Award No. 1582
Docket No. 1507

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

The Fourth Division consisted of the regular members and in addition Referee R. Dean Burch when award was rendered.

PARTIES TO DISPUTE:

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: It is the claim and request of the petitioning organization that —

1. Carrier has violated the provisions of the effective agreement by permitting C. W. Smith to retain forfeited seniority date of September 4, 1946.

2. C. W. Smith shall be shown on applicable seniority roster with a seniority date of January 31, 1958, the date last promoted to Foreman at Daytons Bluff.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the Chicago Burlington & Quincy Railroad Company and The American Railway Supervisors Association effective February 1, 1957, with amendments up to date, which is controlling in this claim. This agreement contains a Rule 10 — SENIORITY which reads as follows:

"RULE 10. (a) Foremen subject to the terms of this agreement shall be granted seniority as of the date last promoted to foreman, except that foremen who are demoted to positions not under the scope of this agreement through no fault of their own, will retain seniority for a period of one year.

(b) All new positions and vacancies of thirty (30) days' or more duration will be promptly bulletined to all foremen at the point where the vacancy occurs for a period of ten (10) days. Bulletins will show positions, rate of pay, hours of assignment and whether of a temporary or permanent nature.

(c) Applications must be filed in writing with the officer whose name is shown on the bulletin within the period specified in paragraph (b). Positions of foremen will be filled on the basis of (1) qualifications and (2) seniority, in the order named, Management to be the sole judge of qualifications.

(d) Foremen transferring permanently from one seniority point to another seniority point will retain their original seniority date at the point to which transferred, and forfeit seniority at the point from which transferred.

(e) Foremen granted leave of absence in accordance with Rule 13 or promoted by the Carrier to positions outside the scope of this agreement shall retain and accumulate seniority."

There is a Memorandum of Agreement between the parties dated January 24, 1957 which reads as follows:

"It is agreed that foremen who are, on February 1, 1957, employed as foremen at a point other than where they were originally assigned as foremen, may, in the event they are displaced from such positions through no fault of their own, return to the point at which originally employed and displace the junior foreman at that point, if qualified. Such foremen will retain their original seniority date and such date will govern in future application of Rule 10.

The provisions of this agreement shall become effective on February 1, 1957, and shall continue in effect subject to the serving of thirty (30) days' notice by one party upon the other party, further handling to be in accordance with the procedural provisions of the amended Railway Labor Act.

Signed at Chicago, Illinois, this 24th day of January, 1957.

FOR THE ORGANIZATION:

/s/ T. W. STIARWALT
General Chairman

/s/ H. J. PAGE
Committeeman, Vice Gen. Chrmn.

/s/ GEO. A. BREUSS
Committeeman, Car Dept. Chrmn.

FOR THE CARRIER:

/s/ J. E. WOLFE
Assistant Vice President, Labor Relations

/s/ E. J. CONLIN
Staff Officer"

Mr. C. W. Smith was promoted to Gang Foreman at Havelock Shop and thereby established seniority date of September 4, 1946. He went to Sheridan, Wyoming as Foreman on 7-1-51. On March 1, 1957, his position of Foreman at Sheridan, Wyoming was abolished. Mr. Smith then returned to Havelock Shop and there returned to the craft as Welder on May 29, 1957. As shown by Association Exhibit No. 13, Havelock Seniority Roster, the following Foremen were junior to Mr. Smith and were employed at Havelock Shop on May 29, 1957 when Mr. Smith returned to the craft as a Welder:

Name	Seniority Date
C. E. Butts	7-12-47
L. F. Schultz	2-18-49
J. Lickei, Jr.	2-18-49
C. Reuland	4-6-49
L. Catherell	8-16-50
C. G. Walker	7-1-51
F. H. Nielson	1-1-56

On January 31, 1958 Mr. Smith was promoted to a position of Foreman at Dayton's Bluff.

Under date of February 5, 1959, (Association Exhibit No. 1) General Chairman T. W. Stiarwalt wrote District Master Mechanic J. R. Van Nortwick asking for seniority date given C. W. Smith who transferred from a Welder, Havelock Shop to a Foreman at Dayton's Bluff on January 31, 1958.

District Master Mechanic J. R. Van Nortwick replied in letter dated March 9, 1959 (Association Exhibit No. 2) that Foreman Smith was given a seniority date of September 4, 1946.

