

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

**ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
OF TEXAS**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier violated the Clerks' Agreement:

1. When it failed to use senior Group 2 employe, R. B. Golding, on temporary vacancies in Group 1 in the Store Department at Pine Bluff, Arkansas, and
2. That R. B. Golding be compensated for the difference between the salary of the position assigned to him and the salary of the positions he should have been permitted to work on July 5, 6, 7, 8, 9, 11, 12, 18, 25, August 3, November 15, 23 and 25, 1949.

EMPLOYEES' STATEMENT OF FACTS: R. B. Golding was employed by the Carrier on October 23, 1944 and at the time of this claim held Group 2 and Group 3 seniority as of October 23, 1944, but held no Group 1 seniority. Prior to September 1, 1949, R. B. Golding was regularly assigned to the position of Issue Man, Back Room, General Store, at a daily salary of \$8.34. On September 1, 1949, he was assigned to a combination position of Issue Man and Caboose Supplyman at a daily salary of \$9.90 (\$8.34 increased due to the 40 Hour Week).

On July 5, 6, 7, 8, 9, 11, 18, 25 and August 3, 1949, vacancies occurred on the positions of Stock Clerk due to vacation and other reasons. The position of Stock Clerk pays \$10.84 daily and the duties consist of keeping a record of the material under his jurisdiction. The vacancies of the days shown above were worked by B. E. Meadows who was employed by the Carrier on June 7, 1948 and at the time of this claim held Group 2 and Group 3 seniority as of June 7, 1948, but held no Group 1 seniority. During the period of this claim, B. E. Meadows was regularly assigned to the position of Issue Man, Back Room, General Store, at a daily salary of \$8.34.

On July 12, 1949, a vacancy occurred on the position of Labor Foreman, rate \$10.54 per day, whose duties consisted of supervising Labor Gang loading company material for shipment on line and unloading material from cars

and subsequently secured leave of absence to train as manager of a grocery store. He did not return from leave until August 3, 1948.

Under these circumstances, the Carrier found no reason to decide that the General Storekeeper erred in using Mr. Meadows on the position for which the claim is filed. He, of course, is responsible for proper operation of the Store Department, which includes filling vacancies with employes competent to perform the work. He is in position to judge the qualification of the employes under his supervision. The evidence shows there was substantial basis for his actions in question, and the Carrier clearly would not be justified in interfering with his proper exercise of discretion under such circumstances.

As pointed out above, the claim is not supported by the rule, and is not valid for any reason. The Carrier respectfully requests that it be denied.

All data herein has been presented to representatives of the Employees.

(Exhibits not reproduced.)

OPINION OF BOARD: This case presents the question whether a senior Group 2 employe should have been used in preference to a junior Group 2 employe to fill temporary vacancies in Group 1.

The claim is based on Rule 11-1 ("Temporary Assignments—Short Vacancy") which reads:

"A new position or vacancy of less than thirty (30) calendar days duration shall be considered temporary and shall be filled without bulletining. A new position or vacancy of indefinite duration need not be bulletined until expiration of thirty (30) calendar days. A new position of vacancy known to be of more than thirty (30) calendar days duration shall be promptly bulletined and filled under the provisions of Rule 10. Notation shall be made on such advertisement bulletin showing probable duration. The following provisions shall apply in filling such new position or vacancy:

(a) Furloughed or extra employes shall be used to fill a new position or temporary vacancy for which they are qualified and available, in accordance with their seniority.

(b) An employe holding Group 1 seniority and regularly assigned to a Group 2 or Group 3 position shall be used on a new position or temporary vacancy in Group 1, for which he is qualified, and makes application, provided no senior qualified furloughed or extra employe is available.

(c) When no qualified furloughed or extra employe is available for the vacancy, regularly assigned employes in the office where the vacancy occurs may be advanced to fill a new position or temporary vacancy. In order to give the senior furloughed or extra employe the benefit of the extra work, such employe will be placed on the highest rated position on which a temporary change is made for which he is qualified."

Rule 4-1 and 2 ("Promotions, Assignments and Displacements") reads as follows:

"4-1. Employes covered by these rules shall be in line for promotion. Promotion, assignment and displacement shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

NOTE: The word 'sufficient' is intended to more clearly establish the right of the senior clerk or employe to bid in a new position

or vacancy where two or more employees have adequate fitness and ability.

4-2. Employees promoted from Group 2 or 3 positions to Group 1 positions, or from Group 3 to position in Group 2, shall acquire seniority in the higher group as of date of promotion, subject to provisions of Rule 3, and shall retain all seniority accrued in the groups from which promoted. If displaced, they shall be required to exhaust their seniority rights in the group and seniority districts in which then employed subject to provisions of paragraph 4-1, before being permitted to exercise rights over employees in group or seniority district from which promoted provided it does not necessitate a change of residence."

The Carrier also contends that its determination of fitness and ability should not be disturbed.

FIRST: Rule 11-1 establishes the manner and order in which temporary vacancies are to be filled without bulletining. Neither of the employees involved here was a furloughed or extra employee or an employee holding Group 1 seniority; and so neither could qualify under paragraphs (a) or (b) of the Rule. But no claim is made on behalf of any employee who might have qualified under paragraphs (a) or (b); and the Carrier did not call any such employee to fill the vacancy in question.

The essence of the claim therefore is that, having reached into the employees covered by paragraph (c) to fill the vacancy, the Carrier was not entitled to select a junior employee in preference to a senior qualified employee in that group who has requested that he be allowed to perform the work. Rule 4-1 and use of the word "advanced" in Rule 11-1 (c) support this claim. This temporary assignment was nonetheless a promotion even though Group 2 and 3 employees would acquire no seniority in Group 1 while filling a temporary unbulletined vacancy (See Rule 3 Interpretation B and note; also Award 5285).

If claimant had sufficient fitness and ability, the claim is good (see Awards 2341, 2490, 4841 and 5604) though others may be senior to claimant (Awards 1646, 4022 and 5266).

SECOND: The main issue involves the fitness and ability of the claimant.

The responsibility for the selection of employees and their promotion is the Carrier's; and we should not substitute our judgment based on paper for the Carrier's first hand judgment, except upon a showing of abuse of discretion (Award 5292 and awards cited).

Prior to the time of the claim the junior had worked a total of 14 days in filling short vacancies on Group 1 positions: 4 days as Assistant Stock Clerk, 3 days as Labor Foreman and 7 days as Typist. His regular service was performed as Store Helper, Store Helper and Issueman and Caboose Supplyman. Claimant, on the other hand, had worked a total of 88 days in filling short vacancies in Group 1 positions: 34 days as Assistant Stock Clerk, 1 day as Stock Clerk, 8 days as Third Copy Clerk and 52 days as File Clerk. His regular service was performed as Laborer, Issueman, Caboose Supplyman, Store Helper—Iron Rack, Issueman—Back Room, Relief Man and File Clerk.

The record taken as a whole justifies a conclusion that the determination made by the Carrier was based upon comparisons of experience and not upon individual assessment of fitness and ability. We conclude that the junior was assigned because he had experience and because the Carrier considered that the senior was not sufficiently qualified. The essence of the Carrier's determination is contained in its official statement: "the work performed by Mr. Golding (the senior) did not qualify him for the vacancies . . ."

It is well established that such a determination is destructive of rights to promotion and constitutes abuse of discretion (see Awards 2427, 2534, 4026 and 5265).

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 as above found.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 1st day of February, 1952.