



Award 18608

Docket No. MW-18968

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Thomas Rimer, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

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

(1) Messrs. W. A. Fremmen and H. F. Letner each be accorded a seniority date as relief foreman as of the time their pay started as such and that their names and seniority dates be listed on the relief foreman's seniority roster for 1969 and thereafter. (System File 2579-4)

EMPLOYEES' STATEMENT OF FACTS: Claimants W. A. Fremmen and H. F. Letner both hold seniority as section laborers on Seniority District No. 3 (Claimant Fremmen's name was incorrectly spelled "Freeman" in our notice of intent dated September 22, 1970). Under dates of December 31, 1968 and March 28, 1969 respectively, the claimants were notified as follows:

LETTER 1

**"Missouri-Kansas-Texas Railroad Company
Engineering Department
Parsons, Kansas 67357**

**J. T. Flake
Division Engineer**

December 31, 1968

**Mr. William A. Freeman
Box 82
Canadian, Oklahoma**

Dear Mr. Freeman:

You have been selected to perform the duties of a Relief Foreman and/or a Track Foreman on Old Southern District, Seniority District No. 3.

Your seniority date in this position will be effective November 1, 1968.

On November 12, 1969, Division Engineer J. T. Flake advised the General Chairman that Messrs. Schopenhorst and Romaker had requested that their names be removed from the relief foreman's list and denied his request that the other two men be placed on the sniority rosters as relief foremen (Carrier's Exhibit "A," Sheet 6).

The General Chairman appealed the Division Engineer's decision to the Carrier's then Acting Chief Engineer J. H. Hughes on November 20, 1969 (Carrier's Exhibit "A," Sheet 7).

Acting Chief Engineer Hughes declined the alleged claim on December 6, 1969 (Carrier's Exhibit "A," Sheets 8 and 9) whereupon the General Chairman appealed his decision to the undersigned highest officer of the Carrier designated to receive claims with his letter December 17, 1969 (Carrier's Exhibit "A," Sheets 10 and 11).

The undersigned Manager of Personnel declined the General Chairman's alleged claim on December 23, 1969 (Carrier's Exhibit "A," Sheet 12) and as result of the General Chairman's letter December 30, 1969 to the undersigned Manager of Personnel (Carrier's Exhibit "A," Sheets 13 and 14) supplemented that declination with a letter to the General Chairman dated January 6, 1970 (Carrier's Exhibit "A," Sheets 15, 16 and 17).

A conference, wherein this alleged claim was discussed by the parties involved herein, was held on March 26 and 27, 1970.

Copy of all correspondence exchanged by the parties in the handling of this alleged claim on the property is attached hereto as Carrier's Exhibit "A," Sheets 1 through 22.

Carrier's Exhibit "B," Sheets 1 through 7, consists of a copy of Memorandum of Agreement dated June 2, 1939; a request of former General Chairman E. Jones dated February 26, 1942, for a list of relief foremen; Carrier's letter March 5, 1942 to General Chairman E. Jones, listing men selected for training as foremen; General Chairman Jones' proposed agreement of May 21, 1942, to replace the June 2, 1939 Agreement, and the Carrier's declination to do so dated August 28, 1942.

Carrier's Exhibit "C," Sheets 1 through 7, inclusive, is copy of Award No. 19 of Public Law Board No. 76 dated October 31, 1969.

Agreement No. DP-357, effective February 1, 1928, with Revisions to September 15, 1961, between the Missouri-Kansas-Texas Railroad Company and Employees Represented by the Brotherhood of Maintenance of Way Em-ployes is on file with the Third Division, National Railroad Adjustment Board.

(Exhibits not reproduced.)

OPINION OF BOARD: Careful and thorough review of the record in this case reveals that the claim handled on the property and appealed to the highest officer designated to handle disputes alleged that:

"The records will reflect that Mr. Fremmen was informed by Mr. Flake on December 31, 1969 that he had been selected to perform the duties of a relief foreman and/or track foreman on Seniority District

No. 3, with seniority established as of November 1, 1968. Mr. Letner received a like letter dated March 28, 1969 with seniority established as of March 24, 1969, as relief foreman.

It is our contention that when Mr. Flake advised Mr. Fremmen and Mr. Letner of their selection and assignment of relief foreman on the old Southern District, Seniority District No. 3, their classifications were changed from that of track laborer to that of track laborer and relief foreman, and their names should have been placed on the 1969 seniority roster as relief foremen in accordance with Rules 15 and 16 of Article 3 of the current Agreement with seniority dates as reflected in Mr. Flake's letter of notification and assignment."

This at variance with the claim appealed to this Board. The Carrier moves that the claim be dismissed by reason of the variance, supported by the well established principles under which the Board has operated and the long line of awards which have upheld those principles. The orderly process of dispute settlement requires that only the claim which was denied on the property by the Carrier's highest appeal officer may be presented to and considered by this Board.

The Organization argues that the original claim is the same as the one referred here. It is contended that, while the seniority dates claimed differ, the Organization sought only to establish for each Claimant a date as a relief foreman. The specific dates claimed are considered immaterial and thus the variance is not a significant procedural deficiency and does not bar the Board's consideration of the substantive issue presented.

Throughout the steps of appeal on the property, the Organization predicated its claim on letters written to each of the Claimants by Mr. J. T. Flake, Division Engineer, notifying them of their "selection" as a Relief Foreman and/or a Track Foreman and assigning each a seniority date. For Claimant Fremmen this was indicated to be November 1, 1968 and for Claimant Letner, March 24, 1969. However, the predicate of the claim before us now is that the Carrier should assign dates on a seniority roster pursuant to Article 3, Rule 1 which reads in part, "Seniority begins at the time employee's pay starts in the respective branch or class of service in which employed, transferred or promoted and when regularly assigned."

Accordingly, the Organization now requests a date of March 3, 1969 for Fremmen and a date of June 26, 1969 for Letner based upon the dates of their alleged first performance of the work of relief foreman. Not only are the dates quite different from those originally claimed, but are grounded on a wholly different postulate, one advanced on the property and the second presented to this Board for the first time.

We cannot agree with the Organization that the dates claimed are "immaterial" to our consideration of the case. The differences are the result of a shift in position and a new showing of evidence by the Organization in its handling of the dispute. The significance lies in this shift and the supporting evidence brought forward to establish the dates requested and not the dates themselves.

In its ex parte submission to the Board the Organization introduced Exhibits A and B, Carrier Forms 1846, "Advice of Employees Entering and

Leaving Service and Change in Positions," which show Fremmen as having been assigned as relief foreman on March 3, 1969 and Letner being so assigned on June 26, 1969. The Carrier objects to this evidence as being untimely, since it had not been produced on the property and had not served as the basis for the claim at that time. It is also contended that it is worthless as evidence since only the Carrier is in possession of the complete work record of the Claimants. It was further stated that the dates shown on these forms "were not (the dates of) the first service performed by either claimant following his selection to train as a Foreman * * *."

We concur with the argument of the Carrier and the support to be found in the record that the Statement of Claim presented to this Board is substantially different from the claim handled on the property. Accordingly we cannot resolve the dispute. Awards 13235, 14258, 15384, 18445, among others, have so held.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 we may not consider the claim.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1971.