

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

MISSOURI PACIFIC RAILROAD COMPANY

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

- (1) That Water Service Helper Rhodes was improperly displaced by Pumper Parks on July 1, 1946;
- (2) That Water Service Helper Rhodes be returned to the service as a Water Service Helper, Missouri Division, and be allowed pay at the Water Service Helper's rate for all time that he has been improperly held out of service subsequent to July 1, 1946.

EMPLOYEES' STATEMENT OF FACTS: On November 10, 1941, Melvin H. Parks entered the service of the Carrier as a Pumper. While employed in such capacity, he entered Military Service on February 20, 1943, and was subsequently discharged on October 9, 1945. He reported for work with the Carrier and commenced his duties on October 29, 1945. Melvin Parks was assigned to his former position of Pumper at Dexter, Missouri. On June 9, 1946, the position of Pumper held by Melvin Parks was abolished. Effective July 1, 1946 and in accordance with authority given him by Carrier's officer L. G. Byrd, Melvin Parks displaced Water Service Repairman's Helper Mitchell Rhodes, and assumed the duties of Water Service Repairman's Helper. Melvin Parks had no previous service in this class, nor no seniority.

Mitchell Rhodes entered the Carrier's service as a Laborer on August 10, 1943. He was promoted to the position of Water Service Repairman's Helper on August 23, 1945. His seniority in such class is that of that date.

The agreement in effect, dated July 1, 1938, between the parties to this dispute as well as subsequent memorandums and special decisions are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rule 3 (a) of the current agreement states as follows:

"Rule 3. (a) When force is reduced, the senior man in the sub-department, on the seniority district, capable of doing the work, shall be retained. Employees affected either by position being abolished or being displaced may displace junior employees of their own rank or class in their seniority district, if qualified."

It will be noted from the above that employees whose positions have been abolished may displace junior employees only of their own rank or class.

In their handling of this case on the property, the employes have not questioned the fact that had Mr. Parks expressed a desire to displace Mr. Rhodes within ten days from December 15, 1945, as provided for in the second paragraph of the note under Section 2 of MW-51-2, quoted above, he, Mr. Parks, would have been entitled to do so.

When the officials of the Carrier became aware that Mr. Parks had not been duly advised of his rights under MW-51-2 they undertook to correct the results of their failure to give him that advice in time to enable him to exercise the privileges accorded him by that agreement. Mr. Rhodes is in no worse position by reason of this action on the part of the Carrier than he would have been had the Carrier's officials notified Mr. Parks in time to permit his exercising the privileges accorded him under MW-51-2 within the period of time set out in that agreement. As a matter of fact, Mr. Rhodes enjoyed the occupancy of a regular position of water service repairman helper for a period of six months longer than he would have enjoyed it had Mr. Parks been made aware of his rights under MW-51-2 and exercised them within the time limit described.

The claims should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Melvin H. Parks entered the service of the Carrier as a Pumper on November 20, 1941. While employed in that capacity he entered the armed forces on February 20, 1943. He was honorably discharged from army service October 9, 1945, and on October 29 following resumed service with the Carrier in his former position of Pumper at Dexter, Missouri, in accordance with the provisions of a Memorandum Agreement then in force and effect pertaining to resumption of service without loss of seniority by returning soldiers.

The Claimant, Mitchell Rhodes, was employed by the Carrier as a Water Service Laborer on August 8, 1943, and approximately two years thereafter was promoted to the position of Water Service Repairman Helper. His seniority in such class dates from August 23, 1945.

December 1, 1945, the Carrier and the Brotherhood executed Memorandum Agreement MW-51-2 for the purpose of further protecting the rights of returning military service employes. According to concessions made by each party provisions of such Agreement pertinent to, and decisive of, the instant dispute read:

"Note: In the application of the foregoing Section, an employe returning from military service will, upon his or her return to the service of any carrier party hereto by which he or she was employed at the time of entering military service, if possessing sufficient qualifications (of which Management shall be the judge), be privileged to return to the position, if it exists, which he or she held at the time he or she enlisted or was inducted into the military forces, or within ten (10) days thereafter exercise seniority rights to any positions bulletined subsequent to the date of such employe's entrance into the military service; seniority date of such employe, in classification other than that in which seniority was held at the time of entrance into military service, shall be immediately ahead of and the same date as that of the employe he or she displaces.

"Those who have already returned will have ten (10) days from December 15, 1945, in which to exercise their displacement rights in line with the foregoing, and those displaced by them will exercise their seniority pursuant to the rules of the working agreement."

