Award No. 1936
Docket No. 1911

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

The Fourth Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 30 RAILWAY EMPLOYES' DEPARTMENT AFL-CIO — MACHINISTS

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM:

1. That the Carrier violated Rule No. 8, Section E-1, when they assigned machinist W. Korenoski to fill relief supervisor position instead of Supervisor T. V. Cunningham who holds seniority in said capacity.

2. The Carrier should be ordered to compensate T. V. Cunningham, hereinafter referred to as the claimant for every day from May 21, 1962, said position was filled by persons other than claimant.

EMPLOYES' STATEMENT OF FACTS: Mr. Cunningham is recognized as a Supervisor by the Baltimore and Ohio Railroad Company, which can be attested on the Pittsburgh Division Supervisors' Roster, Exhibit "A"; holding position No. 26 with a seniority date of 2-1-60.

The aforementioned roster does not show Mr. Korenoski in any position. By no stretch of the imagination can this position be considered temporary; as it covers a period of months when various supervisors go on vacation and are off duty for other reasons.

These supervisors are human and as a consequence some have to take time off for illness, all get vacations, and there are extenuating circumstances when a person has to have time off, which results in the need of a "relief supervisor."

The dispute was handled with carrier officials designated to handle such affairs who all declined to adjust the matter.

The Agreement effective January 1, 1942, as subsequently amended, is controlling.

POSITION OF EMPLOYES: Inasmuch as both the Machinists and the Supervisors are represented in System Federation No. 30 by the General

Chairman of District Lodge No. 29, by two separate agreements — the Shop Crafts' and the Supervisors' — it is submitted that Rule 8, Section E-1 is controlling, providing the following:

> "In selecting supervisors to fill vacancies or new positions under paragraph (e) of this rule, employees will be considered in the following order:
>
> "First — Supervisors included on the seniority roster of the territory where the vacancy exists will be considered.
>
> "Second — Furloughed supervisors at all other points will be considered in their order of length of service as supervisors.
>
> "Third — In the event there are no qualified supervisors available, as outlined in the two preceding sub-paragraphs, selection will then be made by the management."

Under "Third" above would be the only time that Carrier could utilize other than supervisors or furloughed supervisors and since Cunningham has seniority as a supervisor and furloughed (See Exhibit "A" attached) he, of course, would have preference in filling such relief position of foremen while on vacations, off sick or for other reasons.

Your Honorable Board is requested to find in favor of the Employes by sustaining the claim of claimant T. V. Cunningham.

All matters herein referred to in support of the Employes' Position have been the subject of correspondence and discussion with management.

An oral hearing is not requested.

CARRIER'S STATEMENT OF FACTS: This claim originated at this Carrier's Back Shop at Glenwood, Pa. The claim originated in a Memorandum of Conference held at Glenwood on October 15, 1962, entered into between Mr. P. L. Hofstetter, Superintendent of Shops and Mr. E. L. Reisinger, General Chairman, International Association of Machinists.

In the Memorandum of Conference the "Question" was:

> "Claim of T. V. Cunningham, Jr. for one day at supervisor's rate for each day a machinist is used to perform supervisory duties from May 21, 1962."

The "Contention of Committee" in that Memorandum of Conference read:

> "Agreement signed January 1, 1942, between The Baltimore and Ohio Railroad represented by Mr. W. G. Carl, Assistant to Vice-President and all General Chairman of the Shop Crafts, Page 10, Rule 8, Paragraph E-1, Section 2 states furloughed supervisors at all other points will be considered in their order of length of service as supervisors. I am not claiming time for Mr. T. V. Cunningham, Jr. on account of he belongs on the roster at Connellsville which comes under the jurisdiction of Master Mechanic Craig, but I am claiming time on this rule for the oldest supervisor that is furloughed."

The facts in this case are that Machinist W. Korenoski was used to fill certain supervisors' vacation vacancies at Glenwood Back Shop.

