

PARTIES TO DISPUTE: Baltimore and Ohio Railroad Company
and
Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM: Claim of furloughed Extra Gang Foreman, H. E. Madigan, Sub-Division No. 4, Cumberland Division for pay as an Extra Gang Foreman beginning February 7, 1972 account trackman filling a vacation vacancy on Sub-division No. 4 while Mr. Madigan was furloughed both as a trackman and as a gang Foreman.

OPINION OF BOARD: Claimant, upon return, on December 29, 1971, from leave of absence due to illness submitted a "return to duty slip" to his Supervisor which indicated that he was physically able to resume work. He was advised that there were no positions available to him at that time, by reason of his seniority, whereupon he told the Supervisor that he would like to work wherever possible. Subsequently, Claimant was given a copy of Bulletin No. 97 and later bulletin No. 2, each advertising a foreman's position at different locations. Claimant declined to bid on either of these bulletined positions; the positions were awarded to employees junior in seniority to Claimant.

On February 7, 1972, Foreman Trout, at Mountain Lake, Md., went on two weeks vacation and Carrier filled this temporary vacancy with Trackman Lee who was regularly assigned to a Gang located at Swanton, Md. Trackman Lee resided at Deer Park, Mr. ^{Mad} as did the Claimant. Claim is account Claimant

was available but was not called for the vacation relief assignment.

Carrier defended its position by stating that had the Claimant requested to work the vacancy he would have been permitted to do so. On the other hand, Petitioner avers that "it is the Carrier's responsibility to notify employees of temporary vacancies and call them back to service from a furloughed status."

Carrier cited Rule 40(a) in defense of the position by stating that Claimant would have been assigned to the vacancy had he requested same. Rule 40(a) reads:

"New positions or vacancies if filled temporarily pending permanent appointment will be assigned to senior qualified employees upon request." (emphasis added)

The vacancy in question was a temporary vacancy, a vacation relief assignment, and could hardly be construed as a vacancy "pending permanent assignment." Carrier stated further, ". . . it is clear that claimant's own failure to communicate his interest in working to the Carrier was directly responsible for his not working the temporary vacation vacancy." It appears that the language of the above-quoted rule was designed to cover situations ultimately leading to a permanent assignment for the reference to a vacancy is in the same context as the reference to a new position, certainly not a position which the permanently assigned employee will be entitled to re-occupy upon his return from vacation. The record shows, and the Carrier agreed, that Claimant did advise his availability to work "wherever possible." It is not unreasonable to understand

why Claimant did not exercise his seniority on the two permanent positions that were bulletined since they were some 75 or 80 miles distance from his residence. Claimant's disinclination to bid, under the circumstances, certainly did not nullify the fact that he was available for work. Any prudent person would be able to understand that it might not be possible for an employee to elect to take a position at such distance from his residence; yet he could still maintain his availability to perform service that was a reasonable distance away should such an opportunity arise. It is apparent that the Rule cited by the Carrier in defense of its declination of the claim does not apply in the instant case.

Carrier's letter of March 24, 1972 to the Claimant stated in pertinent part:

"Had you requested the position as per Rule 40 paragraph (a) of the M of W Agreement, it would have been granted to you. Since you made no effort to do so, do not feel your claim has any merit, and it is respectively declined."

In other words, the reason the claim was declined by Carrier was that Claimant did not follow the Division Engineer's interpretation of that particular Rule. But the record shows that Claimant did advise of his availability to work, was qualified, and held sufficient seniority.

It is, therefore, our determination that, in this particular instance, the Carrier erred in declining the claim and we find in favor of Claimant.

AWARD: Claim sustained.

ORDER: The Carrier shall comply with this Award within thirty (30) days of the date of this Award.


C. Robert Asadley, Neutral Member


A. J. Cunningham, Employee Member


L. W. Burks, Carrier Member

Baltimore, Maryland
March 11, 1974