General Chairman Stiarwalt then wrote Mr. Van Nortwick (Association Exhibit No. 3) stating that Mr. C. W. Smith had forfeited his seniority date of September 4, 1946 because he had returned to the craft of his own volition, and requested Mr. Van Nortwick to revise the seniority roster to show Mr. Smith with seniority date of January 31, 1958 at Dayton's Bluff, the date last promoted to Foreman.

Mr. Van Nortwick declined this claim in letter dated March 17, 1959 (Association Exhibit No. 4). The claim was then appealed to Carrier's highest appeals officer (Association Exhibit Nos. 5 through No. 12 inclusive) and was denied. The claim was then progressed to the Fourth Division N.R.A.B. in letter notice dated December 29, 1959.

POSITION OF EMPLOYES: It is the position of the employes that Mr. C. W. Smith forfeited his September 4, 1946 seniority date when he chose of his own volition to return to the craft as a Welder at Havelock Shop on May 29, 1957, instead of displacing junior foremen working at that point. When he was again promoted to Foreman at Dayton's Bluff his new seniority date should have been January 31, 1958, the day he was last promoted to Foreman.

Rule 10 — Seniority, which we have quoted in full in our Statement of Facts, is controlling in this dispute. Paragraph (a) of Rule 10 reads as follows:

> "Rule 10. (a) Foreman subject to the terms of this agreement shall be granted seniority as of the date last promoted to foreman, except that foremen who are demoted to positions not under the scope of this agreement through no fault of their own, will retain seniority for a period of one year."

Here we see that in the first instance, Foremen shall be granted seniority as of the date last promoted to foreman. This portion of Rule 10 (a) standing alone, would mean that an employe would receive a seniority date

as of the date he was promoted to Foreman the first time. If for any reason such as abolishment of his position, displacement by a senior employe, etc., he was demoted to a position not under the scope of the agreement, he would lose that seniority date even if such demotion was for only one day. Then if he was again promoted to Foreman, his seniority date would be the date on which he was last promoted to Foreman. Recognizing that this limitation would be a hardship on the employe, and also taking into consideration the obvious fact that the parties did not want a furloughed foreman to hold his seniority indefinitely, the parties added the following language as a exception:

> "* * *, except that foremen who are demoted to positions not under the scope of the agreement **through no fault of their own**, will retain seniority for a period of one year." (Emphasis supplied)

Here we see that the parties agreed to permit foremen who were demoted to positions not under the scope of the agreement, to retain their seniority for a period of one year, **but**, this right was not to be extended to any foreman **unless** such demotion was through no fault of his own. The reasoning behind this exception to the right to retain seniority rights for one year is that it is a well accepted principle of seniority that an individual holding seniority rights must exhaust such rights before returning to another class of service or before being furloughed. Seniority rights to work entail the duty to protect the work within the scope of the agreement. Whatever their reasons, the parties to this agreement did agree to Rule 10 (a) of the effective agreement.

Mr. C. W. Smith is therefore entitled only to seniority as of the date last promoted to foreman which was at Dayton's Bluff on January 31, 1958, **unless** the exception contained in Rule 10 can be applied to him. It is our position that the exception to Rule 10 (a) cannot be applied to Mr. Smith. When his position of Foremen at Sheridan was abolished, the seniority roster (Association Exhibit No. 13) shows that there were seven positions of foremen at Havelock Shop, the point at which he was originally assigned as foreman, which were occupied by foremen junior to Mr. Smith. These junior foremen were:

Name	Seniority Date
C. E. Butts	7-12-47
L. F. Schultz	2-18-49
J. Lickei, Jr.	2-18-49
C. Reuland	4-6-49
L. Catherell	8-16-50
C. G. Walker	7-1-51
F. H. Nielson	1-1-56

Mr. Smith could have displaced one of these junior foremen, but instead, of his own volition, he returned to the craft and displaced on a postiion of Welder at Havelock. It was a free choice on Mr. Smith's part and Carrier so admitted in Staff Officer E. J. Conlin's letter dated July 27, 1959 (Association Exhibit No. 9) where he states:

> "As explained to you in conference, the memorandum of agreement at page 10 of the scheduled permits foremen to displace the junior man at the place where they were originally assigned as

foremen when they lose their positions through no fault of their own. It does not require that they make this displacement, and this is evidenced by the use of the term "may" in that agreement.

