

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO GREAT WESTERN RAILWAY COMPANY**

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

(1) The Carrier violated the effective agreement when they failed to assign the senior unassigned Bridge and Building Foreman Mr. M. R. Leiberg, to fill the position of Bridge and Building Foreman on the M. C. & F. D. District, during the period May 14th through May 25th, 1951 and in lieu thereof, assigned the duties to a junior employe;

(2) Mr. M. R. Leibers be paid the difference between the amount received at the Bridge and Building Carpenter's rate and what he should have received at the Bridge and Building Foreman's rate for the period referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Charles Bourne, regular Bridge and Building Foreman on the System Bridge and Building crew was absent from his assigned duties May 14 to May 25, 1951, both dates inclusive, while on his annual vacation.

The Carrier assigned Mr. Wallace Law as Acting Foreman during Foreman Bourne's absence. Mr. Law held seniority as a Bridge and Building Foreman as of April 7, 1947, but at the time was working in a lower classification account of a reduction in the number of Bridge and Building crews on the property.

Mr. M. R. Leibers, who was similarly employed in a lower classification because of a reduction in the number of Bridge and Building crews, held seniority as a Bridge and Building Foreman as of September 1, 1940.

The Carrier did not offer Mr. Leibers the opportunity to perform temporary service as a Bridge and Building Foreman in consideration of his accrued seniority, and deprived him of the opportunity of increasing his earnings and of filling a more desirable position than he was then currently holding.

Claim was filed in behalf of Mr. Leibers for the difference between what he earned and what he would have earned had he been properly assigned to relieve the vacationing foreman.

Vacation Agreement of December 17, 1941. There has been no subsequent change in the original agreement which conferred to Claimant any right to vacation relief work in the **System Bridge Gang**, and as indicated above, the original agreement "does not modify or in any manner affect the schedule rules or agreements except as specifically provided herein."

It is the Carrier's contention and evidence is conclusive that under terms of the controlling agreement (Memorandum of Agreement dated August 7, 1940, quoted in Carrier's Statement of Facts) Claimant had no right to the service on which this claim is premised. Furthermore, Claimant was not denied any alleged right by the Carrier, because he made no request that his services be utilized on the vacation relief work in dispute, and no protest or claim was made by either Claimant or Organization for some six months thereafter.

Carrier requests that claim be denied for obvious lack of merit.

OPINION OF BOARD: The Organization is making claim on behalf of M. R. Leibers, holding seniority as of September 1, 1940, as B&B Foreman on the M.C.&F.D. District, for Carrier's failure to assign said employee as vacation relief Foreman on the System Bridge Gang, at which time he was working as Carpenter on the M.C.&F.D. District. The Organization requests that Claimant be paid for the period May 14th through May 25, 1951, at Foreman's rate on the System Bridge Gang, which position they contend was assigned to a junior employee. Claim is made that Carrier violated the Agreement by its failure to assign Claimant to the position, all in violation of Rule 3—Consideration:

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

and further alleges a violation of Rule 9 (c)—Bulletin Notice:

"New positions or vacancies of thirty (30) days or less duration shall be considered temporary and may be filled without bulletining except that senior qualified employees in the seniority rank and group will be given preferred consideration."

Carrier denies it violated the Agreement as alleged, and relies on the provisions of the Memorandum Agreement, effective August 7, 1940, as sustaining its position in denying claim.

The record clearly shows Claimant held seniority as a furloughed Foreman, and was regularly assigned as Carpenter, on the M.C.&F.D. District, both positions being held in the said District as alleged. At the time the claim before us arose, Claimant was holding the Carpenter's position.

There is no dispute between the parties that he held seniority as above stated. But the Organization contends Carrier failed to assign the position of B&B Foreman, to the Claimant, when the regularly assigned Foreman on System B&B Gang, went on vacation, and Claimant holding seniority as a furloughed Foreman on the M.C.&F.D. District, was not given the assignment. The rules cited by the Organization are clear and Carrier concedes Claimant held seniority on the M.C.&F.D. District as above stated, but Carrier contends the Memorandum Agreement of August 7, 1940 controls the situation before us. The Memorandum of Agreement provides for the organization of an additional bridge gang, with the privilege of operating on any part of the System. The Memorandum specifically prescribes the methods by which employees may be assigned to the System Bridge Gang, as follows:

1. By bulletin to all B&B employees on the system, and their seniority will accrue to employees selected for this gang, on their respective Districts.

2. In case of force reduction on any B&B Gangs, on the system, furloughed employes will have the right to exercise their seniority over junior employes, . . .

By the provisions of the Memorandum Agreement, and it is not denied by the Organization, Claimant did not at the time the System Bridge Gang was organized, exercise his seniority, as provided, and become a member of such System Gang. Nor is there evidence in the record, that because of force reduction, Claimant exercised his seniority rights to take position as Foreman on the B&B System Gang. We are of the opinion, and hold, that Claimant held no seniority rights in the System B&B Gang, as provided by the provisions of the Memorandum Agreement of August 7, 1940. He had not exercised his rights as provided by the Memorandum Agreement, and therefore Carrier did not violate the Agreement as alleged. Claimant held seniority in the M.C.&F.D. District, as provided by Rule 5 (a) of the Agreement. As to violations by Carrier of Rules 3 and 9 (c), we hold the claim is without merit, since the Memorandum Agreement of August 7, 1940, was subsequent to the Agreement, and specifically provides the method by which Claimant could have availed himself to obtain a position on the System B&B Gang, but failed to do. Therefore the first portion of the claim is without merit and should be denied.

As to that portion of the claim designated as (2), the Board is of the opinion there is nothing in the record to indicate to this Board the employe would have earned more money or would have worked more hours had he received the assignment on the System Bridge and Building crew. To the contrary the record clearly shows the employe actually earned \$2.24 more on his own assignment than he would have earned on the System Bridge Gang crew.

Therefore, the Board is of the opinion the claim is moot for the reason the Claimant actually earned more compensation over the period alleged than he would have earned had he been assigned the System Bridge Gang Foreman position. Since there being no meritorious claim existing, the claim as filed should 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 claim is without merit and should be denied.

AWARD

Claim denied in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 2nd day of October, 1953.