

Award No. 2792
Docket No. CL-2840

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Alvin Garrison be compensated for the difference between what he did earn and what he could have earned for the period of March 30th to April 4th, 1943, inclusive, had he been assigned the position of Material Handler in the Store Department at Superior, Wisconsin, as requested by him on March 29th, 1943.

JOINT STATEMENT OF FACTS: On January 3, 1942, Mr. H. Hayes, General Storekeeper, issued Bulletin No. 2 covering the position of a Material Handler at Superior Store with a rate of 69¢ per hour.

The employees protested this rate, claiming that the correct rate should be 72¢ per hour. On July 16, 1942, the Assistant to the Vice President replied to the employees in part as follows:

"Form has been submitted by the Stores Department changing rate to 72¢ per hour, effective January 27th, 1942, and as soon as such form is approved, adjustment will be taken care of."

On September 5th, 1942, the General Chairman for the employees wrote the Assistant to the Vice President in part as follows:

"I am advised under date of September 1st, that this adjustment has not been made. Will you kindly advise."

On September 16th, the Assistant to the Vice President advised:

"Yours September 5th requesting adjustment in rate of pay for Material Handler at Superior Store. I am now advised that adjustment will be handled on the first half of September payrolls."

The proper rate was applied to this position as stated on the first half of September payroll, but the position was not bulletined.

On March 25th, 1943, Division Chairman wrote the District Storekeeper at Superior requesting that this position be bulletined. On March 29th, 1943, Alvin Garrison, an employe at Superior Store, requested that he be placed on this position and at the same time requested the position be bulletined as provided for in the Agreement. On March 29th, 1943, General Foreman, Edward Ryan, refused his request.

On March 29, 1943, the Storekeeper at Superior replied to the Division Chairman in part:

"Change in Rates—Rule 15. Except when changes in rates result from negotiations for adjustment of a general character, the changing of a rate of a specified position for a particular reason shall constitute a new position."

As previously stated, the Carrier was and is of the opinion that Rule 15 had no application in this case, since this was not the "changing of a rate for a specified position for a particular reason," but on the contrary, was the correction of an improper rate on a new position. However, it was agreed to rebulletin the position so that factor has now no bearing on the point at issue. Since the position in question was not a "vacancy of thirty (30) days or less duration," it is obvious that Rule 12 can have no application. This leaves Rules 11 and 14 as the governing rules.

Rule 14, as will be noted, simply provides for the bulletining of vacancies of more than thirty days' duration and the filling of same "in accordance with these rules." No question is involved herein as to the proper party not having been assigned following the close of the bulletin, the only question being as to its occupancy during the prescribed bulletin period of five days.

Such being the case, final determination of the dispute must, of necessity, rest squarely upon the provisions of Rule 11 and the Carrier, therefore, directs the attention of the Board to the language of that rule. "Bulletined positions may be filled temporarily pending an assignment. . . ." It will be noted that this language neither makes it obligatory to fill positions during the bulletin period nor does it in any way prescribe who shall fill such positions during such period in the event they are filled, leaving these matters entirely at the discretion of the Carrier. The reason for this is, of course, obvious, since anything else might lead to a chaotic condition on the position during the bulletin period. As an example, if the rule had said the senior employee applying would be placed immediately, it could quite easily have resulted in a different employee occupying the position each of the five days, depending on the order in which bids were received, since there could be no assurance that the oldest employee bidding would be the first to place his bid. Therefore, the negotiators of the rule very sensibly made it possible for the position to be filled by the Carrier, if desired, during the bulletin period without disturbance. In the instant case, the Carrier simply left the man on the job who had formerly bid it in until the close of the bulletin period, at which time Mr. Garrison, the senior bidder, was placed and while, as previously pointed out, it was the Carrier's option under the rule to fill the position as it saw fit during the bulletin period, it might be well in passing to direct attention to the fact that there could be no assurance that Mr. Garrison was going to be the senior bidder until the bulletin was closed.

The other language of Rule 11—"and in the event no applications are received may be permanently filled without regard to these rules," has, of course, no bearing in this case, since applications were received and the position filled in accordance therewith.

