as the Carrier relies upon Rule 2-A-3 it is the Carrier's burden to establish facts which demonstrate its applicability. The Carrier has not done so.

It follows that the requirement of Rule 2-A-3(a) that an employee signify his desire to be utilized to fill vacancies under that Rule is inapplicable to this case. Accordingly, it matters not that Claimant failed to signify his desire to fill the vacationing Inspector's position.

The Carrier maintains that Section 12(b) of the National Vacation Agreement does not provide for the compensation claimed in this case. While that may be true, the fact remains that the Organization has established that the Carrier violated Section 12(b). The claim, which is for the difference between what Claimant actually earned and what he would have earned had the Carrier treated him properly under Article 12(b), seeks to make Claimant whole for the loss he has suffered as a result of the Carrier's violation of the Agreement. Accordingly, the claim is proper.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 18th day of May 1992.