

Award No. 11086
Docket No. MW-10374

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**MAINE CENTRAL RAILROAD COMPANY
PORTLAND TERMINAL COMPANY**

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

(1) That the Carrier violated the effective agreement when, on the 15th day of April, 1957, it bulletined the track foreman's position at No. Concord, Vt. on a permanent basis, rather than on a temporary basis, subject to the return of the original holder of the position, track foreman A. J. Whitten.

(2) That the Carrier now bulletin the position on a temporary basis, subject to the return of the original holder of the position, and that Foreman A. J. Whitten be compensated for any loss of earnings resulting from the Carrier's improper bulletin of the position.

EMPLOYEES' STATEMENT OF FACTS: Because an injury sustained by Mr. Wilfred Paridis temporarily precluded him from filling and protecting his regular assigned position as Track Foreman at Conway Center, N.H., the temporary vacancy created thereby was bulletined as a temporary vacancy subject to the return of the original holder of the position, Mr. Wilfred Paridis. The successful applicant therefor was Track Foreman A. F. Whitten who was the "original holder" and regular incumbent of the position of Track Foreman at North Concord, Vermont.

On April 15, 1957, the Carrier bulletined the track foreman's position at North Concord, Vermont, which had been temporarily vacated by Track Foreman Whitten while protecting the position of Track Foreman at Conway Center, N.H., pending the return of the original and regular incumbent, Mr. Wilfred Paridis. The Carrier advertised the temporary vacancy at North Concord, Vt., as a "permanent" vacancy. The Employees protested, contending that the temporary vacancy in the position regularly held by Track Foreman Whitten should have also been advertised as a "temporary" vacancy and the instant claim was formally presented.

The Carrier has declined the claim.

The Agreement in effect between the two parties to this dispute dated January 1, 1953, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

tioned, these being procured at a later date, which accounts for my statement to the General Chairman —

“I could not, of course, say whether similar instances in the past have ever been called to the attention of the former General Chairman, but I can say, of a certainty, that the handling given the instant case is no different than the handling given similar cases in the past.”

Your Honorable Board, in the handling of disputes progressed to it, has established and consistently adhered to certain principles which we feel strongly support the Carriers' position. One of such principles is that the past actions of the Parties with respect to a certain rule—in this instance Rule 21 (b) — during the period the rule has been in existence—in this instance some 16 years—is expressive of their intention and the construction the Parties placed upon its terms.

If the Employees can prove it was the intent of the Parties to apply Rule 21 (b) in the manner they allege, no such proof has been offered the Carrier. Their argument, in so far as their handling of the claim on the property is concerned, is based on but four words, i.e., “It is our position”.

In reverse, the Carrier has proved, and we took but one year—1954—which was within the tenure of office of the General Chairman who negotiated the Agreements of both 1942 and 1953 for the Brotherhood, and the year prior to the present General Chairman taking over—that Rule 21 (b) has been applied on these Properties in the manner agreed to by the Parties.

In conclusion the Carrier respectfully requests, that having proved the claim of the Employees in the instant dispute is devoid of merit under the rules of the current Agreement between the Parties, it be DENIED in its entirety by your Honorable Board.

All data in support of the Carriers' position have been submitted to the Employees and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are not in dispute. Due to the illness of the regular occupant of track foreman position at Conway Center, New Hampshire, that position was bulletined under Rule 21(b), as a temporary vacancy. The Claimant, who held a regularly assigned track foreman's position at North Concord, Vermont, bid for and was assigned the temporary vacancy at Conway Center. Subsequently, the vacancy thus created at North Concord, Vermont, was bulletined as a “permanent” vacancy and awarded to the successful bidder. The claim is premised on the contention that the vacancy at North Concord should have been bulletined as a temporary vacancy under Rule 21(b) because in the chain of events, it was “occasioned by” the illness of the regular occupant of the track foreman position at Conway Center, and in the event the regular occupant of the position at Conway Center should return to his position the Claimant should then be entitled to return to his permanent position. Bulletining the track foreman position at North Concord as permanent cut off this right of Claimant.

Subsequent to the handling of this claim on the property, the occupant of the Conway Center position resigned. The position was then bulle-

tined on a permanent basis. The Claimant bid for and was assigned to the position permanently on January 27, 1958. Thus, the possibility of being forced off the "temporary" vacancy at Conway Center and the resulting necessity of moving to such position as might be available under the rules, no longer exists. The Claimant suffered no loss and there is no longer a threat of a loss. The issue raised by the claim before the Board has become moot and should therefore be dismissed without prejudice.

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 Employee involved in this dispute are respectively Carrier and Employee 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.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1963.