Under these principles when Smith was reduced to a welder in May 1957, he was not required to displace the junior foreman at Havelock. He retained his original foreman's seniority date of September 4, 1946, and was appointed foreman at Daytons Bluff in January 1958, being out of the foreman craft for a period of less than one year. His retention of the September 4, 1946 seniority date is therefore correct."

Mr. Conlin here admits that Mr. Smith could have displaced the junior foreman at Havelock. This admission is proof that Mr. Smith did return to the craft of his own volition. This being true, and Mr. Conlin here admits it is, Mr. Smith certainly cannot claim that his return to the craft was a demotion to a position not under the scope of the foreman's agreement through no fault of his own as required by Rule 10 (a).

Mr. Conlin however, attempts to take refuge in that part of the Memorandum of Agreement dated January 24, 1957 found on page 10 of the agreement, reading as follows:

"It is agreed that foreman who are, on February 1, 1957 employed as foreman at a point other than where they were originally assigned as foreman, may, in the event they are displaced from such position through no fault of their own, return to the point at which originally employed and displace the junior foreman at that point if qualified. Such foreman will retain their original seniority date and such date will govern in future application of Rule 10."

Mr. Conlin argues that these foremen are not required to make this displacement because of the word "may" appearing in the Memorandum. We agree that such foremen are not required to exercise the right of displacement granted to them by this Memorandum of Agreement. **But**, neither are they required to exercise the right of displacement at the point at which they were employed when they are displaced. The foremen always have the right to return to the craft if they so wish, but if they do return of their own volition without exhausting their seniority rights as a foreman, they then forfeit their seniority rights as a foreman. This is true because the exception in Rule 10 (a) is restricted to "foremen who are demoted to positions not under the scope of this agreement through no fault of their own". Certainly a foreman who returns to the craft before he has made any effort to exhaust his seniority rights over junior foremen working at the point cannot contend that his return to the craft was through no fault of his own. The rights of displacement granted these foremen by the Memorandum of Agreement dated January 24, 1957 and Rule 10, are permessive and a Foreman may choose not to exercise his rights under these rules, but if he does so choose, he cannot escape the penalty provision of loss of seniority which is also a part of the rule. The rights and penalties provided by these rules are a package deal and the Foreman cannot accept the one without accepting the other.

General Chairman Stiarwalt in his letter dated July 21, 1959 (Association Exhibit No. 10) clearly explained this difference to Mr. Conlin, but

Mr. Conlin tried to confuse the issue by stating in his letter dated August 5, 1959 (Association Exhibit No. 11) that:

> "With regard to Rule 10, and its requirement that a foreman be demoted through no fault of his own, Smith certainly lost his job as assistant car foreman at Sheridan on March 1, 1957 through no fault of his own, when that job was abolished. He also lost the job of train yard foreman at Denver through no fault of his own on May 29, 1957, when you insisted that he had made an improper displacement, and we agreed with you."

Mr. Conlin's error here is that he tries to use the abolishment of Mr. Smith's position at Sheridan as proof that Mr. Smith was demoted to a position not under the scope of the agreement through no fault of his own. It is true that the abolishment of Mr. Smith's position at Sheridan was through no fault of his own, **but** his return to the craft as Welder at Havelock when there were foremen junior to him that he could have displaced, was certainly his own choice and was his own fault. It is Mr. Smith's voluntary return to the craft when has cost him his earlier seniority date.

Mr. Conlin is in error as there are no contradictions in Rule 10 and the Memorandum of Agreement which gave Mr. Smith certain displacement rights which he was free to exercise. In choosing to return to the craft rather than exercise his rights under the rules, Mr. Smith took himself out from under the exception in Rule 10 (a) and when he was again promoted to Foreman at Dayton's Bluff on January 31, 1958, he fell within the category of "Foremen subject to the terms of this agreement shall be granted seniority as of the date last promoted to foreman," and his seniority date should be January 31, 1958 at Dayton's Bluff. A sustaining Award is clearly in order.

The petitioning organization hereby affirms that the dispute presented herein for adjudication has been a matter of correspondence; that conferences have been held thereon between the parties in attempting to compose the matter in dispute, and; that all data submitted in support of Petitioner's presentation has been made known to Respondent Carrier, such data being hereby made a part of the record in this dispute.

Oral hearing is requested.