The record indicates that the claimant, Mr. T. V. Cunningham, was employed as a machinist at the Back Shop with a date of March 20, 1962. Mr. Korenoski had been employed as a machinist at the Back Shop with a date of March 1, 1948.

Neither the claimant, Mr. Cunningham, nor Mr. Korenoski, who was used, held seniority as a supervisor on the Glenwood Back Shop supervisors' roster.

Due to his familiarity with the work at Glenwood Back Shop and the fact that he had been used on numerous occasions in the past in this capacity, and without protest of any kind from the Committee, Machinist Korenoski was used to fill certain supervisors' vacation vacancies during the year 1962.

Superintendent of Shops Hofstetter has furnished the following statement:

"Would like to explain that Mr. Cunningham first came to Glenwood Back Shop as a machinist, starting as such on March 20, 1962. He worked as a machinist at the Back Shop through June 27, 1963 at which time he left to take a Working Foreman's job at Hyndman, Pa.

"Mr. W. Korenoski started at Glenwood Back Shop as a machinist on March 1, 1948 and had varied experience in most of the work throughout the Back Shop until on July 10, 1961 he was picked, because of his ability and experience, to vice supervisors on vacation. Under this setup Mr. Korenoski had to take the place of the different supervisors and direct the work and handling of the men while the regular supervisor was on vacation. While doing so, due to his experience, he did a very good job. He was still vicing supervisors vacations when Mr. Cunningham left the Back Shop on June 27, 1963.

"Mr. Korenoski was much better qualified for vicing supervisors on vacation because of his experience in Back Shop work, whereas, the only experience Mr. Cunningham had before coming to Glenwood Back Shop on March 20, 1962 was Roundhouse work, which work consisted mainly of running repairs, dispatching and form work."

The rules at issue:

When this case was discussed locally on the property as well as on appeal the Committee contended that the instant claim was predicated on the basis of Rule 8 (e-1) 2nd of the Supervisors' Agreement, an agreement between this Carrier and Supervisors of Machinists, Boilermakers, Blacksmiths, Electrical Workers, Sheet Metal Workers and Carmen, below the rank of General Foremen employed in the Maintenance of Equipment Department represented by System Federation #30 R.E.D. (effective for Supervisors of Machinists — January 1, 1942). Rule 8 of the Supervisors' Agreement reads in full as follows:

"(a) The seniority of supervisors regularly assigned as such on January 1, 1942, will be established as of the date they were last employed in a supervisory position coming within the scope of this agreement. (This paragraph to include employees now filling and who

are hereafter promoted to supervisory or official positions with the Company and who were promoted from the ranks of supervisors.)

(b) Thereafter the seniority date of employees promoted to regular positions of supervisors coming within the scope of this agreement will be the date they are assigned to a regular supervisory position. Employees temporarily filling vacancies or performing incidental work as supervisors do not establish any seniority by such employment.

(c) Seniority of supervisors of mechanics shall be confined to the territory of Division Master Mechanic or Superintendent of Shops.

(d) Employees covered by this agreement will be in line for promotion to positions coming within the scope of this agreement. Declining promotion or failing to bid on vacancies or new positions will not affect seniority.

(e) New positions or permanent vacancies will be filled promptly and assignment to positions and promotions under this agreement shall be based on —

a — Fitness for position.
b — Previous record of faithful service.
c — Seniority.

General Superintendent of Power and Equipment to be the judge.

(e-1) In selecting supervisors to fill vacancies or new positions under paragraph (e) of this rule, employees will be considered in the following order:

First — Supervisors included on the seniority roster of the territory where the vacancy exists will be considered.

Second — Furloughed supervisors at all other points will be considered in their order of length of service as supervisors.

Third — In the event there are no qualified supervisors available, as outlined in the two preceding sub-paragraphs, selection will then be made by the management.