June 9, 1946, the position of Pumper at Dexter, held by Parks, was abolished. Thereupon, effective on July 1, 1946, pursuant to authority

assumed to have been vested in it by the memorandum from which we have just quoted, the Carrier permitted Parks to displace Rhodes on the position of Water Service Repairman Helper which had been occupied by the latter since August 1945.

There is no dispute between the parties as to the foregoing factual situation.

The basis of the Brotherhood's position with respect to the instant Claim is clearly stated on page 2 of its original submission as follows:

"Rule 3 (a) of the current agreement states as follows:

'Rule 3. (a) When force is reduced, the senior man in the sub-department, on the seniority district, capable of doing the work, shall be retained. Employees affected either by position being abolished or being displaced may displace junior employees of their own rank or class in their seniority district, if qualified.'

"It will be noted from the above that employees whose positions have been abolished may displace junior employees only of their own rank or class.

"The Employees contend, as stated in the Statement of Facts, that Pumper Melvin Parks had no seniority whatever in the class of Water Service Repairman's Helper at the time he was allowed to displace Mitchell Rhodes on a position of Water Service Repairman's Helper. . . . There can be no question but that such a displacement was a clear cut violation of Rule 3 (a), and we so contend."

In its reply to the foregoing submission, and with particular reference to the portion heretofore quoted, the Carrier states:

"The statements contained in the Employees' Position on page 2 and through the first full paragraph of page 3 would be controlling in the absence of the existence of the provisions of the Memorandum Agreement dated December 1, 1945, known as Special Decision MW-51-2 . . ."

Thus, from what has been heretofore stated, it appears the sole question for decision in this case is whether Memorandum Agreement MW-51-2 authorized the Carrier to displace Rhodes by Parks on the position of Water Service Repairman Helper in July 1, 1946, and that if it did not do so the Claim must be sustained.

Turning to the Memorandum Agreement it will be noted the first paragraph quoted is limited to employees returning from the service and hence is not decisive under the facts involved. The second paragraph does have application for it deals with employees already returned. Parks was a returned employee. Indeed he had been assigned to and had been occupying his position of Pumper for more than a month prior to the date of the execution of the Agreement. Therefore, it becomes apparent the Carrier must justify its action under terms of the second paragraph or not at all. In substance such paragraph is that returned soldiers were entitled to ten days from December 15, 1945, in which to exercise seniority rights to any position bulletined subsequent to the date of such employee's entrance into military service.

The Carrier frankly concedes that Parks made no attempt to displace Rhodes within ten days from December 15, 1945, and then with commendable candor excuse his failure to do so by admitting that neither it nor the Brotherhood saw to it that Parks received notice of the Agreement in time for him to have taken action of that character within the period of time allowed by its terms. It then defends and attempts to justify its action in displacing Rhodes more than six months after the Memorandum Agreement gave Parks

whatever rights he may have had to displace Rhodes by asserting (1) Parks would have taken action had he known of the Agreement, (2) his failure to do so was the fault of the Carrier and the Brotherhood, each of whom had the duty to notify him, (3) the Memorandum Agreement contemplates a preference to returning service men employes, and (4) since Parks had the right to displace Rhodes the latter was no worse off as a result of Carrier's action than he would have been if the former had received notice in time to have acted within the ten day period.

We concede there is much in every defense on which Carrier replied to excite our sympathy and frankly confess that if responsibility for initiation of the Claim had been ours we might, under the conditions and circumstances disclosed by the record, have been hesitant about bringing it. However, we are not here to determine whether Claims shall be instituted or disposed of cases on the basis of sympathy. The province of this Division is to interpret contracts when disputes have arisen involving their proper construction and to render Awards accordingly. Without laboring the subject further it can and should be said we fail to find anything in any defense raised by the Carrier which constitutes legal justification for failure to comply with the terms and requirements of the express terms of the Memorandum Agreement requiring Parks to exercise such displacement rights as he may have had under its terms within ten days after its execution. The contract, since it was negotiated by his authorized representative, was his and he is bound by its terms. It follows Rhodes was improperly displaced by Parks on July 1, 1946, that he should be returned to service as a Water Service Repairman Helper and that he should be compensated for time he has been improperly held out of service. Such compensation, however, should be and is limited to the difference between what Rhodes would have received from his regular assignment as Helper and what he actually received for services, regardless of their character, from all other sources since his displacement, the Carrier to have the benefit of deductions for time not worked under conditions where it would not have been liable for pay had he been in is employ.

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 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 Rhodes was improperly displaced by Parks, that he should be returned as a Water Service Repairman Helper, and compensated for time held out of service as indicated and as limited in the opinion.

AWARD

Claim 1 sustained. Claim 2 sustained to the extent indicated in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. L. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of September, 1948.