

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Benjamin C. Hilliard, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILROAD SIGNALMEN
OF AMERICA**

**NEW YORK, NEW HAVEN & HARTFORD RAILROAD
COMPANY**

(Howard S. Palmer, James Lee Loomis, and Henry B. Sawyer, Trustees.)

STATEMENT OF CLAIM: "Claim that T. E. Gilbert be paid the difference between the rate received as signal helper and the rate of signalman from March 27, 1939, for a period of approximately four weeks, Sundays excluded, as indicated by payroll."

JOINT STATEMENT OF FACTS: "T. E. Gilbert who held seniority rights in the signalman's class was working as signal helper through the exercise of his seniority in connection with force reduction. Signalman Welch, in signal maintenance gang was absent from work during the period specified in the statement of claim. Prior to the temporary vacancy created by Mr. Welch's absence from duty Mr. Gilbert made request through the proper officer of the company that he be assigned to fill position of signalman temporarily vacated by Welch, however, the management refused to grant Gilbert's request and assigned E. C. Thornhill, who like Gilbert held seniority rights in the signalman's class, was working in the helper's class as result of force reduction, but Gilbert was senior to Thornhill in the signalman's class."

There is in existence an agreement between the parties bearing effective date of February 1, 1923.

POSITION OF EMPLOYES: "It is the position of the Brotherhood that Sections 1 and 2 of Article 4, and other rules of the current agreement between The New York, New Haven & Hartford Railroad Company and the Brotherhood of Railroad Signalmen of America, sustains the claim of T. E. Gilbert in this case.

"Sections 1 and 2 of Article 4 read as follows:

'Section 1.—Basis of Promotion: Promotion shall be based on ability, fitness, merit and seniority. Ability, fitness and merit being equal and sufficient, seniority shall prevail; the management to be the judge.'

'Section 2.—Vacancies and new positions: In transferring employees to fill vacancies or new positions, the provisions of Section 1 of this article will apply.'

"It must be further observed that demoted signalmen would have no preferential rights to a vacancy. If a procedure were to be followed as requested by the committee which would amount, in effect, to the assignment of a senior applicant who happened to have knowledge of a vacancy in a higher grade for a period of less than 30 days, it would not be proper that such right be restricted to a demoted man who had such knowledge but rather it would be only proper, if such premise were correct, that such privilege be extended to any rostered signalman or signal maintainer on the roster district involved who had such knowledge as it might well be that a position in place of the absent man were more preferential from the standpoint of hours, location or any other reason which the man, himself, might conceive. If this thought were carried to its logical conclusion, it would mean that in order to place all rostered maintainers or signalmen on a similar footing, that they should all be notified. The Committee, in their claim, make no distinction as to whether the position was vacant for one day or 29 days and again, if this theory were carried to its logical conclusion, the result would be nothing more than a different means of advertising temporary vacancies of less than 30 days and which the Agreement, Article 4, Section 6, specifically provides need not be done.

"In a previous case occurring on this property, known as the Coffey case, Railroad Docket 2621, it was agreed 'that should a senior man in a higher grade who had been demoted to a lower grade, allow a junior man to take a job in the higher grade, as future vacancies developed in the higher grade, the junior man, while still employed therein, is entitled to preferential rights for such jobs over the senior man who has been demoted and is working in the lower grade and that such senior man can get back into the higher grade only after all of the men working therein, whether junior or senior to him, have exercised their preference.' It will be observed from this understanding how unfair the contention as made in the Gilbert case could work out. If Gilbert, a junior demoted man, having knowledge of a vacancy of less than 30 days in the higher grade in his immediate vicinity had arbitrary rights to such position on request he would, according to the committee's contention in the previous case, acquire preferential rights for other work in the higher grade that developed while he was employed therein over men senior to him who had also been demoted but who were located at the same point on the seniority district or elsewhere who had no knowledge that a signalman's or signal maintainer's position was vacant for not to exceed 30 days or if they had such knowledge, did not care to make a change from their regular position for such a short period. The Carrier holds that it was perfectly within its rights in assigning any available demoted man to the temporary work of less than 30 days in place of Welch while he was absent on jury duty."