CARRIER'S STATEMENT OF FACTS: Cameron Willard Smith began working for the Chicago, Burlington & Quincy Railroad as a laborer in the Store Department on March 7, 1934. Between that time and his enlistment in the U. S. Navy in September, 1942, he worked in various capacities, including pipefitter helper, boilermaker helper, machinist helper, car welder, steel car helper and janitor.

After discharge from military service, Smith resumed employment with the Carrier as a welder at Havelock Shops, near Lincoln, Nebraska, on November 6, 1945. On September 4, 1946 he was promoted to the position of Gang Foreman at Havelock. This date, September 4, 1946, is the seniority date as foreman the Carrier applied to him, and the retention of that seniority date is the subject of this dispute.

Smith transferred to Sheridan, Wyoming as Assistant Car Foreman effective July 1, 1951, to Denver, Colorado as Night Train Yard Foreman

effective February 1, 1955, and back to Sheridan as Assistant Car Foreman effective May 1, 1956. He was working in this last mentioned capacity at the time the current collective bargaining agreement between the parties became effective February 1, 1957.

The position of Assistant Car Foreman at Sheridan, Wyoming was abolished effective April 1, 1957, and the local officers permitted Smith to displace Mr. L. F. Chapla as Night Train Yard Foreman at Denver. By letter dated April 25, 1957, the General Chairman of petitioning organization protested this displacement, and requested that Chapla be returned to this position. The General Chairman pointed out that under the agreement Smith could only displace the junior foreman at Havelock Shops, the point where he was originally assigned as foreman, if qualified, and did not have the right to displace a foreman at Denver, even though he had worked there previously.

The Carrier agreed with the General Chairman's position in this regard. Smith was required to leave the Night Train Yard Foreman position at Denver, and Chapla was restored effective May 22, 1957. However, Smith did not displace the junior foreman at Havelock, but instead went to work as a welder on May 29, 1957.

The junior foreman at Havelock at this time was Assistant Work Equipment Shop Foreman F. H. Nielson, holding a seniority date of January 1, 1956. In this work equipment shop, all of the Burlington's roadway and bridge and building equipment is overhauled and maintained. This includes track motor cars, tie tampers, ballasters, discers, derricks, air compressors, clamshells, draglines, power jacks, rail drills, rail layers, etc. A total of 67 men were employed in that shop, 40 of whom were of the machinist and blacksmith crafts. Smith had been a car foreman since 1946, was not a machinist, and was not qualified to take Nielsen's job as Assistant Foreman in the work equipment shop.

Approximately eight months later, on February 1, 1958, Smith was promoted to the job he now holds as Relief Foreman, Daytons Bluff, Minnesota. Daytons Bluff is the CB&Q freight terminal for the Twin Cities of St. Paul and Minneapolis. Because he had been worked as a welder only from May 29, 1957 to January 31, 1958, a period of less than a year, the Carrier permitted Smith to retain his original seniority date as foreman, i.e., September 4, 1946.

The American Railway Supervisors Association protested Smith's retention of the September 4, 1946 date, and insisted he be granted a new date of January 31, 1958, or approximately the date he was last promoted to foreman at Daytons Bluff. When the Carrier refused to change the seniority date, the instant claim was progressed to the Fourth Division.

POSITION OF CARRIER: The issue in this dispute is whether Smith lost his seniority date of September 4, 1946 by reason of working a period of approximately eight months as a welder at Havelock. The organization contends that Smith forfeited this seniority date because he worked as a welder of his own volition. The Carrier's position is first, that the agreement is permissive, not mandatory, and Smith did not **have** to displace the junior foreman at Havelock in order to retain his seniority, so long as he did not work in the lower rated capacity longer than a year. Second, the Carrier asserts that Smith was not qualified to displace the junior foreman at

Havelock, therefore he did not return to the welder's position of his own volition.

From a statement of the issue involved in this dispute, the Board will note that this case falls in that category where notice and opportunity to be heard must also be given to the individual. Relief Foreman C. W. Smith has about nine years of seniority at stake in this docket. Under the procedural rules of this Board, he is entitled to notice of the hearing. His home address is:

Mr. C. W. Smith
402 Earl
St. Paul, Minnesota

The agreement provisions relative to this dispute are few and simple to understand. The basic seniority rule is embodied in Rule 10(a) of the agreement effective February 1, 1957. This rule reads:

"Seniority.

"Rule 10. (a) Foremen subject to the terms of this agreement shall be granted seniority as of the date last promoted to foreman, except that **foremen who are demoted to positions not under the scope of this agreement through no fault of their own, will retain seniority for a period of one year.** (Emphasis added).