(f) When it becomes necessary to reduce the number of supervisors at any point or in any sub-division or department, four (4) days' notice will be given employees whose positions are abolished and they may exercise their seniority rights within four (4) days thereafter. Other employees who are displaced by such action may do likewise.

(g) Employees covered by this agreement who are furloughed shall file their name and address with the proper officer at the time furloughed, and shall keep the proper officer informed of any change in their address. Failure to do so or to return to work within ten (10) days after being notified will cause forfeiture of all rights under this agreement unless proper arrangements are made with his immediate supervisor for further absence.

(h) A seniority roster of all employees showing name, title, location, date of birth, date last entered service and seniority date, will be posted in January of each year at all shops where supervisors are employed. Roster will be open for protest for a period of sixty (60) days from the date of posting. Upon presentation of proof of error by an employee or his representative, such error shall be corrected. Committeemen will be furnished with copy of roster upon request."

There is no provision in Rule 8 of the Supervisors' Agreement that required the Carrier to consider the claimant in filling "vacation vacancies":

The Carrier directs particular attention to that part of Rule 8 relied upon by the Committee i.e., Rule 8 (e-1) Second, that reads in part "In selecting supervisors to fill vacancies or new positions under Paragraph (e) of this rule, employees will be considered in the following order: * * *."

Plainly neither Rule 8 (e-1) nor any other rule appearing in the Supervisors' Agreement required that the Carrier consider the claimant in filling so-called "vacation" vacancies. Rule 8 (e-1) refers to "vacancies or new positions under Paragraph (e) of this rule * * *."

As can be observed what is defined in Rule 8 (e) are "new positions or permanent vacancies".

Plainly the vacancies in question in this case were "vacation" vacancies; they were not "new positions or permanent vacancies". It is apparent, therefore, that there is no provision in Rule 8 or any other rule of the Supervisors' Agreement that would have required the Carrier to consider the claimant in filling any so-called "vacation" vacancy.

The Vacation Agreement clearly spells out that "vacation" vacancies do not constitute "vacancies" within the meaning of any working agreement:

Rule 8 (e) of the Supervisors' Agreement clearly points out that it covers "new positions or permanent vacancies". It has no reference whatever to the filling of "vacation" vacancies. In a word "vacation" vacancies are not "new positions or permanent vacancies." Under the terms or meaning of this or any other working agreement there was no new position involved here; there were no permanent vacancies involved here.

The awards of the National Railroad Adjustment Board uphold the principle that "vacation" vacancies are not "vacancies" within the meaning of any working agreement:

In Award 8707 (Third Division) a claim that senior extra employes had the right to displace junior extra employes who had filled, for more than three working days, the positions of operators on vacations on the ground that such vacancies were required to be filled under the Agreement by the oldest available extra employe was denied because "* * * The Vacation Agreement in its Article 12(b), makes express provision as to this point, providing that absence from duty because of vacation will not constitute vacancies 'under any agreement' but requiring only that 'effort will be made to observe the principle of seniority.' The Vacation Agreement by its express terms has de-

fined a vacation absence as not a 'vacancy' under any agreement, and to that extent has limited the applicability of seniority and other rules."

In Award 8815 (Third Division) where a claimant section-foreman, temporarily assigned to a vacancy due to illness of regular foreman; refused opportunity to work a vacation vacancy because of the possibility that the temporary assignment he was on would last longer and that he should have been permitted to bump a junior foreman assigned to the vacation vacancy when claimant's temporary assignment ended on return of the regular foreman was denied because Article 12(b) of the Vacation Agreement only requires the carrier to make a bona fide effort to observe the principle of seniority. It does not mean that seniority must be given preference under all circumstances. The rule does not give the "right to displace" as an absolute right. Awards 5192 and 5461 were cited in support.

