Award No. 11101
Docket No. MW-9652

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Raymond E. McGrath, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the Agreement from March 16 to April 3, 1956 when it used regularly assigned B & B Mechanic Emil P. Boss to temporarily fill a vacancy in another position of the same rank instead of calling and using furloughed B & B mechanic Carl J. Meyer.

(2) B & B Mechanic Carl J. Meyer now be allowed twelve (12) days' pay at the B & B Mechanic's rate account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On February 15, 1956, claimant Carl J. Meyer, a B & B Mechanic, was cut off account of force reduction. There were no junior employes of his class or rank working in his seniority district and, in consequence thereof, he assumed the status of the senior furloughed B & B Mechanic on the Carrier's Eastern Division.

From March 16, 1956 to April 3, 1956, a temporary vacancy in the rank or class of B & B Mechanic existed on Gang #5, Eastern Division, and the Carrier used regularly assigned B & B Mechanic Emil P. Boss of Gang #3 to fill this position, pending bulletining and assignment.

Claimant Meyer was available, qualified and desirous of filling this vacancy, had the Carrier so directed.

Claim as set forth herein was filed and the Carrier has denied the claim.

The Agreement in effect between the two parties to this dispute dated August 1, 1950, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Scope Rule, insofar as pertinent hereto, provides:

as senior laid-off employe and assignment to the temporary vacancy in which event the claimant would not have had the work anyhow.

There is a timing element in this dispute which should be dealt with in order to make clear the Carrier's position. The Employes have progressed their claim on the basis of Rules 3(f) and 11(c) and have not stated their position with respect to the displacement rights of Mr. Boss or another senior employe. It is perhaps their thought that Mr. Boss was moved to the temporary vacancy and his position of Mechanic thus made vacant was just not filled. As we have pointed out above, there was no increase in force here involved, but on the other hand there was an actual force reduction. A position of Mechanic was discontinued and this would have been done even if Mr. Hartage had not retired. The concurrent timing of these two events might cause some confusion as to the real issue in that Mr. Boss was used to fill the Hartage vacancy and other employes remained where they were. So that there may be no misunderstanding of the facts, it should be stated that Mr. Boss was not the junior Mechanic and under Rule 3(a) he would have been retained as a Mechanic if the Hartage vacancy had not occurred. However in that event another Mechanic senior to claimant would have been laid off and had prior rights to the temporary vacancy over claimant.

Stated briefly, it is the Carrier's position that no violation of the Agreement occurred when Mr. Boss was moved to the temporary vacancy because he was senior to claimant, regardless of the force reduction, and under the application of the rules to the force reduction that actually occurred the claimant could not have acquired the work for which claim is made.

While we think it is clear there was no violation of any rule in moving Mr. Boss to this vacancy and practice is not necessarily controlling our investigation has developed, as stated in letter of August 15, 1956, quoted in Section 13 of our Statement of Facts, that it has been the practice to move assigned employes in this manner to protect temporary vacancies at higher rates of pay.

We think it is obvious that if the claimant had been used in preference to Mr. Boss on this temporary vacancy we would have had a junior employe working at a higher rate of pay than a senior employe who desired the higher rated work. We do not believe that the rules contemplate a reversal of this kind in the principle of seniority. There may be instances when this kind of situation obtains account no senior employe desiring to move, but certainly there is no rule that requires restriction of seniority in this manner when the employe holding the superior date desires to avail himself of his advantage thereunder.

OPINION OF BOARD: The sections of the Agreement germaine to the issues in this case have been set out in full by both parties so that they will not be re-quoted in full here but referred to by rule number and sub-section or re-stated only in part.

