

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the effective agreement when they laid off Painter Page Rodems on March 22, 23, 24, 25, 26, 27, and 29, 1948 and retained a junior painter in service.

(2) That Painter Page Rodems be reimbursed in the amount of eight (8) hours per day at his straight time rate of pay on each of the dates referred to in part (1) of this claim account of being erroneously laid off in force reduction.

EMPLOYEES' STATEMENT OF FACTS: Mr. Page Rodems, painter, was prior to March 20, 1948, assigned to work in the traveling miscellaneous paint gang on the Sacramento Division. Mr. Rodems has a seniority date as painter, which is listed on the current seniority roster as October 17, 1939.

On March 22, 23, 24, 25, 26, 27, and 29, 1948, he was laid off in force reduction and a junior employe was retained in service. On March 21, 1948, Mr. Rodems entered protest with his Supervisor, stating that he was improperly laid off and that the junior employe should have been laid off instead. Subsequent to March 29, 1948, Mr. Rodems was returned to work as a painter.

The agreement in effect between the two parties to this dispute, dated September 1, 1926, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES; Rule 2 of the effective agreement reads as follows:

"Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad, as provided in these rules."

It will be noted that Rule 2, quoted above grants employes who have accumulated seniority, rights to positions over employes who have less seniority with the Railroad. One consideration which accrues to employes who have accumulated seniority is the privilege of retaining their position when forces are reduced in instances where the seniority accruing to them

petitioner's general chairman that predicated merely upon the fact the claimant was senior in the seniority class of painter, to the occupant of the higher rated position in the classification of sign painter, he (the claimant) should have been retained in B&B Miscellaneous Paint Gang and effective March 22, 1948, placed on the said higher rated position in the classification of sign painter, thereby removing the occupant of the latter position from that gang. The carrier submits that such handling on its part would not only have been contrary to the provisions of Rule 4, but likewise would have involved a violation of that portion of the provisions of the Interpretation to Rule 9 of the current agreement, above quoted.

Even though it be conceded that merely by virtue of the fact the claimant was senior in the seniority class of painter to the occupant of the higher rated position in the classification of sign painter, the carrier was thereby obligated when making force reduction in B&B Miscellaneous Paint Gang on March 20, 1948 to retain the senior of the employees who were occupying the positions that were maintained in that gang (which the carrier does not concede but expressly denies), there would still be no basis for sustaining the claim in this docket for the reason that Rule 4 of the current agreement explicitly provides that the retention of the senior employee is contingent upon such employee being "capable of doing the work." Of the two employees who occupied the positions in B&B Miscellaneous Paint Gang on March 20, 1948, the only employee of said gang "capable of doing the work" required of the position classified as sign painter was the individual who occupied that position on March 20, 1948. The claimant was not capable of doing such work. It is therefore manifest that since the claimant was not "capable of doing the work" of a sign painter and did not possess the requisite ability to fill the only remaining position in the gang, there could be no basis under Rule 4, or in fact any other provision of the current agreement for retaining the claimant in that gang and removing the occupant of the position classified as sign painter from such position and the gang.

The carrier submits that in the final analysis its action in abolishing the position classified as painter in B&B Miscellaneous Paint Gang was proper; that no basis exists for the contention that the claimant should have been retained in said gang; that any loss in compensation incurred by the claimant on the dates involved was attributable to his failure to exercise his seniority displacement privilege to obtain a position available to him in the classification of painter; and that, to accept the petitioner's position in this docket would definitely be tantamount to writing into Rule 4 of the current agreement a provision that does not appear therein. In the latter respect it is a well established principle that this Board has the authority to construe and enforce agreements but not to make new rules or amend existing rules.

CONCLUSION

The carrier asserts that it has conclusively established that the claim in this docket is without basis or merit and therefore respectfully submits that it is incumbent upon the Board to deny the claim.

(Exhibits not reproduced).

OPINION OF BOARD: On March 20, 1948, claimant's position was abolished in force reduction. An employee in the same class and seniority district who was junior to him in seniority was retained. Claimant contends that the Carrier violated the Agreement in laying off the senior instead of the junior employee.

Claimant was designated as a painter. The junior employee was designated as a sign painter. The Agreement carries but one classification under which these two employees could be listed, that of painter. We are obliged to hold that claimant was the senior employee in the same class with the junior employee and that the latter and not the former should have been laid off first in force reduction. Award 4784.

It is shown, however, that claimant could have and was entitled to displace a junior employe the next day after he was laid off. This fact was called to his attention but he ignored it until March 30, 1948 when he was returned to work as a painter.

The Carrier urges that the failure of claimant to displace another employe on another paint gang and not the laying off of the senior instead of the junior employe was the cause of claimant's wage loss. The claimant is required to exercise his displacement rights within ten days. He exercised it within that period. We think his claim for work lost between March 20 and March 30, 1948, is valid under the rules. Carrier's disregard for claimant's seniority was the proximate cause of the loss. An affirmative award is in order.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of December, 1950.

DISSENT TO AWARD NO. 5160—DOCKET MW-5017

This claim for payment of eight hours straight time per day for seven specified days in March, 1948, alleged a junior painter had improperly been retained in the service. The conclusions reached were erroneous because the record showed that (1) Carrier in accomplishing the force reduction abolished the position of painter which was occupied by the claimant and (2) acted in accordance with the terms of Rule 4 which authorized the following procedure:

" * * * the senior man in the sub-department and class, on the seniority district capable of doing the work, shall be retained."

To support the claim the Opinion erroneously holds that the "Carrier's disregard for claimant's seniority was the proximate cause of the loss." The record did not show the claimant was capable of doing the work.

The error is further compounded by the citation of Award 4784 wherein claim was sustained because claimant therein was denied the position, not because incompetent, but on the mistaken ground of lack of seniority.

For these reasons we disagree with the award.

/s/ J E. Kemp
/s/ R. H. Allison
/s/ A. H. Jones
/s/ R. M. Butler
/s/ C. P. Dugan