

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

George E. Bushnell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of J. E. Whitmer: First; that being assigned as crossing watchman at Poplar Bluff, Mo. from December 23rd, 1939 to March 20, 1940, he thereby established seniority rights as crossing watchman.

"Second: Having thus established seniority rights as crossing watchman he was not subject to displacement except under the provisions of Rule 3, Paragraphs (a) and (b) of current agreement, and that therefore the Carrier was in error in permitting another employe to displace him on March 20, 1940.

"Third: That he shall be restored to the position of crossing watchman at Poplar Bluff, and paid for any time lost since March 20, 1940, because of the improper displacement."

EMPLOYEES' STATEMENT OF FACTS: "On December 23, 1939, J. E. Whitmer was assigned to fill a vacancy as crossing watchman at Poplar Bluff, Missouri, which vacancy was made a regular or permanent position on January 1, 1940, caused by the retirement of the regular crossing watchman, which position Whitmer filled satisfactorily until March 20, 1940, on which date he was displaced by a man who had no seniority rights as crossing watchman."

POSITION OF EMPLOYEES: "On December 23, 1939, J. E. Whitmer was assigned to relieve the regular crossing watchman at Poplar Bluff. Effective as of January 1, 1940, the regular crossing watchman retired, which created a permanent vacancy of the position of crossing watchman. J. E. Whitmer was continued in the service on that permanent vacancy from January 1 until March 20, 1940, when he was displaced by a Mr. Randles, a former disabled switchman, who had no seniority rights as a crossing watchman.

"We maintain that by having worked in the regular position as crossing watchman from January 1 to March 20, J. E. Whitmer established seniority rights as crossing watchman, and having established seniority rights as crossing watchman he was not subject to displacement only under the application of Schedule Rule 10 (e-2), which reads:

"It is not the intention of this rule that employes holding positions enumerated above shall be displaced for other than good and sufficient causes, such as apply under this agreement to employes covered by seniority rules, nor is it intended that incapacitated employes holding such positions shall be displaced by able-bodied employes, who may be taken out of service account reduction of force."

"The general rule of promotion and seniority will not apply to positions of * * * highway crossing watchmen * * *"

"Whitmer, as heretofore stated, was not assigned to the vacancy created by Wiggins' Retirement. The vacancy caused by Wiggins' retirement was not bulletined. Whitmer was placed on the temporary vacancy caused by Wiggins entering the hospital on December 23, 1939, and when it was definitely known that Wiggins was retiring from the service, a permanent assignment was subject to the requirements of Rule 10 (e-1), and then it was an obligation upon the Carrier in making a permanent assignment to give consideration to 'incapacitated' employees. There were two of them available, one as stated in the Carrier's statement of facts—a Mr. Enloe incapacitated section laborer; another a Mr. Randles an incapacitated switchman. Enloe, after having been given an opportunity to demonstrate his ability to fulfill the duties of a crossing watchman decided he could not handle the job, and it was thereupon proffered to Randles, who, after trying out on the job, accepted it, was assigned thereto and is still so employed.

"A decision sustaining the Employees' contention would nullify Rule 10 of our wage agreement with the Employees insofar as it provides consideration being given to incapacitated employees in filling vacancies of crossing watchmen."

OPINION OF BOARD: Rule 10 (e-1) of the agreement specifically exempts the application of the general rule of promotion and seniority to the position of crossing watchman and requires that this position, when practicable, shall be filled by an incapacitated employee from any department. The preference among the carrier's employees is to be determined by the three factors of (1) incapacity for other work; (2) seniority in the service; and (3) ability to perform the work.

Claimant is not an incapacitated employee and his ability to do the work is not questioned. He insists that, under Rule 1-(b), he is entitled to seniority rights, by reason of the fact that he continued as a crossing watchman for more than 60 days, namely, from December 23, 1939, to March 20, 1940, at which time he was displaced by an incapacitated employee. Rule 1-(b) is persuasive, but Rule 10 (e-1) is controlling. The manifest purpose of the controlling rule is to provide work in certain positions for incapacitated employees. Although the agreement provides that seniority in the service and ability shall be considered, the main purpose is to care for disabled men.

The replacement of claimant who was not incapacitated by an incapacitated employee is not a violation of the agreement.

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 employee involved in this dispute are respectively carrier and employee 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 the carrier did not violate the rules of the agreement in displacing claimant Whitmer with an incapacitated employee.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of May, 1941.