The Claimant contends that Carl J. Meyer a B & B Mechanic, covered by the Agreement was cut off account of force reduction on February 15th, 1956, that there were no junior employes working on the Eastern Division whom, he could displace and that therefore he acquired the status as the senior furloughed B & B Mechanic on the Eastern Division; that effective at the close of day's work on March 15, 1956, B & B Mechanic John B. Hartage working in Gang #5, retired from the Carrier's service, thereby creating a temporary vacancy in such class pend-

ing bulletining and assignment. The Claimant states that the Carrier used a regularly assigned B & B Mechanic Emil P. Boss who was working at the time in B & B Gang No. 3 to fill this temporary vacancy in B & B Gang No. 5. The claim is that under Rule 3(f) the vacancy should have been filled with Claimant Meyers and he is asking that he be allowed twelve (12) days from March 16, 1956 to April 3, 1956 during which time the temporary vacancy existed.

The Carrier states that on the same date, March 15, 1956, that Traveling Carpenter John B. Hartage went on pension that simultaneously the position occupied by Emil P. Boss as B & B mechanic was discontinued and not filled due to reduction of forces; and that Boss was transferred to the temporary vacancy on the Traveling Carpenter position pending determination of the successful bidder.

The job in question was bulletined for bids and Boss was the successful bidder.

The Carrier states that Rule 3(f) is conditioned upon the clause "When forces are increased" with which the rule begins. That there was no increase in force involved.

The Carrier states that Rule 11(c) is a permissive rule under which the Carrier may use either one of two procedures in filling a vacancy pending bulletin and assignment: (1) by use of an employe entitled to promotion and (2) by use of an available employe unable to hold a regular assignment. Carrier further states that the Rule contains no mandatory requirement to use either of these two options and that some other means of filling the vacancy might be used if it does not violate any rule of the Agreement.

Carrier states that it did in fact utilize option (1) of the rule; it used the senior available competent employe entitled to promotion.

Carrier further states that Mr. Boss had prior rights to this work over Claimant under the provisions of Sections (a) and (b) of Rule 3. That under these provisions Mr. Boss or some other employe senior to Claimant, had displacement rights when the position of Mechanic was abolished and could have displaced the Claimant if the latter had been called to fill the vacancy, on the Traveling Carpenter position.

Rule 3(f) states:

> "When forces are increased, **or** in filling temporary vacancies, senior laid off employes in their respective rank, seniority group and seniority district, will be given preference in employment."

Since the above Rule is clearly in the alternative we disagree with the Carrier's position that the Rule 3(f) is condition upon and applies only when the forces are increased. It seems to apply in two instances—(1) when the forces are increased and (2) in filling temporary vacancies. From the record here we have a situation where a temporary vacancy was being filled and the Rule 3(f) should have been followed unless some other Rule of the Agreement applies to the facts before us.

We now turn to the question as to whether Rule 11(c) applies here. We think it does. It reads as follows:

> "(c) Promotions to new positions or to fill vacancies will be made after bulletin notice has been posted for a period of ten

(10) days at the headquarters of the gangs in the sub-department of employes entitled to consideration in filling the positions, during which time employes may file their applications with the official whose name appears on the bulletin. The appointment will be made before the expiration of twenty (20) days from the date the bulletin is posted and the name of the employe selected will then be announced by bulletin in the same manner the position was advertised. New positions or vacancies may be filled temporarily, pending bulletin and assignment, by senior available competent employe entitled to promotion, or the senior available competent employe holding seniority in that classification and not able to hold position in that classification account reduction in forces. Local chairman to be furnished copy of bulletin and assignment."

From the record in this case it appears that the Carrier following this Rule used the "senior available competent employe entitled to promotion." It is not necessary to determine whether the raise in pay with no change in job classification is a "promotion" within the terms of the Agreement, since the phrase used is "**entitled to** promotion."

During the handling of this case on the property Carrier wrote a letter to the Organization stating:

> "At that time we agreed to make a further investigation as to the practice that has prevailed in handling situations of this kind. This has been done and we are advised that it has always been the practice that when a vacancy occurred on a position to contact the senior man working on a position carrying a lesser rate of pay and ascertain if he wanted the position and if he did not, then contact the next senior man and so on until position was filled. This was done pending time position was advertised and senior bidder assigned."

Since the man used on this temporary vacancy qualified under Rule 11(c) it was proper for the Carrier to assign him to the position.

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 the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of February 1963.