C. W. Smith had been "last promoted" to foreman on September 4, 1946 at the time this rule was agreed to. Accordingly he was granted that seniority date. The last clause of this rule guaranteed that he would retain that date of September 4, 1946, if demoted to other positions through no fault of his own, provided he was again promoted to foreman in less than a year.

The organization does not take issue with the fact that a seniority date once granted a foreman under Rule 10(a), remains with that individual no matter where he may be transferred as a foreman. This is expressly provided for in paragraph (d) of Rule 10, which states that:

"(d) Foremen transferring permanently from one seniority point to another seniority point will retain their original seniority date at the point to which transferred, and forfeit seniority at the point from which transferred."

Under this provision a foreman takes his date with him when transferred to another point to work as foreman. Accordingly, it is Carrier's position that Smith took his September 4, 1946 date with him to Daytons Bluff when transferred to that point on February 1, 1958. This conclusion is necessary in view of the fact that he had not worked on other than foreman positions for a period in excess of a year.

The Memorandum of Agreement which is reproduced at page 10 of the schedule is also involved in this dispute. This agreement was designed to afford some measure of protection to the men who were, on February 1, 1957, working at a point other than where they first were promoted to the foreman ranks. This new schedule agreement, effective February 1, 1957, granted seniority rights to foremen on the Burlington for the first time. Many of the men, including C. W. Smith, had been transferred to other

points as foremen, and many of these points were the smaller towns where mechanical facilities were maintained. These smaller points were "drying up" in 1957 because of the increased use of diesel engines, and the corresponding decrease in maintenance requirements over steam engines. C. W. Smith was one of these men, for he had been transferred from Havelock to Sheridan, Wyoming in 1951, six years before the new schedule agreement was made.

The material portion of the Memorandum of Agreement at page 10 reads as follows:

> "It is agreed that foremen who are, on February 1, 1957, employed as foremen at a point other than where they were originally assigned as foremen, **may** in the event they are displaced from such positions through no fault of their own, return to the point at which originally employed and displace the junior foreman at that point, **if qualified.** Such foremen will retain their original seniority date and such date will govern in future application of Rule 10." (Emphasis added).

Under this rule, Smith was privileged to displace the junior man at Havelock Shops, if he was qualified to assume the position such junior man held. But there is nothing in this rule, as the organization would like to have this Board believe, that made it mandatory for Smith to displace the junior foreman at Havelock.

It should be obvious to anyone that under these contractual provisions Smith did not lose his foreman's seniority date of September 4, 1946 because of working as a welder at Havelock Shops, rather than as a foreman. In the first place, his service as a welder extended only from May 29, 1957 to January 31, 1958. This eight-month period was considerably less than the one year specified in paragraph (a) of Rule 10. Under the last portion of that paragraph his seniority was preserved for a year, since it was through no fault of his that he lost his foreman jobs at Sheridan and Denver. The job he had held at Sheridan was abolished. He was removed from the job he held at Denver after the organization protested his displacement of L. F. Chapla, who, incidentally, holds a seniority date of September 28, 1955, and is nine (9) years junior in seniority to C. W. Smith.

Under the Memorandum of Agreement at page 10, Smith **was not required to displace F. H. Nielsen,** the Assistant Work Equipment Shop Foreman at Havelock. If he were qualified, Smith had the **privilege** of displacing the junior foreman. The Memorandum of Agreement uses the term **"may"; it does not say "must".** Actually, the organization's entire case is premised on the obvious fallacy that when the parties to the contract say "may" they meant "must". No obligation to displace the junior man can possibly be read into the Memorandum of Agreement at page 10. Neither does a man jeopardize his foreman seniority by refusing to make such a displacement, if he is again promoted to the foreman ranks within a year, as Smith was in this case.

