Award No. 4474
Docket No. MW-4445

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

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

(1) That the Carrier improperly placed the name of G. A. Purdy on the Drawbridge Tenders' Seniority Roster, Chattanooga Division, January 1, 1948, with a seniority date of November 4, 1942;

(2) That G. A. Purdy held no seniority as a Drawbridge Tender on February 1, 1947;

(3) That the Drawbridge Tenders' Roster, Chattanooga Division, January 1, 1948, be corrected in accordance with Parts (1) and (2) of this claim.

JOINT STATEMENT OF FACTS: For sometime prior to February 1, 1947 the drawbridge tenders employed by The Nashville, Chattanooga & St. Louis Railway were not represented by any labor organization under a collective bargaining agreement.

During the latter part of 1946 these drawbridge tenders sought and obtained representation by the Brotherhood of Maintenance of Way Employes, and by a memorandum agreement effective February 1, 1947 the drawbridge tenders were placed within the scope of the agreement of November 1, 1940 between the Railway and its Maintenance of Way Employes, with certain modifications in said agreement of November 1, 1940. Copy of the Memorandum Agreement of February 1, 1947 is filed herewith as Joint Exhibit "A."

When the memorandum of agreement of February 1, 1947 was negotiated, it was mutually agreed that only such employes as were regularly performing drawbridge tender's work and those who at that time were protecting the extra work would be given seniority as drawbridge tenders and that such employes would be given a seniority dating as of the first day they actually performed drawbridge tender's work.

Prior to May 10, 1944, G. A. Purdy was used as relief drawbridge tender. On May 10, 1944 he was appointed B&B Foreman and worked in that capacity until the B&B gang in his charge was cut off in force reduction during December, 1946. He performed no drawbridge tender's work while employed as Foreman.

After his gang was cut off in force reduction in December, 1946, he posted on new machinery on the drawbridge in order to qualify in its operation and asked to again be used on extra or relief work.

position carrying a higher rate than that of draw bridge tender, for which reason he was not considered available for this lower rated work. It will be noted this vacancy occurred on the effective date of the Memorandum Agreement (Joint Exhibit "A"), at which time Purdy had not been acquainted with the provisions of Rule 3(f) of said memorandum agreement, nor required to indicate in writing whether he would protect extra and relief drawbridge tender's work at the lower rate.

(3) On February 22, 1947, Mr. Purdy was working as B&B helper at a rate lower than that of drawbridge tender, but through error the supervisor overlooked the fact that he had been advised by the Division Engineer on December 16, 1946 that Mr. Purdy was available as relief drawbridge tender when needed, and Mr. Ted Creek was called for this one day's work as drawbridge tender. The Carrier respectfully submits that an employe does not forfeit his seniority by reason of an error on the part of a carrier official.

Attention is called to that part of the Joint Statement of Facts wherein it is stated that Purdy after his gang was cut off in December, 1946, posted on new machinery on the drawbridge in order to qualify in its operation and asked to again be used on extra or relief work and that under date of December 16, 1946 the Division Engineer advised the supervisor that Purdy had qualified and was available as relief drawbridge tender when needed. As a matter of fact, Purdy lost time from December 4th through December 7th, 1946, which he could have worked as B&B mechanic, while he was posting on the new drawbridge machinery. This fact alone is conclusive that it was proper to consider Purdy as one of those who had qualified and stood for relief or extra work on February 1, 1947. General Chairman Davis concurred in this conclusion in his letter of April 4, 1947, hereinbefore quoted.

In conclusion, the Carrier respectfully submits that in consideration of all the facts which have been presented, it would be an injustice to Mr. Purdy to deprive him of his seniority as draw bridge tender which has heretofore been established by mutual agreement between representatives of the Carrier and the Organization, parties to this dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The System Committee of the Brotherhood contends that Carrier improperly placed the name of G. A. Purdy on its Drawbridge Tenders' Seniority Roster, Chattanooga Division, dated January 1, 1948, with seniority as of November 4, 1942, when in fact he had no such seniority on February 1, 1947, the date when, by Memorandum Agreement, drawbridge tenders were placed under the effective Agreement of the Brotherhood. It asks that the seniority roster be corrected.

The record discloses that prior to February 1, 1947, drawbridge tenders were not represented. By Memorandum of the Brotherhood with the Carrier, effective on that date, these employes were placed within the scope of the Brotherhood's Agreement effective November 1, 1940.

When the Memorandum of Agreement effective February 1, 1947, was being negotiated it was mutually agreed that only such employes as were regularly performing drawbridge tender's work and those who, at that time, were actually protecting the extra or relief work would be given seniority as drawbridge tenders and that such employes would be given a seniority dating as of the first day they actually performed drawbridge tender's work.

Based on this understanding it is the Brotherhood's contention that the facts disclose that Purdy was not entitled to seniority as a drawbridge tender because he was not actually protecting the extra work thereof on February 1, 1947. Although not called, because of oversight on the part of the Carrier, we think the facts disclose that Purdy qualified and advised Carrier of his desire to perform extra drawbridge tender's work and, within the understanding, was actually protecting that work.

Further, the parties have settled this question on the property. On April 2, 1947, N. H. Lassiter, Director of Personnel of the Carrier, wrote the General Chairman of the Brotherhood about this matter and therein advised him of the situation. On April 4, 1947, the General Chairman replied thereto as follows:

> "In view of the circumstances which you explain and the fact that Mr. Purdy no doubt if cut off again might again request relief drawbridge tender's work, I see no objections to giving him seniority as relief man as of the first day he actually worked as drawbridge tender."

We think the letter of the Director of Personnel fairly reflected the facts, except as to the cause for its failing to call Purdy, and that the understanding had by the parties is binding.

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 the Carrier has not violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of July, 1949.