OPINION OF BOARD: In behalf of claimant, of conceded qualifications, and with seniority rights above those of an employee who was preferred to a temporary vacancy in a position of greater rank than that enjoyed by either at the time, complaint is made. The facts, set forth in a joint submission, as well as the rules invoked by the parties, appear in the record, and are recited in the matter preceding this "opinion."

We think the question here is not distinguishable from those determined in Awards 132, 495 and 1058. The sum of the controlling doctrine, as we perceive it, is that while the carrier is not required to "bulletin" temporary vacancies, still it may not disregard rules of seniority in filling such a vacancy.

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 which has been invoked in this presentation.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of June, 1940.

DISSENT TO AWARD NO. 1114, DOCKET NO. SG-1135

The error of this Award lies in its ascription of absolute requirement of adherence to rules of seniority in filling a temporary vacancy notwithstanding the presence of other rules dealing with vacancies and temporary vacancies which provide in one place (Article IV, Section 6) that the latter need not be bulletined until the expiration of thirty days and in another (Article IV, Section 7) that they may be filled temporarily pending permanent appointment. The Opinion frankly and singly states the question not to be distinguishable from those determined in Awards 132, 495 and 1058 and goes directly to a conclusion that seniority rules may not be disregarded in filling such a vacancy.

Distinguishment between cases as an element for determination of proper decision cannot be limited to the single item of the question raised. Concededly in each of the awards named and in the instant case the question was the propriety of filling a temporary vacancy by use of an employe not the senior employe. But equally important as the question are the facts in each case and the rules of the respective agreements involved; distinguishment, if it be worthy, needs to consider these.

Particularly, as to the rules involved, did Award No. 132 cite a rule providing for exercise of seniority (Article III, Section 3, of the agreement there involved) "only when vacancies occur or new positions are created" as being the rule which could not be limited by the provisions relating to filling of temporary vacancies, as did Award No. 495 state that there was applied in that decision the reduction-in-force rule (Rule 43), which provided for recall of employes "to service in the order of their seniority" and specified the method to be followed "when filling temporary positions." Those rules in those two awards were in the agreements there involved in addition to the equivalent of the promotion and the vacancy-and-new-position rules (Article IV, Sections 1 and 2) here only relied upon by the petitioners. No such or similar additional rules as the ones stated by Awards 132 and 495 to there apply appear in the agreement involved in the instant case. Lacking those or similar additional rules, it is unsound to attribute the force of those preceding awards as a controlling factor in a decision in the instant case as is done by the Opinion in this Award.

It is respectfully submitted that complete distinguishment assential to sound, wise and correct interpretation of the contract between the parties applicable to the practical circumstances which the few simple rules in the agreement here involved were intended to cover, would have detected and given due weight to the more extended rules definitely identified by the awards which apparently were the genesis of the instant award.

The plain and evident situation, in respect to the agreement here before us is that the preference to position accruing to seniority in service by the two rules cited in the Position of Employees (Article IV, Sections 1 and 2) was not intended to be absolute as the Opinion of Board here implies, for if it were the provision for filling temporary vacancies pending permanent appointment (Article IV, Section 7) would be a vain and useless inclusion. The fact is that the declaration by the Opinion to that effect is a contradiction not only of this provision of Article IV, Section 7, but of the many factual situations relating to brief temporary vacancies where unavailability of senior employees makes the absolutism of that pronouncement an anachronism.

The lead to that declaration is openly expressed in the Opinion by its nondistinguishment from the question in the previous awards there cited. The failure to consider the difference in facts and the rules applying to the question in the respective cases represents an incomplete distinguishment and in consequence an award which is in error.

S/ R. F. RAY
S/ C. P. DUGAN
S/ A. H. JONES
S/ R. H. ALLISON
S/ C. C. COOK