Another fact that prevents the organization's argument from having any semblance of merit, is that Smith was not qualified to displace Nielsen as Assistant Foreman of the work equipment shop at Havelock. Although younger than Smith in foreman seniority, Nielsen had served an apprenticeship as a machinist, which he completed on January 22, 1941. He was a

qualified journeyman machinist with many years' experience by May, 1957. The work equipment shop at Havelock is primarily a machine shop, with approximately 25 different machines in it, such as lathes, milling machines, planers and the like. At that time a force of 67 men were employed in that shop. The foreman and assistant foreman supervised the following classes of employes:

19 machinists
14 machinist helpers
5 machinist apprentices
2 freight car repairman helpers
2 welders
8 carpenters and electricians
4 carpenter or electrician helpers
1 blacksmith
1 blacksmith helper
2 freight car repairman
1 electrician apprentice
1 painter
5 power plant employes

Obviously, a man who had never been a machinist could not be qualified as assistant foreman of a machine shop. The five machinist apprentices would not get the proper training of their foreman didn't know the trade. With 40 of the 65 employes to be supervised being of machinist and blacksmith crafts, it would be pure folly to give them a foreman who had never served any apprenticeship, and whose only previous supervisory experience was as a car foreman.

Attached to this submission marked "Carrier's Exhibit No. 1" is a holographic statement signed by Relief Foreman C. W. Smith, and dated January 18, 1960. This statement reads as follows:

"Statement of Cameron W. Smith
January 18, 1960
St. Paul, Minn.

"I am employed by the CB&Q RR at Daytons Bluff, Minn, as Relief Forman, and has been since Feb. 1 1958.

"I began working for the Burlington as a Store Department Labor, In March 1934, and except for lay offs and military service & I have worked for this Company ever since, I worked as a boilerker helper, pipefitter helper, machinist helper, welder car helper, & janitor at West Burlington & Galesburg, Ill. Prior to enlisting in the U.S.Navy in Sept. 1942, I was honorably discharged on Sept. 27, 1945 and resumed employment with the CB&Q as a welder at Havelock Shops, Lincoln Nebr. in Nov 1945.

"I was promoted to Gang forman at Havelock Shops effective Sept 1, 1946. Transfered to Sheridan Wyo as asst. Car Forman July 1-1951 and Transfered to Denver Colo. as Night train yard Forman in Feb. 1955. In May-1956 I transfered back to Sheridan Wyo as asst Car Forman. When that job was abolished I Returned to Denver as Night train yard Forman, Effective April 1-1957. "Shortly after I took the job at Denver I was told, That I should have not bumped anyone at Denver because of the agrement with the formans union, but that I could bump the junior Forman at the Havelock Shops. The Junior man there was a machine Shop Forman **and as I am not a machinest, I was not qualified.** insted I went back to Havelock and worked as a Welder beginning May 29, 1957. I Remained there until Feb 1-1958. When I came here to Daytons Bluff as Relief Forman.

"I have been told now that the American Railway Supervisors Association is protesting my Seniority Date of Sept. 4, 1946, and Intends to take that Case to the Board. I have read the agreement of January 24, 1957 at Page 10 of the ARSA Schedule also Rule 10 of this agreement, For the life of me I can't understand how anyone could say I ever lost my 1946 Seniority Date I woked as a welder at Havelock from May 29, 1957 to Feb. 1-1958. Only eight months. **Rule 10(a) says I can retain seniority for a year,** when demoted through no fault of my own. **It was not my fault that I had to leave the jobs at Sheridan Wyo. or Denver Colo.**

/s/ Cameron W. Smith
Relief Forman
Dayton Bluff Minn."

(Emphasis added).

It will be noted that Smith states, without equivocation, that he was not qualified to hold down the Assistant Foreman job in the work equipment shop. In other words, even if he wanted to displace Nielsen under the Memorandum of Agreement at page 10, he could not have done so because of lack of qualifications.

The manner in which the American Railway Supervisors Association has doggedly attempted to deprive Smith of most of his seniority as a foreman, smacks of violation of the Railway Labor Act. As the designated representative for collective bargaining purposes, the Association is obligated to render fair treatment to **all** of the Mechanical Department supervisors included in that class or craft. This obligation to protect all of the members of that group, irrespective of race, creed, color or union membership, arises from Section 2 Fourth of the Act, where it states that:

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

Coupled with this right of the majority to represent the entire group is the obligation to represent each and every member of the group in a fair and impartial manner.

The United States Supreme Court has upheld the rights of the minority to fair and equal representation under Section 2 Fourth of the Railway Labor Act. Most of these cases are familiar to the members of this Board, but for ready reference the following citations are made.

