

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20062
Docket Number MW-20041

Frederick R. Blackwell, Referee

(Brotherhood of Maintenance of Way Employes

PARTIES TO DISPUTE: (

(Missouri-Kansas-Texas Railroad Company

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

(1) The Carrier violated Rule 2 of Article 4 and Rule 1 of Article 3 of the current Agreement when it failed and refused to assign the extra gang foreman's position on Extra Gang 268 to the senior applicant, Mr. J. A. **Merrick**. (System File ZOO-164/2579-4)

(2) That Mr. A. Merrick be allowed the difference in what he received as Assistant Foreman and what he should have received as Extra Gang Foreman.

OPINION OF BOARD: When the Carrier advertised a vacancy in the position of Extra Gang Foreman on Gang 268 on September 28, 1971, **temporarily** located in the vicinity of Parsons, Kansas, Old Northern District, Seniority District No. 2, no bids were received from any employee holding seniority in the classification of foreman. After receipt of bids on the position from Claimant J. A. Merrick and Employee L. A. Woods, the Carrier assigned the position to Employee Woods on October 14, 1971. Prior to the vacancy Claimant Merrick established seniority as a track laborer on January 5, 1970 and as assistant section foreman on April 6, 1971; on this latter date he was assigned to the position of assistant section foreman on Section 213. Employee Woods established seniority as a track laborer on September 22, 1970, and he held no seniority as an assistant foreman when the Gang 268 **foremanship** was advertised. On April 28, 1971, the Carrier selected both the **Claimant** and Employee Woods to train as relief assistant foremen and/or track foremen under a training program provided by Rule 1, Art. 4, of the Agreement; however, neither employee had completed the program when the position in dispute here was advertised.

The **Employees** allege that Carrier should have assigned the Gang 268 foremanship to Claimant Merrick, because he was the senior qualified applicant, and that Carrier's failure to do so violated Rule 1, Art. 3, and Rule 2, Art. 4, of the Agreement. The Carrier's position is that the Claimant's seniority, being in a lower classification than foreman, did not entitle him to consideration for the foremanship; that no agreement-violation occurred because Rule 1, Art. 4, is a special rule which takes precedence over other rules and specifically governs the selection and training of track laborers for possible promotion to **foremanship**; and that the contentions urged by the Employees have been resolved adversely to the Employees in Third Division Award No. 11587 and Award No. 19, Public Law Board No. 76, **involving** the same parties and rules that are involved in the instant dispute.

The pertinent rules are as follows:

"ARTICLE 3. SENIORITY

Rule 1. Seniority begins at time **employee's** pay starts in the respective branch or class of service in which employed, transferred or promoted and when regularly assigned. **Employees** are entitled to consideration for position in accordance with their seniority ranking as provided in these rules."

"ARTICLE 4. **PROMOTIONS** AND BULLETINS

Rule 1. The Division Engineer will select from Track Laborers' roster not to exceed four men on each seniority district to be used as relief assistant track foremen and/or track foremen on their respective seniority districts. The Track Laborers so selected will be advised in writing, a copy of such advice will be sent to General Chairman and to Local Chairman. The men so selected shall be those the Division Engineer regards as most likely material for promotion to assistant track foreman **and/or** track foreman. These men shall be used for relief assistant track foreman and/or track foreman's work on their seniority district, and if their work as relief foreman or assistant foreman during the period of twelve consecutive months following their selection for relief work is satisfactory and they pass satisfactory examinations, they shall be eligible in the order of their written designation as relief foreman for promotion to assistant track foremanship and/or track foremanship on their seniority district. Where conditions make necessary men may be promoted in less than twelve months.

Rule 2. New positions and vacancies shall be bulletined within ten (10) days previous to or following the date such vacancies occur and the right to bid on such vacancies or new positions will be accorded foremen, assistant and/or relief foremen in the order named."

The issue here is whether the Claimant had seniority of a character which entitled him to consideration for assignment to the **position** of Extra Gang Foreman on Gang 268. We believe the answer must be in the affirmative because of the provision of Rule 1, Art. 3, and Rule 2, **Art.** 4. The provisions of Rule 1, Art. 3, create seniority rights for all employees covered by the Agreement, and Rule 2, Art. 4, prescribes how such rights shall be exercised when certain classifications of employees are involved. The Claimant is within those classifications. More specifically, because of the Claimant's seniority as an **assistant**

section foreman, he falls squarely within the explicit text of Rule 2, Art. 4, which states that the right to bid on "vacancies or new positions **will** be accorded foremen, assistant and/or relief foremen in the order named." This text is quite clear and we think the underlined phrase "in the order named" prevents any confusion in the application of the text to the instant facts. The classification of foremen is the first in the order of classifications named in the rule; however, no employee having foreman seniority bid on the Gang 268 foremanship and, thus, the right to bid on the position shifted to the classification of assistant foremen as it is the next in the order of classifications named in the rule. The Claimant did have seniority in this classification and he did place a bid on the **Gang** 268 foremanship; the conclusion is therefore inescapable that, by the explicit requirements of Rule 2, Art. 4, he was entitled to the Gang 268 foremanship by reason of his seniority as an assistant section foreman. In reaching this conclusion we have carefully considered the Carrier's urgings that Rule 1, Art. 4, takes precedence over all other rules in this case and that prior Awards require a ruling against the Employees. As previously noted, however, neither of the two involved employees (Claimant **Merrick** and Employee Woods) had completed the Rule 1, Art. 4, training program when the Gang 268 **foremanship** became vacant, and, further, the Carrier makes no claim that it based its action in any way upon the designation of the two such employees as trainees under the rule. Thus, Rule 1, Art. 4, has no relevance to this dispute. See Award No. 19, Public Law Board No. 76, for a **comment** on this facet of the instant dispute. Nor do we believe that the Employees' herein contentions have been resolved by the prior Awards cited by Carrier. In Award No. 11587, the Board did not have before it a text such as the one set out in Rule 2, Art. 4. And although such a text was under consideration in Award No. **19**, Public Law Board No. 76, the two employees involved in that Award were both track laborers - a classification not even mentioned in the text of Rule 2, Art. 4. In contrast the Claimant here held seniority in the classification of assistant section foreman while the other employee, Woods, held seniority only in the classification of track laborer. This fact, which clearly differentiates Claimant from Employee Woods under the text of Rule 2, Art. 4, gave **Claimant** seniority rights over Employee Woods in respect to bidding in the vacancy in the position of Extra Gang Foreman on Gang 268.

For the foregoing reasons we shall sustain the claim.

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

That the parties waived oral hearing;

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;

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

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1973.