

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY

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

(a) that in conformity with and on the basis of Rule 8 of current agreement and the Carrier's interpretation of Paragraph (g) thereof, Mr. James McKown, Kansas City Division, being the senior laborer who submitted bid for position as section foreman on Section No. 25, Excelsior Springs, Missouri, advertised by Bulletin No. 19, August 3, 1942, should have been assigned to that position.

(b) that James McKown be accorded seniority rights as section foreman from August 3, 1942;

(c) that James McKown be paid the difference between what he earned as section laborer and that which he would have earned as section foreman from August 17th to September 7th, 1942, inclusive.

JOINT STATEMENT OF FACTS: Section Foreman O. Britton, who was regularly assigned to position of Section Foreman, Section No. 25, Excelsior Springs, Missouri, layed off indefinitely. On August 3, 1942, this position was bulletined as a temporary vacancy, to employes in the Track Department in that seniority district. There were no applications received from Section Foremen. The two senior applicants were:

Name	Seniority Date as Section Foreman	Seniority Date as Assistant Foreman	Seniority Date as Section Laborer
P. J. Mullins	None	December 16, 1934	February 9, 1932
James McKown	None	None	March 1, 1920

Mr. Mullins was assigned to the temporary vacancy and performed service thereon from August 17, 1942, to September 7, 1942, inclusive, when the regular occupant of the position returned to service.

The agreement in effect between the Carrier and the Brotherhood is by inference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: The dispute in connection with this claim arose over the application of Schedule Rule 8, particularly the first part of paragraph (g) thereof reading:

"Employes declining promotion shall not lose their rights except to the employe promoted and only in the next higher rank of service."

Schedule Rule 8 (g) employees declining promotion shall not lose their rights except to the employee promoted and only in the next higher rank of service. To illustrate, assume a section foreman's vacancy was bulletined and no applications were received from employees with a date as section foreman. Among the section laborers making application was one who had been promoted to an assistant foreman; in assigning one of the applicants to the section foreman's vacancy no consideration was given to seniority date as an assistant foreman but the assignment was made on the basis of the senior qualified section laborer, disregarding the assistant foreman's date that any or all the section laborers may have established.

The instructions did not provide that this interpretation would be retroactive.

The assignment of P. J. Mullins to the Section Foreman's vacancy at Excelsior Springs was in accordance with the practice on the Kansas City Division and it is the position of the Carrier that where an interpretation was rendered October 25, 1943 it would have no effect on anything that had happened before then.

General Chairman James was notified as to this interpretation under date of October 26, 1943.

It is the position of the Carrier that while there was no uniform practice on the railroad the practice on each division should govern insofar as that division is concerned until such time as a uniform interpretation was put into effect, therefore, there is absolutely no merit in this claim and the same should be declined.

OPINION OF BOARD: The facts here are not in dispute. A regularly assigned section foreman layed off indefinitely. His position was bulletined as a temporary vacancy pursuant to provisions of Rule 8 (a) and (b) of the Maintenance of Way Schedule. It was filled by appointment of one who had far less seniority rights as a section laborer than the claimant, notwithstanding no issue was raised with respect to the qualification of the latter. The Carrier concedes the assignment was based on a construction provisions of the schedule require recognition of an Assistant Track Foreman who has seniority rights in that capacity regardless of superior existing seniority rights of other section laborers who had bid for the position.

The parties agree that the dispute arises over the application of that portion of current schedule Rule 8 (g), which reads:

"Employees declining promotion shall not lose their rights except to the employee promoted and only in the next higher rank of service."

The Claimant strenuously urges a subsequent interpretation, in line with his position and now current, placed on the rule by the Carrier to the effect that in filling a temporary vacancy of section foreman the senior qualified laborer making application will be assigned even though some junior laborer also making application may have a date as an Assistant Foreman, should be considered as supporting his contention. Just as strenuously the Carrier argues that consideration should be given the fact that after assignment of the position the General Chairman of the Brotherhood of Maintenance of Way Employees indicated he concurred in the construction of the issue. A subsequent construction could not be retroactive while under the facts disclosed by the record the view expressed by the General Chairman did not deprive the Claimant of any merit his claim might possess. Less potent is an additional contention the general practice on each division with respect to the meaning of the rule should govern until such time as a uniform interpretation thereon was placed in effect.

The determining factor, so far as it involves Claimant's rights, is the force and effect to be given the rule as impelled by the language to be found therein at the moment of the making of the assignment which filled the vacancy. We turn to that issue.

While it is conceded the rule involved is 8 (g), we are not precluded in our deliberation from giving consideration to other rules which, while they may not be entirely determinative, are helpful in enabling us to arrive at a proper conclusion as to the meaning and intent to be found in the language of the one we are now construing.

With this in mind we direct attention to Rule 3 of the Maintenance of Way Schedule which reads:

"CONSIDERATION FOR POSITIONS

"Rights accruing to employes under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Railroad as hereinafter provided."

Also Rule 6 (a):

"Promotion shall be based on ability and seniority; ability being sufficient, seniority shall prevail, the Management to be the judge, subject to appeal."

Although it may well be said that the intent and purpose of Rule 8 (g) standing alone leaves room for some argument on the issue here involved, we believe that construed with the rules just quoted there can be but one interpretation placed upon it, and that is, that in the event of a section foreman's vacancy duly bulletined and on which no applications from foremen are received, the senior qualified applicant must be assigned, even though some junior laborer having a date as an Assistant Foreman is also an applicant for such position. Any other construction would result in a nullification of the force and effect which must be given to Rules 3 and 6 (a).

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 in failing to accept the bid of McKown for position of Section Foreman the carrier violated current Maintenance of Way Schedule Rule 8 (g).

AWARD

Claim (a), (b) and (c) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of July, 1944.