In **Steele v. Louisville & Nashville Railroad Co. et al.,** 323 U. S. 192, (December 18, 1944), the BLF&E sought and obtained an agreement which operated the detriment of colored firemen on the L&N. The negro firemen filed suit in court asking that the enforcement of the agreement be enjoined. The Supreme Court upheld their positions, speaking through Chief Justice Stone, stated at page 199:

"But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of the craft, to represent the craft, did not intend to confer plenary power

upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority."

and at pages 200-201, the Court said:

"The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them. As we have pointed out with respect to the like provision of the National Labor Relations Act in **J. I. Case Co. v. Labor Board,** supra, 338, 'The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit . . .' The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it."

Again at page 202 the Chief Justice's opinion states:

"While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed."

It is apparent that the American Railway Supervisors Association is acting "against those whom it represents" in prosecuting this claim solely to deprive Relief Foreman C. W. Smith of eleven years' seniority.

The Supreme Court's opinion in the **Steele** case also states, as page 204:

"While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, **it does require the union,** in collective bargaining and in making contracts with the carrier, **to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.**" (Emphasis added).

The instant claim, prosecuted to the Fourth Division under the guise of contract interpretation, is so lacking in merit that it must be construed as an act of hostility by the American Railway Supervisors Association against Relief Foreman C. W. Smith. Surely the organization has not attempted to interpret the agreement in a fair and impartial manner.

The **Steele** case was merely the forerunner of a line of decisions in the U. S. Supreme Court, imposing the same obligations upon the railway

labor unions to treat the minorities in good faith. The case of **Tunstall v. Brotherhood of Locomotive Firemen & Enginemen et al.**, 323 U. S. 210, was decided the same date, December 18, 1944. It was a companion case to **Steele,** with a similar opinion by Chief Justice Stone. In neither of these cases did a single one of the nine Supreme Court justices dissent.
these cases did a single one of the nine Supreme Court Justices dissent.

The same interpretation to the Railway Labor Act was set forth five years later by the U. S. Supreme Court in the case of **Graham et al. v. Brotherhood of Locomotive Firemen & Enginemen,** 338 U. S. 232, in an opinion rendered November 7, 1949 by Justice Jackson. The Court said, as page 239:

> "It would serve no purpose to review at length the reasons which, in the **Steele** and **Tunstall** cases, **supra,** impelled us to conclude that the Railway Labor Act imposes upon the Brotherhood the duty to represent all members of the craft without discrimination and invests a racial minority of the craft with the right to enforce that duty. It suffices to say that **we reiterate that such is the law."** (Emphasis added).

Again there was no dissenting opinion by any of the nine Supreme Court justices.

A more recent case in this line of decisions is that of **Brotherhood of Railroad Trainmen et al. v. Howard et al.**, 343 U. S. 768, an opinion by Mr. Justice Black dated June 9, 1952. Similar discriminatory practices against minority groups were indulged in by the BRT, and these practices were again held contrary to law. At page 774 the Court stated:

> **"Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers."** (Emphasis added).

Surely the Petitioner in this docket is attempting a "lawless invasion" of the seniority rights of Relief Foreman C. W. Smith, and such action merits a most severe censure by this Board, an administrative agency created to uphold the Railway Labor Act.

The Carrier's position in this docket may be summed up as follows:

1. Smith did not lose his September 4, 1946 seniority date because under Rule 10(a) he could hold it for one year. He was out of the foreman craft only for eight months.

2. Under the Memorandum of Agreement at page 10, Smith did not have to displace the junior man at Havelock Shops in order to preserve his seniority as a foreman. This agreement is permissive, not mandatory.

3. Smith was not qualified to displace junior foreman F. H. Nielsen at Havelock Shops, and therefore could not have taken that job even if he desired.

4. This claim is so unfounded in contract that it amounts to a lawless invasion of the seniority rights of Relief Foreman C. W. Smith, contrary to the Railway Labor Act.

The claim must be denied.

All data herein and herewith submitted have been previously submitted to the organization.

Oral hearing is desired.

(Exhibits not reproduced.)

OPINION OF BOARD: Mr. C. W. Smith began working for the C B & Q Railroad Company in 1934. After working at various tasks he was promoted to the position of Gang Foreman at Havelock Shops, Nebraska, on September 4, 1946. Smith transferred to Sheridan, Wyoming, as Assistant Car Foreman effective July 1, 1951; to Denver, Colorado, as Night Train Yard Foreman, effective February 1, 1955; and back to Sheridan as Assistant Car Foreman, effective May 1, 1956.