It is, therefore, the position of the Carrier that the claim in this case has no basis on any rule, since the provisions of Rule 11, the only rule in any way applicable, were fully complied with, and requests that your Board so hold.

OPINION OF BOARD: This dispute is before the Board upon a joint statement of facts. There is some dispute in the record over the question of whether or not the position should have been bulletined, however, both parties agree that, since the Carrier upon the request of the Employees had bulletined or rebulletined the position, the question of whether or not it was necessary to bulletin under the provisions of Rule 15, 1943, the Carrier had in its possession an application for the position from the Claimant-employee dated Mar. 29, 1943.

Claimant held seniority rights to this position and he was assigned to the position on Apr. 4, 1943. His claim is for the earnings on the position from Mar. 30th to Apr. 4th, 1943, less what he earned on a lower-rated position. Between the dates of Mar. 29, 1943, on which date this Claimant made application, and Apr. 4, 1943, the position was filled by one whose seniority date was subsequent to that of Claimant.

It is the contention of the Employees that under the rules and the awards of this Board it was the duty of the Carrier to appoint the senior qualified man, who was the Claimant, to this position pending the position being filled under the bulletin, while the Carrier contends that it has the right to fill the position temporarily pending the filling of it under the bulletin without regard to the seniority rights of the employees involved.

Rule 7 of the Agreement provides that new positions or vacancies will be bulletined for a period of five days. Rule 11 provides that temporary appointments of bulletined positions may be filled temporarily pending an assignment. Rule 12 provides for short vacancies of thirty days or less duration and states they shall be considered temporary and may be filled without bulletining except that senior employees will be given preference. Rule 13 covers indefinite vacancies. Rule 14 covers long vacancies and Rule 15 covers change in rates of pay.

This Board has been confronted with the same question before. In Award 2490, this Board said:

"There are positions on a railroad, no doubt, that must be filled instantly; positions so important that it would disrupt transportation if the Carrier was required to wait only a few days before filling them. The intent was that such positions could be filled temporarily without taking time to bulletin them. But seniority rights are not in any sense mentioned, modified or abrogated by the rule. The language of Award 132 appears to state the correct interpretation of the rule: 'It will be observed that this section, while expressly limiting the duty of the Carrier to bulletin positions, does not contain any express limitations upon its duty to respect the seniority rights of employees in filling positions covered by this section. If, therefore, the section in question does limit the right of seniority, it does so by implication and not by an express provision. The Division cannot accept the view that the parties to the Agreement under consideration intended that Section 5 of Article IV should by implication limit the seniority rights guaranteed to employees by Section 3 of Article III.'

We adhere to the proposition that a valuable right cannot be abrogated by implication in one section of an agreement when such right was expressly and plainly granted in another section. It will be assumed that the contracting parties intended that some effect be given to both sections and that limitations of one upon the other would not be made except when it appears clearly that they were so intended. We conclude, therefore, that the Carrier must give effect to seniority rights in filling the positions here in question even though they were not required to be bulletined."

In the recent Award No. 2720, with Judge Tipton as referee, this Board said:

"We think when this rule is considered as a whole, it contemplates that new or temporary positions must be filled by senior available competent employees if a bulletin is necessary; and if not necessary to bulletin the position because the vacancy would cease before it could be bulletined, then it would also be necessary to use the available competent senior employee. To hold otherwise would destroy seniority rights. See Awards Nos. 2341, 2426, and 2490."

The only difference between the case at bar and Award 2720 is that here we are confronted with a position that must be bulletined as a permanent one, while in the award cited it was a temporary position.

The Claimant earned his seniority rights under the provisions of Rule 3 (a). Such rights are of too great importance to railroad employes to be set aside by technicalities or by an implication which might appear in one of the rules. These rules must be read together. The rights of this employe should not be taken from him unless it is definitely set out in one of the rules. We conclude therefore that, there being no rule that would take the seniority rights from this employe, the Carrier must give effect to seniority rights in filling the position here in question and the claim must be sustained.

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

That both parties to this dispute waived hearing thereon;

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;

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

That the Carrier violated the Agreement as contended by the Petitioner.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of January, 1945.