

Award No. 1862
Docket No. MW-1916

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY**

(Wilson McCarthy and Henry Swan, Trustees)

STATEMENT OF CLAIM: Claim of Extra Section Foreman Mike Ruybalid, Alamosa Division, for difference between his earnings as a section laborer and that of Section Foreman, April 7 to May 7, 1941, on account of a junior foreman being used on a temporary vacancy during this period.

JOINT STATEMENT OF FACTS: Section Foreman at Parlin, Colorado, laid off April 7, 1941, for a fifteen day period account sickness in his family, which lay off was subsequently extended for another period of fifteen days. During the absence of the regular foreman, the vacancy was filled by Extra Foreman Gilbert Mora. Extra Foreman Ruybalid contends he should have been used and presented claim as above stated, which claim has been denied by the Management.

POSITION OF EMPLOYES: It is the position of the Employes that the Carrier violated Rule 9 (f) of the agreement effective February 1, 1941, which rule reads as follows:

"Rule 9 (f): New positions and vacancies shall be bulletined within thirty (30) days previous to or immediately following date such vacancy occurs, except that temporary vacancies of thirty (30) days or less need not be bulletined but will be filled by the senior available qualified employee. In the event it develops that the vacancy will be for a period in excess of thirty (30) days, it will be bulletined and the senior qualified applicant assigned. An employee assigned to a position which is not bulletined in accordance with this rule may be displaced by a senior qualified employee after ten days." (Emphasis supplied.)

Rule 6 (c) reads as follows:

"Employes on leave of absence who engage in other employment will lose their seniority unless they have secured satisfactory permission through the proper officials of the Railroad Company and the employes' representatives."

As stated in the Statement of Facts, the section foreman at Parlin, Colorado, laid off from April 7, 1941 for a period of fifteen days, account of sickness in his family. Before the expiration of fifteen days an extension of fifteen days was granted. Thus the temporary vacancy for section foreman existed for a period of thirty days, from April 7, 1941 to May 7, 1941.

rado, the distance is 145 miles, it being necessary to travel 83 miles from Alamosa to Salida, Colorado, and 62 miles from Salida to Parlin. There is no passenger train service in this territory, and between Alamosa and Salida freight train service is infrequent and irregular.

OPINION OF BOARD: The Joint Statement of Facts in this dispute is as follows:

"Section Foreman at Parlin, Colorado, laid off April 7, 1941, for a fifteen day period account sickness in his family, which lay off was subsequently extended for another period of fifteen days. During the absence of the regular foreman, the vacancy was filled by Extra Foreman Gilbert Mora. Extra Foreman Ruybalid contends he should have been used and presented claim as above stated, which claim has been denied by the Management."

The applicable provision in the agreement is (Rule 9 (f)):

"New positions and vacancies shall be bulletined within thirty (30) days previous to or immediately following date such vacancy occurs, except that temporary vacancies of thirty (30) days or less need not be bulletined but will be filled by the senior available qualified employee. In the event it develops that the vacancy will be for a period in excess of thirty (30) days, it will be bulletined and the senior qualified applicant assigned. An employe assigned to a position which is not bulletined in accordance with this rule may be displaced by a senior qualified employe after ten days."

As applied to the situation at hand there was no occasion for the bulletining a temporary vacancy; the temporary vacancy could be filled by the senior qualified employe; an employe—if not the senior qualified employe, having been assigned to such temporary vacancy because the senior qualified employe was not available may only be displaced by a senior qualified employe after ten days of occupancy of the vacancy.

It is admitted that extra foreman Mora who was appointed to the vacancy was junior in rank to Ruybalid, although both were qualified, and that Ruybalid was not the senior qualified employe. Employes contend that since Ruybalid was senior to Mora and was qualified, that the Carrier violated the rule as to Ruybalid. Carrier answers this by saying that Ruybalid was not available because the division "is all narrow gauge, with limited train service making it very difficult to fill vacancies of short duration in the ranks of Maintenance of Way forces. For example, from Alamosa, Colorado, the distance is 145 miles, it being necessary to travel 83 miles from Alamosa to Salida, Colorado, and 62 miles from Salida to Parlin. There is no passenger train service in this territory, and between Alamosa and Salida freight train service is infrequent and irregular."

These physical facts might have been some reason why Ruybalid would have refused the assignment had he been notified of the vacancy and had an opportunity to decide whether he wanted to make the effort to get to Parlin, but may not be used as an excuse by the carrier in saying that Ruybalid was not available. There is nothing in this record to indicate that the carrier made any attempt to notify or reach Ruybalid, and the regional test of availability, admittedly is the entire division which comprises the seniority district. Ruybalid was in the seniority district.

The fact that Ruybalid was not the senior qualified employe is not important here. He was senior to Mora. No other senior qualified employe is here challenging his right. Nor can the fact that Mora was not displaced after 10 days be urged against Ruybalid because he did not know there was anyone to displace.

The most that can be said for carrier's position is that it would have required a little more effort and inconvenience to notify Ruybalid, but that such

was its clear legal duty cannot be challenged. The right of seniority is one of the most valuable that an employe has, and the Carrier must respect it. See Awards 105, 132, 495, 769, 1058.

In the opinion of the Board the carrier violated the rule and the claim must be sustained.

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 employe involved in this dispute are respectively carrier and employe 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 Rule 9 (f) was violated and Claimant is entitled to have his claim sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1942.