The position of Assistant Car Foreman at Sheridan, Wyoming, was abolished effective April 1, 1957. Smith then erroneously displaced the Night Train Yard Foreman at Denver, Colorado, and after agreement between Smith, employes and management that this displacement was improper, Smith went back to Havelock as a welder on May 29, 1957.

On or about February 1, 1958, Smith was promoted to the job of Relief Foreman at Daytons Bluff, Minnesota. The American Railway Supervisors Association, upon being advised by the Carrier that Smith had retained his seniority date of September 4, 1946, filed the instant claim.

The sole issue in this case is whether Smith lost his seniority date of September 4, 1946, by virtue of having worked at Havelock as a welder for approximately eight months.

The Agreement, effective February 1, 1957, as amended, between the ARSA and C B & Q Railroad Co. controls the present claim.

The applicable portions of the Agreement are:

"RULE 10. (a) Foremen subject to the terms of this agreement shall be granted seniority as of the date last promoted to foreman, except that foremen who are demoted to positions not under the scope of this agreement through no fault of their own, will retain seniority for a period of one year.

(b) All new positions and vacancies of thirty (30) days' or more duration will be promptly bulletined to all foremen at the point where the vacancy occurs for a period of ten (10) days. Bulletins will show positions, rate of pay, hours of assignment and whether of a temporary or permanent nature.

(c) Applications must be filed in writing with the officer whose name is shown on the bulletin within the period specified in paragraph (b). Positions of foremen will be filled on the basis of (1) qualifications and (2) seniority, in the order named, Management to be the sole judge of qualifications.

(d) Foremen transferring permanently from one seniority point to another seniority point will retain their original seniority

date at the point to which transferred, and forfeit seniority at the point from which transferred.

(e) Foremen granted leave of absence in accordance with Rule 13 or promoted by the Carrier to positions outside the scope of this agreement shall retain and accumulate seniority."

In addition to Rule 10 we must also consider that certain Memorandum of Agreement between the parties dated January 24, 1957, which reads in part:

"It is agreed that foreman who are, on February 1, 1957 employed as foreman at a point other than where they were originally assigned as foreman, may, in the event they are displaced from such position through no fault of their own, return to the point at which originally employed and displace the junior foreman at that point if qualified. Such foreman will retain their original seniority date and such date will govern in future application of Rule 10."

Before proceeding to a discussion of the merits of this case, it is well to dispose of a procedural question prompted by Carrier's Exhibit No. 1, attached to and made a part of Management's Ex Parte Submission. Exhibit No. 1 consists of an holographic statement of C. W. Smith and there is no question but that this statement appeared for the first time in the submission and was not considered by the parties on the property. This exhibit is not, therefore, properly before this Division since it does not comply with the provisions of Circular No. 1 of the National Railroad Adjustment Board. Interestingly enough, as reflected by Association Exhibits Nos. 6 and 7, the question of Smith's qualifications does appear to have been considered on the property. Inasmuch as a discussion of Mr. Smith's qualifications are not necessary to the decision of this claim, the propriety of a question by the Referee to Mr. Smith becomes moot.

There is no question but that since Smith's job was abolished at Sheridan, his demotion was, at that time, "through no fault of his own," in accord with Rule 10(a) and he was entitled to retain his seniority date of September 4, 1946, for one year.

This being true, the question then arises as to whether Smith, to retain his seniority, was **required** to displace the junior foreman at Havelock. This is the interpretation of the Memorandum of Agreement, **supra**, urged by the Association.

It is a fundamental rule of contract construction that the various sections of an agreement are to be construed together and effect given to all parts so that they are consistent and sensible. See Third Division Award No. 6856.

It is also basic that this Board is limited to the interpretation of Agreements and does not serve to rewrite agreements.

If the parties to the agreement in question had intended to qualify Rule 10 (a) by the Memorandum of Agreement, it would have been simple enough to use the word "must" or "shall" rather than "may."

Although this Board recognized that justice is not the slave of grammar, nevertheless the tortured construction of the contract urged by the Association is not fairly within the plain meaning of the words used.

At the time Smith's job was abolished in Sheridan, he had the privilege of returning to Havelock and replacing the junior foreman. This privilege was not a duty, however, as evidenced by the use of the word "may", and whatever Smith's reason for not displacing Mr. Nielsen, he (Smith) is entitled under the facts as applied to the agreement to retain his seniority date of September 4, 1946.

FINDINGS: The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Patrick V. Pope
Secretary

Dated at Chicago, Illinois, this 12th day of February, 1962.