

**NATIONAL RAILROAD ADJUSTMENT BOARD.**

**THIRD DIVISION**

Thomas C. Begley, Referee

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
THE DELAWARE AND HUDSON RAILROAD CORPORATION**

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

(1) That the Carrier violated the provisions of the effective agreement when it did not permit Assistant Foreman James Bowen to work as an Extra Gang Foreman during the period July 5 to July 11, 1949, both dates inclusive;

(2) That Assistant Foreman James Bowen be allowed the difference in pay between what he did receive at the Assistant Foreman's rate and what he would have received at the Extra Gang Foreman's rate had he been permitted to work as an Extra Gang Foreman during the period July 5, to July 11, 1949, both dates inclusive.

**EMPLOYEES' STATEMENT OF FACTS:** Extra Gang Foreman Seymour Delello was absent from his regular assigned duties with Extra Gang D-35, during the period July 5 to July 11, 1949, both dates inclusive.

Assistant Foreman James Bowen who was regularly assigned to Extra Gang No. D-35 was not permitted to assume the duties temporarily vacated by Extra Gang Foreman Delello, but the Section Foreman who was regularly assigned to Section D-4 by bulletin assignment was required to suspend service from his regularly assigned position and to assume the duties of Extra Gang Foreman on Extra Gang D-35.

It has been customary on this particular property to assign the Assistant Foreman of a specific gang to fill any temporary vacancies of short duration in the position of Foreman in the same gang.

The agreement between the two parties to this dispute dated November 15, 1943 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

**POSITION OF EMPLOYEES:** Rule 27(a) and (b) of the effective agreement reads as follows:

**"ADVERTISING AND ASSIGNING POSITIONS**

Rule 27. (a) New positions and permanent vacancies will be bulletined permanently any time within ten (10) days after they

The last paragraph of Rule 27 (a) pertaining to filling of temporary vacancies reads as follows:

"Temporary vacancies of thirty (30) days or less duration need not be bulletined. The filling of any vacancies or new positions pending bulletin will be governed by Rule 2."

Rule 27 (b) reads, in parts, as follows:

"If the vacancy is filled before it is bid in and permanently assigned, the senior qualified employe in the gang of the same or lower rank may be assigned to it until it is permanently assigned. \* \* \*"

The right of employes to positions is covered by Rule 2 which reads as follows:

"Rights of employes to positions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail."

Particular attention is directed to that part of Rule 27 (a), quoted on Page 2, which provides that "the filling of any vacancies or new positions pending bulletin will be governed by Rule 2". Assistant Foreman James Bowen was not qualified to cover the position of extra gang foreman.

In this connection we attach statement of Roadmaster William H. Koch marked Exhibit "A" and statement of Extra Gang Foreman Seymour Delello marked Exhibit "B". Extra Gang Foreman Seymour Delello was the regular foreman of Extra Gang No. 35.

It will be noted that Rule 27 (b) provides that the senior qualified employe in the gang "may be assigned". Under this rule the assignment of senior qualified employe in the gang is permissive but not mandatory.

Carrier requests that claim be denied.

Management affirmatively states that all matters referred to herein have been discussed with the Committee and made part of the particular question in dispute.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The claim herein is that Carrier violated the provisions of the effective Agreement when it did not permit Assistant Foreman James Bowen to work as an Extra Gang Foreman during the period July 5 to July 11, 1949, during a vacation period of the regular Extra Gang Foreman, and be compensated the difference in pay of what he did receive at the Assistant Foreman's rate and what he would have received at the Extra Gang Foreman's rate during the period in question.

The Employes rely upon Rule 27 (a) and (b) of the effective Agreement, which reads as follows:

"Rule 27. (a) New positions and permanent vacancies will be bulletined permanently any time within ten (10) days after they are created or occur for a period of ten (10) days. Temporary vacancies in established positions will be bulletined any time within ten (10) days after vacancy occurs for a period of ten (10) days.

"Bulletin showing location of position, rate of pay, assigned hours and reason for temporary vacancies will be posted at head-

quarters of employes entitled to consideration. Appointments will be made within ten (10) days after close of advertising period.

**"Temporary vacancies of thirty (30) days or less duration need not be bulletined. The filling of any vacancies or new positions pending bulletin will be governed by Rule 2. (Emphasis added.)"**

**"(b) If the vacancy is filled before it is bid in and permanently assigned, the senior qualified employe in the gang of the same or lower rank may be assigned to it until it is permanently assigned. Vacancies caused by such assignment may be filled by senior qualified employes in the same gang taken from the same or lower ranks. A senior qualified employe who has been furloughed from the same gang may be called back to the service to fill vacancy in the lowest rank which is created by these transfers."**

The Employes contend that under this rule temporary vacancies of thirty (30) days or less duration, need not be bulletined and that the job should have been filled in accordance with the above rule and by the Assistant Foreman.

The Employes state that Claimant was assigned to the Extra Gang and willing to act as Foreman; that he entered service June 13, 1927 and was promoted to Assistant Foreman in June, 1942; was used as Extra Gang Foreman in December, 1948, with no complaint from the Carrier.

The Carrier contends that the Claimant did not have sufficient ability and merit to take full charge of the Extra Gang No. 35 during the week July 5 to 11, 1949, while the gang was removing 90 lb. turnout and replacing with 112 lb. turnout switches at Binghamton, New York. The Carrier cites Rule 2, which reads as follows:

**"Rule 2. Rights of employes to positions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail." (Emphasis added.)**

This position of Extra Gang Foreman was filled by the Carrier when it used the Section Foreman; therefore, the Vacation Agreement effective January 1, 1942 has no bearing on the claim.

The question to be decided herein is whether or not the Claimant had sufficient ability and merit to take full charge of Extra Gang No. 35. This question is one for the Carrier to decide. The Carrier is given the right under Rule 2 and the last paragraph of 27(a) which refers to Rule 2.

The Employes have failed to prove that the Claimant had the "ability and merit" to perform the job involved or that the Carrier acted in a biased or prejudicial manner in denying the job to the Claimant under Rules 2 and 27(a). Award 4040, 5966. Therefore this claim must be denied.

**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 there has been no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon  
Secretary

Dated at Chicago, Illinois, this 26th day of January, 1953.