

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Benjamin C. Hilliard, Referee

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**TEXAS AND PACIFIC RAILWAY**

**STATEMENT OF CLAIM:** "Claim of A. C. Scarborough, Section foreman, Iatan, Texas, the senior foreman filing bid in response to bulletin issued in January 1939, in conformity with Article 7, Section (a) of the current agreement, for position of section foreman at Millsap, Texas; that the Carrier violated Article 2, Section (a) of the current agreement by not recognizing his seniority rights as a foreman, but assigned a junior employe, and that in conformity with Article 2, Section (a) of the current agreement, he shall be assigned as section foreman at Millsap, Texas."

**EMPLOYES' STATEMENT OF FACTS:** "In January 1939, a bulletin was posted advertising for bids for the position of section foreman at Millsap, Texas. A. C. Scarborough, Section Foreman at Iatan, Texas, was the senior section foreman bidding for the position at Millsap, advertised by said bulletin. A section foreman junior to Scarborough was assigned to Millsap."

**POSITION OF EMPLOYES:** "Article 11, Section (a), of agreement between the Texas and Pacific Railway and the Brotherhood of Maintenance of Way Employes reads:

'Section (a). Seniority or length of unbroken service shall be the basis for determining the rights of employes to consideration for various positions. This, however, to be subject to such exceptions and considerations as may be hereinafter noted.'

That rule is self-explanatory and provides that seniority rights shall be the basis for determining the rights of employes to consideration for various positions. That, of course, means that the senior employe in any given rank shall be given first consideration for the filling of any vacancy that he may desire within his rank. A. C. Scarborough was working in the rank of section foreman. He had been promoted to and qualified in that rank years ago. A vacancy occurred within his rank. It was bulletined in compliance with the agreement. For reasons best known to himself, A. C. Scarborough desired assignment to the section at Millsap which was bulletined. He was the senior section foreman bidding for that position. Accordingly, in compliance with the schedule rules he was and is entitled to assignment to that position. We maintain that A. C. Scarborough is entitled to assignment to the position as section foreman at Millsap and that he should be immediately assigned to that section—and we respectfully request that this Board so direct."

signed of April 24th; also his letter of July 20th, in which complaint was that Section Foreman Scarborough of Iatan bid on the Millsap Section some time in January this year, and you say he was the senior bidder and that he was denied the right to take the job.

You were accompanied at conference by Assistant General Chairman Winchell and the carrier was represented by the undersigned and Mr. Gaines.

The reason for not placing Scarborough on the Millsap Section was given to Assistant General Chairman Winchell in Superintendent Pistole's letter of February 18th, and you were told in conference by Mr. Gaines that the Millsap Section is much harder to keep up than is the Iatan Section, and that he felt it would not have been safe to place Scarborough on the Millsap Section, and this is to advise that it will not now be agreeable to comply with your request.

Yours truly,

(Sgd) W. H. TOBIN,  
Assistant General Manager.

WHT-1.

cc-Mr. R. H. Gaines—MW-1151,  
Mr. A. E. Pistole—PR-670.'

"President F. H. Fljozdal, of the Brotherhood of Maintenance of Way Employes, in his letter to Secretary Johnson, Third Division, October 3rd, makes the following statement:

'The Carrier has declined to join with us in Joint Submission.'

"Attached marked 'Exhibit A' is letter of General Chairman Hudson to Assistant General Manager Tobin, dated September 21, 1939, and Assistant General Manager Tobin's reply dated September 25th .

"The exchange of letters contained in 'Exhibit A' we think explains the reason why we did not agree on joint statement of facts."

**OPINION OF BOARD:** Briefly, it appears that claimant is currently serving, and for several years has served, the carrier as a section foreman in the seniority district within which Millsap, Texas, is located; that in January 1939, the carrier posted a bulletin advertising for bids for the position of section foreman at Millsap; that of those submitting bids for the preferment, claimant was senior section foreman in service; that notwithstanding claimant's seniority the Millsap position was withheld from him and given to a section foreman junior in service. The carrier explains that claimant "was not considered competent to take care of Millsap Section."

Claimant invokes article 2, section (a), of the agreement, which reads: "Seniority or length of unbroken service shall be the basis for determining the rights of employes to consideration for various positions. This, however, to be subject to such exceptions and considerations as may be hereinafter noted." Our study reveals no exceptions which may be said to affect section foremen, nor does the carrier contend so. Its reliance, differently predicated, is based on article 6, section (a), reading: "Promotions shall be based on ability, merit, capacity for increased responsibilities, and seniority. Ability and merit being considered satisfactory, seniority shall prevail. In making these selections, the Management shall be the judge, subject to appeal to the Engineer Maintenance of Way, whose decision shall be final."

We do not regard the question here as one involving promotion, and hence the provision emphasized by the carrier is without application. Neither a new position of any character, nor one above that of section foreman, a rank already obtaining, was to be filled. The vacancy of which the bulletin gave notice was of an existing foremanship within the territorial

district of claimant's seniority rights. It does not lie with the carrier, as we think, to announce out of hand, as attempted here, that one of its section foremen shall not enjoy seniority rights vouchsafed by the rules to all its section foremen. In its efforts to render satisfactory service to the public, a carrier, the circumstances warranting, may dismiss, suspend, reprimand, or otherwise discipline any employe; but it does not follow that it may abrogate his seniority rights, or make futile his desire to exercise seniority.

We have examined many Awards, and particularly those cited by the carrier, but none presents a comparable fact situation. In the interest of any who may wish to study the question at greater length, we mention that the Awards cited are Nos. 96, 98, 110, 396, 489, 592, 632, and 772.

**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 employe involved in this dispute are respectively carrier and employe 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 claimant is entitled to be assigned as section foreman at Millsap, Texas.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1940.