

Award No. 3233

Docket No. MW-3234

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY**

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

(1) That the Carrier violated Rule 21(g) of the Agreement in effect by denying request of Crossing Watchman John Kilroy, Chicago Division, for assignment to vacancy of crossing watchman at Hollywood, Illinois, on March 5th, 1945;

(2) That John Kilroy shall be paid the difference between what he earned as crossing watchman at LaGrange Road, Illinois, and that which he would have earned as crossing watchman at Hollywood, Illinois, from March 5th to April 25th, 1945, inclusive.

EMPLOYEES' STATEMENT OF FACTS: On March 5, 1945 the Carrier established a new position of crossing watchman of ten hours per day assignment, at Hollywood, Illinois.

John Kilroy, with seniority rights as crossing watchman as of December 13, 1941 who was working on an eight hour per day assignment as crossing watchman on the LaGrange Road crossing, made formal application to the Roadmaster for assignment to the newly established crossing watchman's position at Hollywood. However, instead of assigning John Kilroy to the crossing watchman's position at Hollywood, an employe from another department who had no seniority rights as a crossing watchman was assigned.

Agreement effective June 1, 1938 between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Vacancies in the position of crossing watchmen are not subject to bulletin under the application of Schedule Rule 26. However, Rule 21(g) which reads:

"Consideration in filling preferable positions (in regard to location or otherwise) not bulletined, will be given to senior employes."

provides that consideration in filling preferable positions in regard to location and otherwise that are not bulletined will be given to senior employes.

crossing flagman on December 13, 1941. At the time of the claim in this case, he was assigned regularly as crossing flagman at LaGrange Road, LaGrange, Illinois, where U. S. highways cross the Carrier's tracks on which the highway traffic is exceedingly heavy in comparison with the traffic over the crossing at Hollywood.

In view of the facts and circumstances the action of the Carrier in placing Mr. Fender in the vacancy of crossing flagman at Hollywood and in declining request of Crossing Flagman Kilroy for assignment thereto, was entirely proper and in conformity with Rule 24(d). Since Crossing Flagman Kilroy was assigned as crossing flagman at LaGrange Road and, therefore, was not a disabled Maintenance of Way employe to be given preference to a vacancy as crossing flagman, and since the general rule of seniority is not applicable in the filling of such vacancies, the purpose of the parties to Rule 24(d) would be defeated if the claim in this case were sustained.

OPINION OF BOARD: March 5, 1945, the carrier established a new position, not subject to bulletin, of crossing watchman at Hollywood, Illinois. The claimant with seniority rights as a crossing watchman as of December 3, 1941, made application for it. The position was not assigned to him but to an incapacitated employe from another department who had no seniority rights as a crossing watchman. The claimant contends that there was a violation of Rule 21(g); the carrier justifies its action under the provisions of Rule 24(d). These rules are a part of Article III of the agreement entitled "Promotion, Vacancies, New Positions and Bulletins." They read as follows:

"Rule 21(g). Consideration in filling preferable positions (in regard to location or otherwise), not bulletined, will be given to senior employees."

"Rule 24(d). The General rule of seniority will not apply in filling vacancies on regular positions of track, tunnel and bridge watchmen, highway crossing gatemen and flagmen. Such vacancies will be filled by incapacitated employes from any department. Seniority in the service of the railroad, ability to perform the work, and degree to which incapacitated will govern; preference being given to distabled employes in the Maintenance of Way Department."

The claimant contends that the provisions of Rule 24(d) apply only when no employe holding seniority as a crossing watchman desires the vacant position. In other words, Rule 24(d) does not limit the seniority rights given by Rule 21(g).

The contention of the Employes cannot be sustained. The purpose of Rule 24(d) is to provide work for incapacitated employes of the carrier who are unable to perform the duties of their regular positions. To that end the general rules of seniority are made inapplicable to the positions enumerated in the rule, which may be filled by incapacitated employes from any department. The language of the rule is clear and its intent is obvious. In the filling of such vacancies it constitutes an exception to the general rules governing seniority. To construe it as contended for by the employes would be contrary to its spirit.

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 there is no basis for an affirmative award.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 29th day of May, 1946.