

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James M. Douglas, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

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

(1) That the Carrier erred when it advertised a temporary vacancy as section foreman on Section 459, Elm Mott, Texas, as a permanent vacancy;

(2) That bulletin dated April 11, 1947, advertising permanent vacancy of section foreman on Section 459, Elm Mott, Texas, be recalled, and that bulletin be issued advertising a temporary vacancy as section foreman on Section 459, Elm Mott, Texas.

EMPLOYEES' STATEMENT OF CLAIM: Effective January 1, 1947, John William Neyhard, section foreman, Section 459, Elm Mott, Texas, retired in accordance with the provisions of Section 2 (a) 4 of the Railroad Retirement Act, Amended. Under date of April 11, 1947, the Carrier advertised a vacancy as foreman on Section 459, Elm Mott, Texas, as a permanent vacancy. This position was awarded to B. H. Petty under date of April 21, 1947.

Agreement between the parties is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Article 4, Rule 4, of the effective agreement provides as follows:

"ARTICLE 4. PROMOTIONS AND BULLETINS, TRACK DEPARTMENT

Rule 4. A temporary vacancy is defined as a regular position to which an employe has been regularly assigned as track foreman and becomes temporarily vacant for a period of sixty (60) days or more through the regular assignee being promoted to an official position with the railroad or the Organization, or being assigned to extra gangs or being on leave of absence because of an illness, or otherwise. Under such circumstances, the regular assignees will retain their rights to their former positions and other rights. Such vacancies will be handled in accordance with Rules 2 and 3 of this Article, and if assigned to relief foreman regularly appointed in accordance with Rule 1 of this Article. Such assignee will accumu-

ment basis April 11 and 21, 1947, respectively, after annuity for Mr. Neyhard was approved by the Railroad Retirement Board. There certainly is no justification, under the agreement rules applicable, for advertising this position as a temporary vacancy twice, under these facts and circumstances, as Petitioner contends.

Aside from the fact that the claim of the Petitioner is not supported by or justified under the agreement rules, and is in effect a request for an expansion of the rules or a new rule through improper interpretation of the agreement, handling as suggested by the Petitioner involves a lot of unnecessary bookkeeping and potential complications to make it undesirable and impracticable. Since the Railroad Retirement Act has been in effect, there have been no Maintenance of Way employees return to service after retiring on a disability annuity under that Act, and the possibilities of any such retired employees returning to service is extremely remote. Retired employees frequently move to points off the railroad, and in some instances to distant points, and as a rule we never hear from them unless and until they want a pass. Some employees retire early in life, and this involves keeping records and handling vacancies on temporary basis for 10 to 15 years or more, during which time more than one employee may retire from the same position or senior employee may bid it in. Recently, a Section Foreman, 54 years of age, retired account physical disability, and in some instances employees are compelled to retire sooner. The suggested handling would be burdensome and difficult of proper administration. No such handling is now in effect or has been requested by any other class or craft of employees or Organization, except one other Organization made similar request several months ago, which was declined, and they subsequently agreed such vacancies should be advertised on permanent basis when annuity is awarded by the Railroad Retirement Board. It does not appear that the employees themselves can be serious about this matter, as frequently they inquire when temporary vacancies of employees making application for annuity will be advertised as permanent, and in this particular case Foreman B. H. Petty, who bid in the vacancy at Elm Mott on permanent basis wrote District Engineer, Mr. G. L. Moody, March 22, 1947, as follows:

"Whitney Texas March 22, 1947

Mr. G. L. Moody
Smithville, Texas

I understand from good authority that J. W. Neyhard at Elm Mott has drawn his first pension check.

Please advise when Section 459 will be bulletined.

'Sgd' B. H. PETTY

B. H. PETTY
Whitney, Texas."

For reasons shown in this submission the claims of the Petitioner are without merit and agreement support, and therefore should be denied.

Oral hearing is not desired by the Carrier unless requested by the Petitioner, but if oral hearing is not held Carrier desires and requests thirty (30) days in which to make written answer to any and all claims, contentions, and allegations contained in the Petitioner's submission.

The Carrier respectfully requests that the Board deny the claims.

Exhibits not reproduced.

OPINION OF BOARD: The question for decision is whether a regularly assigned section foreman receiving an annuity for physical disability under the Railroad Retirement Act is considered as on leave of absence because

of illness during the continuance of his disability. If so, there is merely a temporary vacancy in his regular position, and it may not be advertised and assigned as a permanent vacancy.

The question arises from these facts. John W. Neyhard, 59 years old, was a regularly assigned section foreman, Section No. 459, Elm Mott, Texas. On October 13, 1946 he laid off sick. His position was advertised and assigned as a temporary vacancy. On January 1, 1947 after proof of total disability he received a physical disability annuity under the Railroad Retirement Act. Upon being advised of this, Carrier readvertised his position as a permanent vacancy and assigned it on a permanent basis. Thereafter the Organization filed this claim seeking to have the bulletin of this position as a permanent vacancy recalled, and the position again advertised as a temporary vacancy.

Under Article 4, Rule 4 of the Agreement only a temporary vacancy is created by a regularly assigned track foreman taking a leave of absence because of illness.

Rule 4 reads in part:

"A temporary vacancy is defined as a regular position to which an employe has been regularly assigned as track foreman and becomes temporarily vacant for a period of sixty (60) days or more through the regular assignee being promoted to an official position with the railroad or the organization, or being assigned to extra gangs or being on leave of absence because of illness, or otherwise."

Thus, in accordance with the rule, when Neyhard's position was first advertised after he laid off sick, it was advertised as only a temporary vacancy because he was on leave of absence because of illness.

There is nothing in the Railroad Retirement Act as amended July 21, 1946, which changes Neyhard's status as an employe on leave of absence because of illness by reason of the fact he receives a physical disability annuity under the act. To obtain such an annuity he must furnish proof of his total disability and after having once done so he must furnish proof of continuing disability from time to time in order to remain under the benefits of the act. The requirements for a physical disability annuity differ from those for a retirement annuity. The latter requires an employe to forsake the service of his employer. But such is not the requirement for a physical disability annuity. In fact the act specifically states that the requirement that an annuitant must relinquish his right to return to the service of his employer shall not apply to those receiving physical disability annuities prior to attaining the age of 65.

If Neyhard recovers from his disability before reaching 65 his annuity ceases. Under Rule 4 he would be entitled to return to his regular position upon returning from his sick leave. Therefore, the position is not now permanently vacated, but only temporarily vacated. In advertising Neyhard's regular position as a permanent vacancy instead of a temporary vacancy, Carrier violated the agreement.

Hence 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 parties waived oral hearing thereon;

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 a Carrier violated the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of May, 1948.