

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**THIRD DIVISION**

Benjamin C. Hilliard, Referee

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**  
**FLORIDA EAST COAST RAILWAY**

**STATEMENT OF CLAIM:** "Claim of E. W. Smith, Assistant B&B Foreman, that he be paid the difference between the rate received as Assistant Bridge Tender and that which he would have received as B&B Foreman for the days that T. C. Bright, a junior assistant B&B foreman, was serving as relief B&B foreman on Bridge Gang No. 3, during the absence of the regular foreman."

**EMPLOYEES' STATEMENT OF FACTS:** "Bridge Foreman C. W. McEwen was granted approximately 45 days leave of absence beginning May 16, 1939.

"Assistant Bridge Foreman E. W. Smith holds seniority rights as such from March 9, 1926. Assistant Bridge Foreman T. C. Bright holds seniority rights as such from August 12, 1937. T. C. Bright, the junior assistant bridge foreman was assigned to the temporary vacancy as bridge foreman, caused by Foreman C. W. McEwen being granted 45 days leave of absence.

"An agreement bearing date of April 12th, 1932, is in effect between the parties, which, by reference, is made a part of this Statement of Facts."

**POSITION OF EMPLOYEES:** "When Bridge Foreman C. W. McEwen was granted 45 days leave of absence, effective May 16, 1939, a temporary vacancy for the position of bridge foreman arose. Schedule Rules 11 (b) and 12 (a) governs in the assignment of an employee to fill such temporary vacancy. Those two rules read:

'Rule 11. (b) Positions or vacancies expected to last less than sixty (60) consecutive working days may be filled without bulletining, but if continued for a longer period they shall be bulletined as permanent positions as soon as that fact is ascertained.'

'Rule 12. (a) Assignments to fill new positions or vacancies shall be based upon ability and merit. If the foregoing qualifications are equal, seniority shall prevail. In all cases, the Management to be the judge, subject to appeal, in accordance with Paragraph (b) of Rule 18.'

"As will be observed, Schedule Rule 12 (a), which is the principal governing rule in this case, reads in part:

'Assignments to fill new positions or vacancies shall be based upon ability and merit. If the foregoing qualifications are equal, seniority shall prevail.'

National Railroad Adjustment Board, in Docket MW-694, Award 719. The following is quoted from the Opinion of Board in that award:

'As indicated by the file note, this letter must have been the result of some understanding between the petitioner and the carrier. The last paragraph of the letter, however, in so far as it can operate as an agreement is extremely vague in its provisions. At most, it would seem, this paragraph merely imposes upon the carrier the duty to do what it can to see that all demoted section foremen shall receive consideration when relief service is being allocated. This letter, as previously pointed out, recognizes that the practice in the past has not been invariably to assign relief service to demoted foremen in the order of their seniority. Moreover the phraseology and the tenor of this letter indicates that the carrier is interested in providing additional income for demoted foremen, and not in making it possible for them to preserve their seniority. But more important than all, the letter relates to the complaints of "cut off Foremen and Assistant Foremen who are working in the ranks of laborers." Again it is recalled that the claimant at the time this controversy arose was not in the service of the carrier as a laborer.'

"In the instant case, E. W. Smith was holding a regular assignment as an Assistant Bridge Tender, at Stuart, and T. C. Bright was a Carpenter in Carpenter Gang No. 1. Each man held rights as Assistant Foreman in the Bridge and Building Department, and E. W. Smith was the senior; however, T. C. Bright was most conveniently available to fill the vacancy created by the absence of Foreman McEwen, and could be used for that purpose without disturbing the regularly assigned forces.

"3. When this claim was discussed in conference between the General Chairman of the Brotherhood and the General Superintendent of the Carrier, on August 1, 1939, the General Chairman frankly agreed that the unadvertised vacancy created by the leave given Foreman McEwen was filled in accordance with customary practice, and also agreed that there was no provision in the agreement requiring the filling of such vacancies in seniority order. This fact was confirmed by the General Superintendent's letter to the General Chairman dated August 1, 1939, Carrier's Exhibit 'N,' and that letter also made mention of the fact that the discussion at the conference developed that E. W. Smith was not the senior man, if it had been necessary to consider employees in seniority order for the vacancy. There were two men senior to E. W. Smith who would have been given consideration ahead of him if the rules of the agreement had required the filling of this vacancy on a seniority basis, and this fact further demonstrates the inconsistency of the contention of the General Chairman in presenting this claim.

"4. It is the position of the Carrier that the claim of the Brotherhood is not valid under the rules of the agreement, and should be denied. The Brotherhood is apparently seeking through an award of the Third Division an interpretation of the rules of the agreement that would have the effect of establishing a new rule for the filling of temporary vacancies that should properly be acquired through the usual channels of negotiation."

**OPINION OF BOARD:** Claimant, not said to lack necessary qualifications therefor, and possessing admitted seniority rights, was deferred to a junior employe in a preferred position. His demand that the carrier pay him the difference between what he received and what he would have realized from the better paying position, was denied.

It appears that the foreman of Bridge Gang No. 3, was granted leave of absence for thirty days, which was subsequently extended fifteen days, or forty-five days in all. For the period of such leave, the carrier assigned one Bright, a carpenter in Carpenter Gang No. 1, and junior to claimant, as is agreed, to the temporary vacancy as bridge foreman. In the course of the leave, claimant sought permission to displace Bright, and made claim for the

difference between the earnings of his then assigned position and the amount earned by the occupant of the vacancy assignment. The carrier declined to comply with either demand.

Claimant, resting on his unchallenged ability, merit, and seniority, cites rule 12 (a) of the agreement, which, so far as applicable, reads: "Assignments to fill new positions or vacancies shall be based upon ability and merit. If the foregoing qualifications are equal, seniority shall prevail. \* \* \*." The carrier, calling attention to rule 11 (b), and taking the position that since the "vacancy" here, to quote from the rule, was "expected to last," and did last, "less than sixty (60) consecutive working days," it could "be filled without bulletining," hence, in making assignment to that vacancy, as argued, the carrier was not required to give heed to claimant's seniority rights.

We are not disposed to the view of the carrier. Simply because of specific language in a rule a brief vacancy may "be filled without bulletining," it does not follow that such a vacancy, or any vacancy, regardless of duration, may be filled in disregard of the seniority rule. Seniority is of vital importance to railroad employees, and to carriers, too, as we venture to think; and its recognition by all concerned should be encouraged, and, if necessary, required at the hands of those exercising administrative functions for carriers. See Awards 132 and 495; also, decision 4079, United States Railroad Labor Board. Let the claim be sustained.

Importance does not attach, as we think, to the fact that two other employees were senior to claimant; they did not make claim for the position.

**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; and

That the carrier violated the agreement in not filling the position in accord with the rules.

#### AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 26th day of April, 1940.