

Award No. 1582
Docket No. 1495
2-AT&SF-BM-'52

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Carroll R. Daugherty when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Boilermakers)**

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: That in conformity with the current agreement the carrier be ordered to additionally compensate Boilermaker S. Vigil at the rate of pay applicable to Class "A" Boilermakers instead of the rate of pay applicable to Class "B" Boilermakers for all service performed retroactive to May 1, 1951, La Junta, Colorado.

EMPLOYES' STATEMENT OF FACTS: Effective August 1, 1945, at La Junta, Colorado, the parties jointly perpetuated a total of ten title holder positions of Class B boilermakers and the names thereof follow:

1. G. A. Barber
2. O. M. Barnes
3. A. E. Berry
4. J. F. Hunter
5. O. N. Inskeep
6. O. E. Isaacson
7. C. E. Masters
8. A. H. Ordener
9. J. Reyher
10. E. Snyder

This force of title holders has been reduced by:

- a) The passing away of G. A. Barber.
- b) The promotion of E. Snyder to the position of Class A Boilermaker the second time.
- c) The retiring on annuity of C. E. Masters and A. E. Berry.
- d) The resignation of A. H. Ordener and O. M. Barnes.

3. Mr. Isaacson was recalled to fill the Class B position as required by paragraph (d) of Rule 24 and not being qualified to handle the work of the position to be filled, was entitled to stand by under the provisions of that rule.
4. Mr. Isaacson's physical incapacitation has not been disputed, thus recognizing his inability to handle the duties of the Class B position; consequently is entitled to consideration under the Long and Faithful Service Rule—Rule 21.
5. The carrier had the right to fill the Class B position perpetuated by Mr. Isaacson.
6. Mr. Vigil, the claimant in this dispute, was the next furloughed employe who held Class B seniority and he was called to fill the position as required by paragraph (d) of Rule 24 and Item (8) of Memorandum of Agreement No. II.

The claim of the employes is not supported by any rule in the agreement. In fact, it is obvious that the employes are attempting to obtain through this Board a change in the rules agreement, which is not a function of the Board. (See excerpts from awards quoted below):

Second Division Award 1122 (Sidney St. F. Thaxter, Referee):

“. . . This Board cannot make or amend a rule. It is bound by the agreement which the parties have made . . .”

Third Division Award 1290 (Herbert B. Rudolph, Referee):

“It has further been the constant holding of this Board that it cannot make a new agreement for the parties so as to include positions not covered in the agreement the parties themselves have made.”

Third Division Award 1687 (Sidney St. F. Thaxter, Referee):

“It is apparent, therefore, that what this board is asked to do is to frame a rule which may apply to situations which may arise in the future not only with respect to this employe but with respect to all others similarly situated. It has been repeatedly held that this board has no authority to make rules. Its function is to interpret them and apply them to the facts of particular cases.”

Third Division Award 2132 (Sidney St. F. Thaxter, Referee):

“. . . It seems to us, however, that it is not advisable, even to reach a result which might appear equitable, to attempt to read into a rule something which is not there. The weight of authority, as well of sound reason, supports this principle.”

Carrier respectfully requests that the claim be denied.

FINDINGS: The Second 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 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 were given due notice of hearing thereon.

Effective August 1, 1945, the parties concluded an agreement under which (through Section (a) of Appendix "A") the carrier's right to man ten Class B boilermakers' positions at La Junta, Colorado was jointly recognized. (Under this Section, in addition to the ten men who were to fill these positions, twelve other employes came to be credited with having established seniority for these positions.) Appendix "A" further provided, in Section (b), that these Class B positions were to disappear as the senior employes holding title thereto during the payroll period of the last half of December, 1943, died, quit, retired, or were discharged. The last sentence of Section (i) of Appendix "A" provided a fifth circumstance under which a Class B position would cease to exist; namely, when a titleholder to such a position was promoted out of it for the second time.

By the time the instant claim arose, six of the ten Class B boilermaker positions had been eliminated—by death, retirement, resignation, and second promotion. One of the remaining four B positions had earlier been filled by O. E. Isaacson, an original titleholder. On August 28, 1945, Isaacson was promoted to a Class A position. But when forces were reduced on September 15, 1947, he exercised his seniority on and occupied a B position until May 19, 1949, when a further force reduction made him exercise his rights on a boilermaker helper position. Thereafter a B position became vacant. But Isaacson being near retirement age and having a bad ankle, preferred to remain in his helper position. Thereupon (December 23, 1950) the carrier promoted helper S. Vigil, a holder of Class B seniority but also qualified for Class A work, to the B vacancy.

The first issue to be considered in this case is whether the Class B position which became vacant and available for Isaacson after he had been demoted to a helper position in the second reduction of force and which he declined for reasons of health continued in existence, as the carrier contends, or was eliminated as asserted by the organization. The newly vacant B position was rightfully his under the terms of Appendix "A" of the Parties' agreement. Did his declination of this position constitute a "resignation" within the meaning of Section (b) of Appendix "A", and should the position thereby have been considered eliminated?

There can be no question that under paragraph (5) of No. II Memorandum of Agreement the carrier could have required Isaacson to take the B vacancy. However, upon proof of his physical disability the carrier elected to permit him to continue working as a helper, under Rule 21 on Faithful Service. We do not think that Isaacson's request for such permission, and the carrier's acceding to the request, constituted "resignation" within the meaning intended for that term by the parties when they wrote Section (b) of Appendix "A". We think the term was intended to mean complete separation from any service with the carrier, for all the other items listed in Section (b) of Appendix "A" have such meaning.

We hold, then, that the vacant B position refused by Isaacson with carrier's permission remained in existence. The definitive questions now become these: Under the agreement, who was properly entitled to fill the vacancy? And what was the proper rate of pay therefor—Class A or Class B?

It appears that claimant Vigil was appropriately moved from his helper position into the vacant B position. After Isaacson, Vigil was the senior man holding Class B rights. Such a move is sanctioned by paragraph eight of the No. II Memorandum of Agreement.

In respect to the rate-of-pay question, we think we must hold that the Class B rate was proper. Given our conclusion that the vacant B position remained in existence and given our decision that claimant Vigil was properly promoted thereto, it follows that he should have been paid at the rate attached to the position.

It is clear that whenever Isaacson, an original titleholder to a B position, retires, dies, resigns or is dismissed from the carrier's service, or is again promoted to a Class A position, the B position involved in the instant dispute will be eliminated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November, 1952.