

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**MISSOURI PACIFIC RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it assigned an employe junior to Assistant B. & B. Foreman Shelly Lemmons to fill a B. & B. Foreman's position during the vacation absence of B. & B. Foreman C. M. Horton from August 16 to and including August 28, 1953;

(2) Assistant B. & B. Foreman Shelly Lemmons be allowed the difference between the Assistant B. & B. Foreman's rate of pay and the B. B. Foreman's pay for a number of hours equal to the number of hours for which the junior employe was paid the B. & B. Foreman's rate of pay while relieving B. & B. Foreman C. M. Horton from August 16 to and including August 28, 1953.

**EMPLOYEES' STATEMENT OF FACTS:** Bridge and Building Foreman C. M. Horton, who was regularly assigned to one of the Carrier's Division Bridge and Building gangs, was absent from his assigned duties from August 16 to and including August 28, 1953, account of vacation.

The Carrier assigned the Assistant Bridge and Building Foreman, who was regularly employed in Foreman Horton's Bridge and Building gang, to fill the position of Bridge and Building Foreman during the foreman's vacation absence.

The Claimant, Mr. Shelly Lemmons, a senior Assistant Bridge and Building Foreman, who was regularly employed in another Bridge and Building gang at another location in the same seniority district, was not offered the opportunity to perform service as a Bridge and Building Foreman in accordance with his accrued seniority and was, therefore, deprived of the opportunity of increasing his earnings and filling a more desirable position than he was currently holding.

Claim was accordingly filed in behalf of the Claimant for the difference between Foreman's rate and Assistant Foreman's rate for the period involved.

The claim was declined as well as all subsequent appeals.

**OPINION OF BOARD:** This claim presents the question whether the Carrier was obligated to apply seniority in filling a temporary vacancy, not subject to or pending bulletin, during the vacation absence of the occupant of a foreman's position.

Although the construction put upon Rule 11 by Award 2720 on this property required the use of the senior employe for this purpose, the Carrier used a junior employe because calling the senior employe would have involved meal and lodging expense by reason of the construction put upon Rule 25 by Award 6252 also on this property.

Rule 11½ makes provision for the establishment of regular assigned relief foremen positions and, in doing so, makes specific provision for board and lodging. But the Carrier has not created any such position and the claim is therefore based upon Rule 11, as construed by Award 2720 and as re-adopted without substantial change in subsequent revisions of the Agreement.

The Carrier's position is based essentially upon Article 12 of the Vacation Agreement.

The basic argument is that, by reason of Article 12 (a) and (b) of the Vacation Agreement, absences on vacation do not constitute vacancies; that, except as otherwise provided in the Agreement, a Carrier is not required to assume greater expense because of granting a vacation than pay in lieu thereof; and that since Article 12 (b) does not require strict application of seniority when, as here, no regular relief employe is utilized, a Carrier may avoid the greater expense of using the senior employe by using the junior employe.

The Carrier's exact position, however, is more specific: it is that the Carrier would have used Claimant pursuant to Rule 11 as construed by Award 2720 if Claimant had applied for the position and so disabled himself to claim meal and lodging expense under the doctrine of Award 6252 thus making his use involve no greater expense than use of the junior employe.

Awards 5192 and 5108 support the Carrier's argument, but Awards 6170, 2484 and 2340 are opposed to it; and Award 2720 is too firmly embedded in this Agreement (Award 5159) to permit a conclusion now that the initiative in filling this vacancy lay with the Claimant rather than with the Carrier.

**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 the Agreement was violated.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon  
Secretary

Dated at Chicago, Illinois this 19th day of March, 1956.

**DISSENT TO AWARD NO. 7251, DOCKET NO. MW-7085**

This award is in error because it is based upon awards involving issues unrelated to the issue involved in the instant case rather than upon awards which admittedly support the action taken by the Carrier herein.

For the above reason we dissent.

/s/ J. E. Kemp  
/s/ R. M. Butler  
/s/ W. H. Castle  
/s/ C. P. Dugan  
/s/ J. F. Mullen