

Award No. 1387

Docket No. MW-1398

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Royal A. Stone, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

MISSOURI PACIFIC RAILROAD

STATEMENT OF CLAIM: "Claim of Employees' Committee that Ed Meinhardt lost his seniority rights in the Bridge and Building Department account of accepting a position as mate on Steamer Willard V. King, and that his name should be removed from the seniority roster of Bridge and Building employes, St. Louis Terminal Division, and that he should be removed from the service in that department."

EMPLOYEES' STATEMENT OF FACTS: "Ed Meinhardt was assigned to the position of boat carpenter on the boat used to transfer freight cars across the Mississippi River at St. Louis, Missouri, which position he held for approximately twelve years. In March 1936 he was assigned or placed on the position of mate on the Steamer Willard V. King, used for the same purpose as mentioned above, holding the position of mate until it was abolished in March, 1940, at which time he was placed as a bridge and building carpenter with his original seniority date as such."

POSITION OF EMPLOYEES: "As stated in Employees' Statement of Facts, Ed Meinhardt was employed as boat carpenter on Steamer Willard V. King, for approximately twelve years. It was recognized by the employes that as long as Ed Meinhardt was employed as a carpenter on the steamer, he retained his seniority rights as carpenter in the Bridge and Building Department, St. Louis Terminal Division.

"In March, 1936, Ed Meinhardt accepted promotion or assignment to the position of Mate on Steamer Willard V. King. By accepting that assignment he took himself out of the sphere of the rank of carpenter and thus severed all relationship with the Bridge and Building Department. Where an employe accepts assignments outside of his rank or classification in the sub-department, there are only two methods under which he may retain and protect his seniority rights in the rank or classification that he leaves; first, by, under the application of Schedule Rule 5, procuring written leave of absence. Rule 5 reads:

'(a) When the requirements of the service will permit, an employe, upon request, may be granted leave of absence for periods of not to exceed ninety (90) days. Leaves of absence of periods for ten (10) days or less to employes may be granted the employes by their direct supervisor, and need not be in writing. Leaves of absence for periods in excess of ten (10) days, but not to exceed ninety (90) days, may be granted by division engineer or other supervisory officer of equal or higher rank, shall be in writing, appropriate record maintained and copy of such written notices will be furnished the employe granted the leave and the local chairman.

doubt, that the Employees accepted the Management's decision of April 7, 1937 (Carrier's Exhibit 'I') and that can but leave before your Honorable Board a dispute arising over the Employees' request of April 1940 (Carrier's Exhibit 'L') that Meinhardt's name be removed from the Employees' roster. This protest was not made until Mr. Meinhardt's displacement on the transfer boat caused by the boat's discontinuance and his exercising his rights to which he was entitled under the agreement in displacing a junior employe on the district where his seniority rights attached. The Employees advance, in addition to Meinhardt's lack of membership in the Missouri Pacific Hospital Association, that has been referred to above, the fact that his employment on the transfer boat in the capacity of a mate debarred him from retaining his seniority rights as a B. & B. mechanic.

"Prior to Meinhardt's assignment to position of mate the question of his being permitted to retain his seniority rights as a B. & B. mechanic while employed as a mate was the subject of discussion with the authorized representative of the Employees, Mr. Hudson, General Chairman, and the record discloses that a mutual understanding was reached, Mr. Hudson agreeing that Meinhardt could retain his seniority as a B. & B. carpenter while employed as a mate (Carrier's Exhibit 'D'). In conference with the Employees on this case, June 18, 1940, reference was made to this recorded memorandum in the file (Carrier's Exhibit 'D') and it was admitted by Mr. Hudson, as well as Mr. Coad, that neither of them recalled the telephone conversation; neither denied it, however, it must, of necessity, be considered as a recorded document in that it is dated March 30, 1936 and bears the signature of the Carrier's Superintendent, Mr. A. R. Miller, who, the memorandum indicates, personally discussed the matter on the telephone with Mr. Coad. Ordinarily it may be stated that matters of this kind are as a rule handled in a more businesslike way, but there are instances, as we are sure that the Members of your Honorable Board appreciate, where matters of this character are handled in telephone conversations and memorandums placed in the file for future reference. It is apparent that this is exactly what was done in this case, and there can be no question from the record that the arrangement whereby Meinhardt was permitted to retain his seniority rights as a B. & B. carpenter while employed as a mate on the transfer boat, Willard V. King, was an 'agreement' between the authorized representatives of the Carrier and the Employees."

OPINION OF BOARD: At the beginning of this case history, General Chairman Hudson recognized that so long as Mr. Meinhardt worked as a boat carpenter he should retain his seniority. All along the case has been rather unusual. Mr. Hudson's initial and correct attitude was that "every individual should be given all the seniority to which he is entitled." He did not then believe that "we should be technical with reference to such matters or refuse to give consideration because of * * * an oversight or mistake of some individual."

When Meinhardt became mate on the Steamer WILLARD V. KING it was agreed between management and brotherhood that he should retain his seniority as B. & B. carpenter. The only record evidence of that arrangement now is carrier's Exhibit D which is the contemporaneous record of a telephone conversation. Nobody now remembers that talk but nobody denies that it took place as recorded. There is no reason for questioning such a contemporaneous and apparently truthful record. The arrangement then made was later and in February 1937 brought to the attention of Mr. Hudson.

Assuming that Mr. Hudson's appeal from the decision of Mr. Halpin, made by his letter of March 17, 1937, is still pending, it is so only in a technical sense. It has not been diligently pressed as it should have been where an employe has so much at stake as Mr. Meinhardt has in this case.

Assuming a violation of the rules, there has been so much acquiescence by all concerned in Meinhardt's seniority status, as indicated by the annual

rosters, that it would be a denial of the plain equity of the case to destroy at this late day the seniority status which Meinhardt has been over 20 years in establishing.

In such a case as this the contract is important. More so for this case, is the action that has been taken under the contract by the parties thereto. The result of such action has been to assure Mr. Meinhardt a seniority rating which it would be rank injustice to take away from him now.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That whatever violation of the rule there was originally has been waived, or at least there is a complete estoppel operative now as against both brotherhood and management, which prevents them from altering Mr. Meinhardt's seniority status to his prejudice.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of April, 1941.