

PUBLIC LAW BOARD NO. 1091

Parties: Brotherhood of Railway, Airline and Steamship Clerks, Freight
Handlers, Express and Station Employees

and

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Boston and Maine Corporation

Statement of Claim: "Claim of System Committee of the Brotherhood That:

1. Carrier violated rules of the Clerks Agreement, effective September 1, 1952, as amended, when it called a junior employee to fill a vacancy on the first trick, Chief Yard Clerks position on Tuesday, November 3, 1970 (Election Day) in its yard at Manchester, New Hampshire.

2. Carrier shall pay claimant, James B. Shugrue eight (8) hours pay at the Chief Yard Clerks rate plus eight (8) hours for Holiday pay for Tuesday, November 3, 1970."

Discussion: On Election Day there was a vacancy in the Chief Yard Clerk's position at Manchester, New Hampshire because the incumbent of that position was on vacation but scheduled to report back to work at 6:30 A.M., Tuesday, November 3, 1970 (Election Day). Election Day was a local holiday governed by holiday pay rules. The Chief Yard Clerk did not return at the scheduled time. Instead he had sent the Carrier a letter from Florida which did not arrive at the Chief Clerk's office in Boston, Massachusetts, until approximately 9:00 A.M., November 3rd, stating that he would not be able to return until November 10, 1970;

On the day in question; when the Travelling Yardmaster arrived at the Manchester Office by 8:20 A.M. he found that the incumbent of the Chief Yard Clerk's post had not reported for work, and that the third trick yard clerk had already left the Yard Office, having finished his tour of duty.

He first called the incumbent's home but got no answer. He then reported the matter to the Chief Clerk in Boston. He then sought to fill the vacancy by calling Clerk Felch whose seniority date was April 1969. Clerk Felch, who lived in Nashua, N. H., and who was scheduled to fill a relief assignment that day at 3:59 P.M. in Lowell, Massachusetts, responded to the travelling yardmaster's call within 30 minutes and filled the existing vacancy.

The Claimant whose seniority date is November 1946, filed the instant claim contending that he should have been called to fill the Manchester vacancy rather than Clerk Felch. The Claimant lived in Lowell, Massachusetts and was scheduled to fill an assignment at Lowell at 5:00 P.M. that day.

Mr. Felch, who lived at Nashua, which was situated 17 miles south of Manchester while the Claimant who lived at Lowell, located 30 miles south of Manchester.

When the Chief Clerk at Boston received the incumbent's letter on November 3, 1970 at about 9:00 A.M. informing the Carrier that he would not be returning to his post until November 10, 1970 because of illness in his family, efforts were instituted at approximately 10:50 A.M. to contact the Claimant to offer him the incumbent's vacancy during the period that the incumbent would be away. The person at the Claimant's home who answered the telephone stated that the Claimant was away for the day and would not be home until 4:00 P.M. Later that day at approximately 4:15 when the Carrier reached the Claimant and offered him the vacancy he refused it.

The schedule agreement rule relied upon by the Claimant is Rule 3(b) which states:

"Within the confines of each seniority district, employees have prior rights in accordance with their length of service within the district (fitness and ability being sufficient) to promotion, assignment, displacement and work."

Organization's Position

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The Organization stresses that Rule 3(b) entitled the Claimant as the senior employee the right to perform the work of the Chief Yard Clerk ~~at Wrentham~~ **MANCHESTER**, on the day in question. When the Carrier made no attempt to contact him and instead offered the work to a junior employee, it breached the Claimant's contractual right to occupy the vacancy.

The Organization contends there was no emergency present. In the first instance, the job was not filled between the hours of 6:30 A.M. to 8:20 A.M.. Furthermore, most of the necessary work had already been performed by the clerk on the preceding third trick. The Organization asserts that there was only a minimal amount of work to be performed at the time of the clerk vacancy.

The Organization also denies that there is any relevancy to the fact that the Claimant lived 13 miles further south than did the junior employee who was utilized. Both the Claimant and the junior employee used the same high speed highway and the Claimant required only 15 minutes more than the junior employee to reach ~~Wrentham~~ **MANCHESTER**. The Organization asserts that the Claimant had a demand right to fill the vacancy and he should have been the first employee called to fill it.