In Award 9323 (Third Division) claim of employes who were absent on vacation for 8 hours at time and one-half because carrier permitted an employe without seniority rights to perform vacation relief work was denied as "The phrase 'will not constitute "vacancies" in their positions under any agreement' clearly removes the vacation absence from the mandatory operation of the seniority rules of the other agreement with respect to vacancies. (Award 8707; see also Awards 5192, 5461, 5976, 6874, 7773.) This is emphasized by the phrase 'effort will be made to observe the principle of seniority' in the second sentence of the provision quoted above. No conflict of agreement arises because Article 12 (b) of the Vacation Agreement expressly effectuates a limited exclusion from, rather than an inconsistency with, the other agreement."

In Award 9556 (Third Division) claim of an Assistant Signalman, who held seniority as Signal Maintainer, that he should have been used to fill positions of signal maintainers on vacation was denied as a vacation is not a vacancy subject to seniority provisions of agreement even though the Signal Maintainer performed some of the work of the employes on vacation.

In Award 10370 (Third Division) claim that the senior employe should have been permitted to fill assignment of employes on vacation was denied as "The Vacation Agreement by its terms, had defined a vacation absence as not a vacancy under any Agreement. See also, Award 5192, 5461, 6874. We are of the opinion that Article 12(b) of the National Vacation Agreement is the controlling Agreement provision. There is no evidence of record alleging a violation of that article."

Under any circumstances under an application of the Rules Agreement-ment the General Superintendent of Motive Power and Equipment (Chief Mechanical Officer) is the sole judge of who fills supervisors' vacancies:

Rule 8(e) of the Supervisors' Agreement reads as follows:

"(e) New positions or permanent vacancies will be filled promptly and assignment to positions and promotions under this agreement shall be based on —

a — Fitness for position.
b — Previous record of faithful service.
c — Seniority.

General Superintendent of Power and Equipment to be the judge.

It will observed that under an application of Rule 8(e), an application that has been accepted over the years, by both parties to the Supervisors' Agreement without protest, the "General Superintendent of Power and Equipment" (Chief Mechanical Officer) is the sole judge of who fills "new positions or permanent vacancies" under the Supervisors' Agreement. In the instant case, if the "vacation vacancies" in question were to be construed as "new positions or permanent vacancies", and they can absolutely not be so considered, then under any circumstances the Chief Mechanical Officer would be the sole judge of who fills such a vacancy. Now in the instant case it is well established (see Superintendent of Shops Hofstetter's letter above) that the claimant in this case had none of the necessary "fitness" to fill the "vacation" vacancies in question. Obviously he could not be considered for the "vacation" vacancies in question arising in Glenwood Back Shop.

The claimant first came to Glenwood Back Shop as a machinist on March 20, 1962. The date of claim commences only two months later. Before coming to Glenwood Back Shop the claimant had been confined solely to roundhouse work, work that consisted principally of running repairs, dispatching and form work. His experience in a Back Shop was minimal and negligible.

Carrier's Summary:

The Carrier submits that the claim in this case is without merit in both parts 1 and 2. The Carrier respectfully requests that this Division so rule and that the claim in its entirety be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Petitioner contends that Carrier breached the Supervisors Agreement when it used Korenoski, a machinist, rather than Claimant to fill a supervisory position that was vacant because its regular incumbent was on vacation.

The work in question belongs to the Supervisors Agreement and should be performed by a supervisor in the absence of a clear stipulation to the contrary. Unlike Korenoski, Claimant is a supervisor under the controlling Agreement's aegis. Claimant was available on the claim dates and was entitled to fill the vacation vacancy, at least in preference to a machinist outside the scope of the Agreement that embraced the position. That principle should be beyond dispute.

The seniority rules of the Superisors Agreement are not designed to deprive supervisors of supervisory work. They merely determine priority as between supervisors to such work.

The claim will be sustained.

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

The carrier and the employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute waived right of appearance at hearing, but were granted privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

The Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Patrick V. Pope
Secretary

Dated at Chicago, Illinois, this 2nd day of September, 1964.