

Award No. 7810  
Docket No. MW-7369

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

John Day Larkin, Referee

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**PORT TERMINAL RAILROAD ASSOCIATION**

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

1. The Carrier violated the Agreement when it arbitrarily refused to consider an application received from and to assign Mr. McCullar Smith to a position of Section Foreman on Section No. 3 as advertised in Bulletin No. 1, dated March 26, 1953, and in lieu thereof assigned a junior employee to the position in question;
2. The Carrier now be required to place Mr. McCullar Smith as Foreman on Section No. 3;
3. Mr. McCullar Smith be allowed the difference between the amount he was paid and the amount he should have been paid had he been properly awarded and assigned to the position advertised in Bulletin No. 1, dated March 26, 1953;
4. That Mr. McCullar Smith's seniority as a promoted employee be retroactively adjusted accordingly.

**EMPLOYEES' STATEMENT OF FACTS:** As of 4:30 P. M. on March 3, 1953, the position of Section Foreman on Section No. 3 at Pasadena, Texas, was permanently vacated by the regular incumbent thereof.

Under date of March 21, 1953, Division Chairman L. R. Tillery directed the Carrier's attention to their failure to bulletin the vacancy thus created in a letter reading:

"9310 Waller Street  
Houston 12, Texas  
March 21, 1953

Mr. W. H. Bogle,  
Eng. of M. of W.,  
Port Terminal Railroad Assoc.  
Houston, Texas.

Dear Sir:

I understand there has been vacancy on Section No. 3 for the position as Section Foreman since 4:30 P. M. March 3, 1953.

as the headquarters of Section No. 4 on which he was serving as assistant foreman. The Carrier would also like to say that the Employees have not presented any evidence whatever to the effect that Mr. Smith possessed the ability to perform in a satisfactory manner the type of work that was to be required of the gang under the direction of Foreman Reynolds. The Employees case is based solely on the fact that Mr. Smith was the senior section foreman.

With respect to Paragraph 4 of the Employees' claim "That Mr. McCuller Smith's seniority as a promoted employe be retroactively adjusted accordingly." The Carrier declares that Mr. Smith's seniority, as a section foreman is still in effect as of February 8, 1952, the date of his first service in that capacity, and that the Carrier has continued to use Mr. Smith as foreman for short relief periods throughout the years 1953 and 1954 with the exception of a period of approximately six months during 1954 when his use as a section foreman was discontinued due to leaving an unsafe rail in the main track over night. His original rights as a section foreman were restored on July 3, 1954 and he has since been used as relief foreman in his seniority order. Therefore, there is no adjustment required in the matter of Mr. Smith's seniority as section foreman.

The Carrier requests that the claim be denied in its entirety. To rule otherwise would have the effect of setting aside a vital portion of Rule 8, which rule has been a part of the Agreement with the Maintenance of Way Organization since April 1, 1935.

The Carrier asserts that the matters herein set forth are known to the Committee for the Employees. Copies of all correspondence between the Committee and the Carrier having to do with the instant claim are appended hereto as Carrier's Exhibit "A".

(Exhibits not reproduced.)

**OPINION OF BOARD:** On March 26, 1953, the Carrier abolished Section No. 7 and transferred the gang to Section No. 3, and made this consolidated section a "floating gang" to be used over the Terminal, wherever scheduled betterment work for the year was to be performed. The Foreman on Section 3 was due for retirement and this position was bulletined on March 26, 1953. Upon expiration of the bulletin, the Carrier assigned the position to A. F. Reynolds, who had been the foreman of abolished Section No. 7. Reynolds was displaced as foreman of Section No. 3 during April 1954, by a senior foreman who had been out of service due to disability.

The claim here is that the foreman's position on consolidated Section No. 3 should have been assigned to Mr. McCullar Smith, who was senior to Mr. Reynolds. It is not denied that claimant has greater seniority, nor that he had performed service as a foreman both prior to and subsequent to this assignment on Section No. 3. It is pointed out that the Carrier had not previously questioned claimant Smith's fitness or ability to serve as a foreman.

Rule 8(a) of the parties' Agreement of September 1, 1949, provides that:

"In filling vacancies and new positions and making promotions, ability, merit, fitness and seniority shall be considered. Ability, merit, and fitness being sufficient seniority shall prevail, the **Management to be the judge.**" (Emphasis ours.)

If the language of the parties' Agreement were different, we might sustain this claim. Many such claims have been supported by the Board; but in all such cases brought to our attention the factual circumstances were different and different language was used. Where the parties have specified that "the Management is to be the judge" where matters of ability, merit and fitness are considered, we are bound by that language. Only upon a showing of gross abuse of discretion should we overrule management's decision in these matters, where the parties have said that Management shall be the judge. This record does not establish proof of serious abuse.

Both applicants in the instant case had had experience as foreman of either Section 7 or Section 3. Foreman Reynolds had been the regular foreman of Section 7. Claimant Smith had served on Section 3 but he had not been its regular foreman. There is some indication in the record that Foreman Reynolds was better qualified to perform the particular assignment in question. Therefore, we cannot conclude that there was an abuse of Management's discretion in this choice. For this reason we find it necessary to deny the claim set forth in the first three paragraphs of Statement of Claim.

With respect to Paragraph 4 of this claim, it is our understanding from the record that this arose because of the Carrier's mistaken omission of claimant Smith's name from the 1953 roster of foremen, and that this has subsequently been corrected. If such is the case, no action by this Board is necessary.

**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 Employees involved in this dispute are respectively Carrier and Employees 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 with respect to paragraphs (1), (2) and (3) of Statement of Claim, no violation of the Agreement is evident. With respect to Paragraph (4) the case is now moot, since the error in question has been corrected.

#### AWARD

Claims (1), (2) and (3) denied in accordance with Opinion and Findings.

Claim (4) dismissed for the reasons set forth in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon  
Executive Secretary

Dated at Chicago, Illinois, this 4th day of April, 1957.