Award No. 8815
Docket No. MW-8327

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE TEXAS AND PACIFIC RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when it refused to permit Section Foreman R. E. Rich, Jr. to exercise displacement rights on Section 238 on June 10, 1952;

(2) Section Foreman R. E. Rich, Jr. be paid the difference between the track foreman's rate of pay and the track apprentice's rate of pay for an equal number of hours as was paid to the junior employe while acting as foreman on Section 238 from June 10 to 13, 1952, both dates inclusive.

EMPLOYES' STATEMENT OF FACTS: The 1952 Eastern Division seniority roster lists the claimant, Mr. R. E. Rich, Jr. with a section foreman's seniority date as of January 2, 1947, whereas Mr. James Powell holds no seniority rights as a section foreman, but does hold seniority as a Track Apprentice as of October 1, 1951.

Prior to June 9, 1952, the regular section foreman assigned to section No. 239 returned, displacing the claimant from his temporary section foreman's assignment.

On the above referred to date, the claimant addressed a letter to the Carrier's General Roadmaster advising of his intent and desire to displace, effective June 10, 1952, Mr. James Powell, a junior employe, who was filling a temporary section foreman's position on section No. 238 from June 9 to and including June 13, 1952.

The General Roadmaster refused to permit the claimant to exercise displacement rights.

The agreement violation was protested and the instant claim was filed in behalf of the claimant.

The claim was declined as well as all subsequent appeals.

employe who began his vacation on August 1, 1949. The claimant had been filling a vacancy of unkown duration and was released some time prior to 10:00 P. M., July 29, 1949, when the assigned man returned. On August 1, at 1:30 P. M., claimant advised the chief dispatcher he was available and that he wished to displace the employe junior to him who had already begun the vacation relief. This request was refused, Vaughan was laid off on account of sickness on Augut 11, 1949, and the remainder of the vacation absence was filled by claimant."

Since then the interpretation made by Awards 5192 and 5461 does not appear to have been questioned.

It is apparent, therefore, that the present claim, if still alive, would be without merit.

All known relevant argumentative facts and documentary evidence are included herein. All data submitted in support of Carrier's position has been presented to the employes or duly authorized representative thereof and made a part of the particular question in dispute.

(Exhibits not Reproduced.)

OPINION OF BOARD: Carrier initially says this claim should be denied because "proceedings were not instituted" prior to January 1, 1956 as required by Section 1 (c) Article V, Section 3 of the August 21, 1954 Agreement, but this contention has been rejected twice at least on this same Carrier, the last time as recently as July 31, 1958. See Awards 2135 on the Second Division by Wenke, and on our own Division 8424 by Lynch.

As to the merits we find this situation. Employes pin their hopes for a sustaining award on Art. 3 (b) of the rules agreement and Art. 12 (b) of the Vacation Agreement.

Art. 3 (b) of the Rules Agreement has to do with reduction in force and has no application to the facts in this case.

Art. 12 (b) of the Vacation Agreement, as pertinent reads:

> "* * * When the position of a vacationing employe is to be filled and regular relief employe is not utilized, effort will be made to observe the principle of seniority."

The only thing that this requires of the Carrier is that it makes a **bona fide effort** to observe the principle of seniority. It does not mean that seniority must be given preference under all circumstances. The rule does not give the "right to displace" as an absolute right.

What happened here was that Claimant on June 9, 1952, when the regularly assigned Section Foreman on Section 238 started his vacation he (Claimant) was filling an indefinite temporary vacancy as Section Foreman on Section 239, because the occupant of that position was away on account of illness. The Claimant had knowledge of the job on Section 238 but he declined it, knowing that it would only last a few days and hoping, no doubt, that his job on Section 239 would continue for some time. So, the Carrier gave the job to the next senior employe. However, on the very next day the regular man on Section 239 came back to work and Claimant lost out. On June 9th he wrote the Carrier and said he wanted to displace the man on

Section 238 starting June 10th. The Carrier said "no" and it is on the basis of that refusal, Claimant predicates his claim, but this little story shows that the Carrier made the effort required by Rule 12 (b) of the Vacation Agreement.

Under these circumstances, the Carrier did not violate the Agreement and the claim must be denied. See Awards 5192 and 5461.

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 the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1959.