

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert G. Simmons, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Thomas Fletcher be allowed the difference in pay between what he received at trackman's rate of pay and that which he should have received at assistant extra gang foreman's rate of pay for the time that he was assigned to and performed work of assistant extra gang foreman from April 16, 1943 to May 29, 1943, inclusive.

EMPLOYEES' STATEMENT OF FACTS: Prior to April 16, 1943 L. C. Penn filled the position of assistant foreman in Extra Gang No. 5-35, Pennsylvania Division. With the close of the work day on April 15th L. C. Penn vacated the position of assistant foreman in Extra Gang No. 5-35, accepting position of foreman in another extra gang to which he had been assigned by bulletin. The Carrier then posted Bulletin No. 821, advertising for position of assistant foreman in Extra Gang No. 5-35. Pending regular assignment under that bulletin, Foreman Franklin Robbins of Extra Gang No. 5-35 assigned Thomas Fletcher, a trackman employed in that extra gang, to fill the position of assistant foreman.

Track Patrolman Neldon Bouren was assigned by Bulletin No. 696 to position of assistant foreman in Extra Gang No. 5-35, advertised by Bulletin No. 821, but was continued in his position as track patrolman until June 1, 1943. During all the period from April 16th until May 29th, 1943, Thomas Fletcher filled the position of assistant foreman in Extra Gang No. 5-35 by assignment and under instruction of his foreman, Franklin Robbins.

The Agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: As stated in Employees' Statement of Facts, when L. C. Penn vacated the position of assistant foreman in Extra Gang No. 5-35 to accept assignment as foreman in another gang, Foreman Franklin Robbins of Extra Gang No. 5-35 assigned Thomas Fletcher, employed as a trackman in that gang, to fill the vacancy thus caused in the position of assistant foreman, pending assignment by bulletin which had been posted. As further stated in Employees' Statement of Facts, Track Patrolman Neldon Bouren bid for and was assigned to the position of extra gang foreman in Extra Gang No. 5-35 but was continued in his position as track patrolman and was not actually assigned as assistant foreman in Extra Gang No. 5-35 until June 1, 1943. Thus, during the period April 16th to May 29th, 1943, Thomas Fletcher actually filled the position of assistant foreman in Extra Gang No. 5-35.

"Rule 28 (a) New positions, permanent and temporary vacancies will be bulletined any time within ten (10) days after they are created or occur for a period of ten (10) days. Bulletin will be posted at headquarters of employees entitled to consideration. Appointments will be made within ten (10) days after close of advertising period. Temporary vacancies of thirty (30) days or less duration need not be bulletined.

"Rule 28 (b) If the vacancy is filled before it is bid in and permanently assigned, the senior qualified employee in the gang of the same or lower rank may be assigned to it until it is permanently assigned. Vacancies caused by such assignment may be filled by senior qualified employees in the same gang taken from the same or lower ranks. A senior qualified employee who has been furloughed from the same gang may be called back to the service to fill vacancy in the lowest rank which is created by these transfers."

The only rule referred to in the handling of this claim on the property was Rule 19 of the July 1, 1939 Agreement which reads as follows:

"Rule 19 Employees assigned to higher rated positions shall receive the higher rate while so engaged; if assigned to a lower rated position their rate will not be changed."

This rule covers rate of pay when employee is assigned to higher rated position. Trackman Fletcher was not assigned to a higher rated position and therefore this rule would not support the claim.

It is the position of the Carrier that claim is not supported by rules of Agreement and Carrier respectfully requests claim be denied.

OPINION OF BOARD: There is no dispute in this claim about these facts. Claimant Fletcher was a trackman in Extra Gang No. 5-35 during the time involved in this claim. On April 16, 1943, a vacancy occurred in the position of assistant foreman. The position was advertised on April 16th and filled by assignment to Mr. Bouren on May 1st. Bouren, however, did not actually undertake the work of the assignment until May 30th.

The Organization asserts that Claimant Fletcher performed the duties of assistant foreman during the period of April 16th to May 29, 1943. The claim is supported by the affidavits of fellow employees that Claimant performed the duties of assistant foreman during the period involved and set out the nature of the work performed in some detail. The Carrier furnishes the affidavit of the foreman that Claimant "was not assigned to or acted in the position of an Assistant Foreman", during the period involved. These affidavits present the conflict in the showing.

The Carrier contends that there is no rule which requires the assignment of an assistant foreman when the need for the service does not exist, and that the work of the gang was such that there was no need to fill the position until rails were received in July. We see no merit in this argument. The Carrier recognized the need of the position by promptly moving to fill it and by filling it on May 1st. The Carrier, however, did not require the actual presence of the newly assigned assistant foreman until May 30th. The position was there at all times to be filled by someone.

The question is: Did Claimant perform the work? The Carrier does not contend that any other employee filled the position, but merely that Claimant did not. As has been pointed out, fellow employees assert that he did. The foreman asserts that he did not, and is supported by his time cards, in which he reported Claimant working as a trackman. Obviously, the Claimant did not make up the time cards, did not approve them, and is not bound by them. The dispute here challenges the correctness of the time cards only as to the designation of the class of work being performed by Claimant.

The affidavits were made on both sides three years after the events in question. The Carrier challenges four of the affidavits as to the knowledge

of the makers concerning the events recited. Sixteen affidavits are unchallenged in that regard. The mere number of affidavits is not a controlling consideration, but that does not mean that number should be disregarded. The affidavits of the employes contain a more detailed statement of the work done. They are supported to some extent by an admission in the record on the part of the Carrier that "it may be that he did perform some of the work claimed", followed by the assertion that in order to permit men to show their aptitudes and to train them for advancement, they commonly are given "a chance to do these types of duties". But there is nothing here to indicate that Claimant was doing this work as training duties. The record supports the Claimant that it was done in the performance of the work of the position, then existing, of an assistant foreman.

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 Employes involved in this dispute are respectively carrier and employes 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 Claimant is entitled to the pay claimed under Rule 19 of the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of February, 1947.