

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20283
Docket Number MW-20297

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employees**
(Missouri-Kansas-Texas Railroad Company

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

(1) The Carrier violated Rule 6 (c) of Article 5 of the current Agreement by not allowing Mr. E. M. Davis the opportunity to fill the temporary vacancy on Section 327, pending bulletin and assignment, from April 3, 1972 to May 11, 1972 (System File **300-83/2579-5**).

(2) The Carrier violated Rule 1 of Article 5 of the current Agreement by not assigning **Mr. E. M. Davis** to Circular No. 670.

(3) That Mr. E. M. Davis be allowed the difference in what he received as track laborer and what he should have received as Track Foreman, beginning April 3, 1972 and continuing until claim is **settled**, because of the violations referred to in Parts 1 and 2 of this claim.

OPINION OF BOARD: Claimant, with seniority as a track laborer dating from May 23, 1968, held a regular position as track laborer on Section Gang 327 at **Durant**, Oklahoma. The regularly assigned foreman of Section Gang 327 vacated that position effective April 3, 1972. For the period between April 3, 1972 and May 22, 1972, the temporary foreman's vacancy was filled by three different employees and was blanked for one week. On April 13, 1972, Carrier advertised the vacancy of Section Foreman for Section Gang 327 by circular addressed to "All Foreman, Seniority District No. **3**". No employees with seniority in the classification of Foreman bid on the advertised position. Two employees requested the position: Claimant and **Machine Operator T. E. Marcangeli, Jr.**, neither of whom had seniority in the Foreman's classification. By Circular dated May 11, 1972 Carrier assigned Marcangeli to the vacant position. It should be noted that **Marcangeli** had seniority in the District dating from July 7, 1970.

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 positions 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.

Rule 3. Except as provided in Rule 4 of this Article, assignments to new positions or vacancies shall be made after bulletin notice has been posted for a period of ten (10) days, during which time **employees** may file their application with the official whose **name** appears on the bulletin. The appointment shall be made before the expiration of twenty (20) days from date of bulletin and the name of the **employee** selected will then be posted. One copy of bulletins and notices of assignments shall be sent to General Chairman and to Local **Chairman**. New positions or vacancies may be filled temporarily pending permanent appointment.

Actual placement of men assigned to bulletined positions should be made without unnecessary delay, but may be done not later than the **beginning** date of the next semi-monthly payroll period, provided such beginning date is not less than five (5) days from the date of the assignment. If such beginning date is less than five (5) days from date of assignment, actual placement shall be made within five (5) days.

Rule 4. Vacancies, or new positions, that are definitely known to be of twenty (20) days or less duration, will not be bulletined. The senior unassigned foreman or senior relief foreman will be notified at last available address of such vacancy, and shall **immediately** inform the Division Engineer of acceptance or rejection. Until such senior unassigned foreman or unassigned **relief** foreman gets on the job, or if he rejects it **or** fails to notify the Division Engineer, vacancy may be filled in the most practicable manner.

ARTICLE 5. BULLETINS AND ASSIGNMENTS

Rule 1. **All** positions except those of Track Laborers will be bulletined.

Promotions shall be based on ability and seniority; ability being sufficient seniority shall govern.

Rule 2. New positions or vacancies which are **known** to be **of** twenty (20) **consecutive** working days duration shall be bulletined as early as practicable, but within five (5) working days following the date such new positions are created or vacancies occur. Copy of bulletins shall be furnished the General Chairman and Local Chairman.

Rule 3. Bids in writing for new positions or vacancies referred to in Rule 2 of this Article must be received by the officer issuing the bulletin within seven (7) working days from date of bulletin. A carbon copy will be furnished the General Chairman and **Local** Chairman. Assignment shall be **made** within ten (10) working days from closing date of bulletin.

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Rule 6. In filling positions temporarily, as referred to in Rule 4, the following shall be observed:

(a) By individuals then employed in a **lower** classification in the gang or unit in which the vacancy occurs or the new

position is created and who hold seniority rights on the district concerned, in the classification in which the vacancy occurs **or** the new position is created.

(b) By furloughed **employees** who hold seniority rights on the seniority district concerned and in the classification in which the vacancy occurs, or in which the new position is created.

(c) By individuals then employed in a lower classification in the gang or unit in which the vacancy occurs or new position is created and who do not hold seniority rights in the classification to be filled and who are eligible and qualified for promotion.

(d) If the vacancy or new position cannot be filled by means of any of the three foregoing methods, position may be filled by new **employee**.

Petitioner first argues that Claimant should have been assigned to the temporary vacancy of Foreman in accordance with Rule 6 (c) of Article 5. Further Petitioner avers that the provisions of Rule 1 of Article 3 and Article 5 Rules 1, 2 and 3 are controlling with respect to the permanent assignment as foreman; for this reason Claimant should have been assigned to the position as foreman of the Gang in preference to **Marcangeli** who had Less seniority, since both **were** qualified. We are persuaded by Carrier's argument that Article 4 rather than Article 5 is applicable to promotions to the foreman's position.

During the handling on the property, the Carrier had addressed a Letter to the Organization which contained, inter alla, the following:

"Our records indicate that **Claimant E. M. Davis** has been employed and quit as a Track Laborer on this Railroad at least seven times since 1956. During this period of time he has never been promoted to any higher classification. His record indicates excessive absenteeism and often without permission. Such an **employee** certainly has never been and is not a candidate for promotion to a higher classification, and the Carrier is, under no circumstances, required to select him for training as Foreman under Article 4, Rule 1, or to promote him without such training."

Carrier argues persuasively that there is no Rule support **for** Petitioner's position with respect to the temporary assignment to the foreman's vacant position, Rule 6 **(c)** is relevant only to vacancies **or** new positions that are known to be of twenty days or less duration (Rule 4) and it is clear that we are dealing here with a permanent vacancy of Gang Foreman.

The primary thrust of Petitioner's position is that Claimant had rights to the foreman's position, and a promotion thereto, by virtue of his seniority in the lower classification. We have dealt with this identical issue involving the same parties on several prior occasions. In Award 11587 and Award No. 19 of Public Law Board No. 76 it was held that seniority in a lower classification did not entitle an **employee**, per se, to a promotion to a higher classified position. Petitioner argues that those Awards were based on an earlier slightly different Agreement. Without dealing with this distinction, the **same** principle has been expressed by this Board in several Awards with these parties under the same Agreement applicable to this dispute. In Awards 19707, 20085, and 20206 it is clearly stated that seniority in a lower classification does not automatically ensure promotion to a vacancy in a higher class. These precedents must be considered in addition to the obvious logic of Carrier's contention that it should not be forced to promote a **man** with Claimant's record to a supervisory position. We concur in the well stated thesis contained in Award 10911:

"When the Division has previously considered and disposed of a dispute involving the same parties, the same rule and **similar** facts presenting the **same** issue as is now before the Division, the prior decisions should control. Any other standard would lead to chaos."

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;

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

That the Agreement was not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.