The Organization states that it is irrelevant, and the Carrier is introducing it only to becloud the issue, that the Carrier offered, and the Claimant rejected, the vacancy when it was offered to him, several hours after it had been offered to the junior employee, for its duration. The Claimant is not filing any claim for the ensuing days, but only for November 3, 1970. It is also irrelevant to assert that the Claimant was allegedly not at home when he was called at 10:50 A.M.. The Carrier did not call him

for the initial vacancy, and therefore it cannot validly contend that the Claimant was not available at the time the initial call was made. Nor is there any merit to the Carrier's plea that it should be exculpated from its contractual breach because the incumbent of the job failed to meet his responsibilities to the Carrier.

The Organization asserts that the record clearly shows that the Claimant was entitled to be called first to fill the vacancy on the basis of his seniority, but the Carrier failed to do so, and therefore the claim should be sustained.

Carrier's Position

The Carrier denies that there is any merit to the claim. There is only one clerk per tour assigned at ~~Manchester~~ ^{MANCHESTER} and when the Travelling Yard-master arrived at 8:20 A.M. and found no clerk on duty, and the third trick clerk already having departed, he took the necessary means to cope with this emergency situation. It was an emergency situation, and it was created by the cavalier and indifferent conduct of the incumbent in not notifying the Carrier that he would not be able to report for duty at the conclusion of his vacation when he knew in advance of the illness in his family. The Carrier asserts that the negligence of the incumbent necessitated its calling the nearest available employee to cover this sudden vacancy.

The Carrier responded to the emergency in the most feasible and expeditious manner. Many awards of the Third Division, both off and on this property, have recognized the principle that in an emergency the Carrier is entitled to a certain latitude of judgment to make a quick decision, and the Division has refused to second guess the Carrier as to whether it made the most expedient judgment at the time, as long as it made a good faith

judgment, at the time it made it.

The Carrier points out that as soon as it received the incumbent's letter later in the morning of November 3rd, it attempted to fill the existing vacancy for the duration in accordance with strict seniority order, but the Claimant eschewed any interest in the position. The Carrier asserts that Claimant is attempting to get "something for nothing" by filing the claim for holiday pay although he had no interest in filling the vacancy. Moreover, he was not disadvantaged on November 3rd, because he worked his regular assignment in Lowell at 5:00 P.M.

The Carrier states that it should not be penalized for attempting to respond promptly to an emergency situation created by an employee's and not its, negligence in a manner that did not really aggrieve the Claimant.

Findings: The Board, upon the whole record and all the evidence, finds that the employee and Carrier are Employee and Carrier within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds the facts of record and the relevant contract provision, support the Organization's rather than the Carrier's position.

The clear language of Rule 3(b) make it evident that the work here in issue had to be assigned or awarded on the basis of length of service. The Claimant had more length of service than Clerk Felch, and should have in the ordinary course of events, been called first to fill the existing vacancy.

The Board finds the defense advanced by the Carrier inadequate in light of the Claimant's firm contractual claim based on seniority. Seniority

is a vested contractual right that may be abridged or curtailed only in the most compelling of circumstances. Such circumstances are here lacking.

The record shows that the Claimant only lived 13 miles further south of ~~Manchester~~ ^{MANCHESTER} than did the junior employee utilized, and since both employees had to use the same high speed highway, the distance was not of sufficient import to warrant breaching the Claimant's seniority. The Board also finds unpersuasive the Carrier's complaint that the incumbent of the job failed to meet his responsibilities to it. Giving full cognizance to the Carrier's justified complaint, the fact remains that the Claimant was not responsible for this breach of conduct and he should not be required to suffer a violation of his seniority rights because of another employee's misconduct over which he had no control.

The Board finds no persuasive reason in the record why the Travelling Yardmaster could not have attempted to fill the existing vacancy on the morning of November 3rd in strict seniority order. Having failed to do so, the Carrier breached the Claimant's seniority rights and must therefore honor his claim.

AWARD: Claim sustained.

AWARD: The Carrier is directed to comply with this AWARD on or before

August 9 1973.

Jacob Seidenberg
JACOB SEIDENBERG, Chairman
and Neutral Member

J. E. Smith
J. E. Smith, Carrier Member

Robert A. Parrish
R. A. Parrish, Employee Member

July 8, 1973