Award No. 4541
Docket No. MW-4471

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: (1) That G. W. Dedman should have been permitted to displace D. P. Perkins as relief foreman effective March 25, 1946;

(2) That G. W. Dedman be allowed the difference in pay between what he did receive at the assistant foreman's rate and what he would have received at the relief foreman's rate during the period March 25 to March 30, 1946, inclusive.

JOINT STATEMENT OF FACTS: On March 25, 1946, G. W. Dedman completed his temporary assignment as relief foreman at Yokena, Mississippi, upon assignment of the position by bulletin to S. E. New. Dedman requested that he be allowed to displace D. P. Perkins, a junior man, who was assigned as relief foreman filling a temporary vacancy on the same division at Centreville, Mississippi, and who, at the time of his assignment to the vacancy March 18, was the senior available relief foreman. The carrier refused to allow Dedman to displace Perkins.

Having bulletined the position at Centreville March 20 when it was learned the regular incumbent would be off more than thirty days, the carrier on March 30 assigned it to J. H. Parker, who was the senior bidder. During the period March 25 to 30, inclusive, 1946, Dedman filled a position of assistant foreman and was paid at the assistant foreman's rate.

The agreement between the parties to this dispute dated September 1, 1934, and revised June 1, 1945, is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Relief Foreman on the Vicksburg Division, in their seniority order up to and including D. P. Perkins are as follows:

1. S. E. New
2. J. H. Parker
3. G. W. Dedman
4. D. P. Perkins

Rule 21 (b) states as follows:

"RULE 21. BULLETIN NOTICE

(b) Positions or vacancies of thirty (30) days or less duration shall be considered temporary and may be filled without bulletin, but senior employes in the seniority district will be given consideration."

Second—1088:

"* * *, the interpretation placed upon it by the employes and the carrier for a long period of time clearly shows the intent and understanding of the parties. For sixteen years the present practice at Ingalton has prevailed. In view of this long period of time in which there has been no complaint, this Board is of the opinion that the claim will have to be denied. See Award 974."

Third—1435:

"Conduct may be, frequently is, just as expressive of intention and settled conviction as are words, either spoken or written. Here there is so much uncontradicted evidence of unambiguous conduct by both parties to the issue, evidencing the conclusion which is considered determinative, that no course is open for a judicial pronouncement other than that the claim be denied."

Third—1645:

"Having stood by for nine years, with full knowledge of the facts, without protesting the arrangement the Organization should not now be allowed to assert a claim for violation of the agreement."

Third—2436:

"Where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforcible to the same extent as the provisions of the contract itself. See Awards Nos. 507, 1257 and 1397."

Third—3603:

"It is stated in Award 2436, 'The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by he parties as evidenced by their actions with reference thereto, offers a safeguide in determining what the parties themselves had in mind when the contract was made.' "

The fact that the organization lived with the interpretation in effect for a period of twelve years following the adoption of Rule 21(b) and did not during that period protest that interpretation notwithstanding such cases occur frequently on each division, indicates without question its intent in agreeing to the rule and its acceptance of the interpretation thereof.

The carrier has shown that Dedman's claim is without merit for the following reasons:

1. Rule 21(b) does not contemplate or authorize bumping on relief assignments of thirty days or less. It prescribes a method of filling vacancies of thirty days or less; and, the vacancy at Centreville being filled in accordance with its provisions, there was no vacancy within the purview of the rule.

2. The failure of the organization over a period of twelve years subsequent to the effective date of the existing rules agreement to protest the practice in effect proves its intent in agreeing to the rule and its acceptance and understanding of the fact that Rule 21(b) does not permit bumping.

3. The displacement provisions of Rule 6 do not apply inasmuch as Rule 6 deals with force reduction and there was no force reduction.

4. Dedman held no seniority rights as a foreman and, therefore, could not displace a person on a foreman's assignment.

For these reasons, the carrier requests your Board to deny this claim.

OPINION OF BOARD: The System Committee contends the Carrier should have permitted claimant, G. W. Dedman, an assistant foreman, to dis-

place D. P. Perkins as relief foreman at Centreville, Mississippi, on March 25, 1946, and asks that because thereof he be compensated for the difference in pay between what he received at assistant foreman's rate and what he would have received at relief foreman's rate during the period from March 25 to March 30, 1946, inclusive.

D. P. Perkins, a junior assistant foreman, was, on March 18, 1946, assigned as relief foreman to fill a temporary vacancy at Centreville, Mississippi, on the Vicksburg Division. At the time of his assignment to fill the vacancy Perkins was the senior available assistant foreman. Claimant, G. W. Dedman, an assistant foreman but senior to Perkins, completed a temporary assignment as relief foreman at Yokena, Mississippi, on the Vicksburg Division when S. E. New was assigned thereto by bulletin. Claimant then requested to displace Perkins but Carrier denied his request. The temporary assignment on the Centreville position ended on March 30, 1946, when J. H. Parker was assigned thereto by bulletin. Following Carrier's refusal the claimant filled a position of assistant foreman at Vicksburg during the period from March 25, to March 30, 1946, inclusive.

While at the time neither claimant nor Perkins had seniority as a foreman, however, claimant was senior to Perkins as assistant foreman and thereby senior to Perkins in all rights that accrued to them by reason of being assistant foremen.

The record contains evidence of a certain agreed to practice with reference to displacement on relief assignments when less than thirty days remain thereon. This was prior to the present agreement effective September 1, 1934, and superseded thereby for Rule 52 (a) of the presently effective agreement provides in part:

> It supersedes all working conditions and interpretations heretofore in effect."

However, Carrier contends that the parties, without complaint, continued this practice after the effective date of the present agreement up until the present complaint and that such practice is implied therein and thus a proper interpretation and construction thereof.

A long continued practice of the parties on the property is pertinent and may be controlling if the subject matter to which it relates is not clearly set forth and covered by the parties' agreement and when it can be said that the agreement is ambiguous with reference thereto but, if the parties' agreement as it relates thereto is clear and unambiguous, then such long continued practice does not prevent the agreement from being enforced according to its terms but monetary claims prior to the complaint asking for a proper application are generally denied.

Rule 21 (b) provides:

> "Positions or vacancies of thirty (30) days or less duration shall be considered temporary and may be filled without bulletin, but senior employes in the seniority district will be given consideration."

This rule expressly provides that vacancies of 30 days or less are temporary and may be filled without bulletin but that seniority shall be applied thereto. When Perkins was assigned thereto he was the senior man available. However, subsequent thereto claimant was displaced on the position he held as relief foreman at Yokena by the position being assigned to S. E. New and claimant then had the following rights under Rule 6 (a), which provides in part:

> "An employe of higher rank than laborer in the Track Department will have the right to displace the junior employe of the same rank within his seniority district * * *."

These rules cover the rights of this claimant and temporary assignments not being excepted therefrom and, under Rule 21 (b), seniority being ex-

pressly applicable thereto the contention of the System Committee is well taken and 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 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 Carrier has violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of September, 1949.