

Award No. 5190
Docket No. 5093
2-P&LE-TWUOA-'67

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

PARTIES TO DISPUTE:

**RAILROAD DIVISION, TRANSPORT WORKERS UNION OF
AMERICA, A. F. of L. - C. I. O.**

**THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY AND
THE LAKE ERIE & EASTERN RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES:

That under the current Agreement Carman Helper A. W. Maga was improperly denied the right to promotion to the position of Carman on December 17, 1964 and again on February 1, 1965.

That accordingly the carrier be ordered to assign the aforementioned employe to a position as carman and be placed on the seniority roster immediately ahead of R. E. Miller, who was hired as a carman December 8, 1964. Also that he be paid eight (8) hours at the applicable rate of pay for December 29, 1964 and for each day thereafter that he could have worked as a carman until such time that the carrier assigns him to a position as a carman.

EMPLOYEES STATEMENT OF FACTS: Carman Helper A. W. Maga, hereinafter referred to as the claimant, was employed by the carrier as a Carman Helper October 4, 1948 and worked in that capacity until April 12, 1958 when he was furloughed in a force reduction. Claimant had previously been employed by this carrier as a Carman on June 23, 1948 and continuously was employed as such until August 28, 1948 when he resigned for personal reasons.

Claimant remained on a furloughed status until recalled to service as a Carman Helper December 18, 1964. He was offered a Carman Helper position of "Equipment Operator", and assigned to work in Struthers Car Shop on the 4:00 P. M. shift effective December 20, 1964. On December 18, 1964 the claimant did pass the required return to duty medical physical examination. He did again on the same date request of Mr. J. Peters, General Foreman, Struthers Car Shop, for a promotion to Carman. This request was denied. Again on February 1, 1965 he made written request for a promotion to position of Carman. This request was ignored.

On December 8, 1965, the carrier did hire R. E. Miller as a Carman, also on December 15, 1964, D. Godwin was hired as a Carman. Again on

Mr. Maga never again acquired seniority under paragraph (2) because he was not promoted, nor was he subsequently hired into the Carmen's Craft. He did not acquire seniority under paragraph (4) because he did not perform service as a Carman during his second tour of employment.

The two functions, i.e., promotion and hiring, referred to in the above rule, are inherent rights of management.

CONCLUSION: Carrier has shown that Mr. Maga has been treated fairly and that Carrier has not been arbitrary, capricious or abusive of discretion in determining his qualifications as a car repairman. This claim is an attempt through an award of this Board to deprive the Carrier of its discretionary powers which would require an assumption on the part of the Board that the Claimant on December 29, 1964 was qualified as a car repairman. Carrier further submits that the qualifying rights are not vested in either the employee or in the Organization but continue to lie with the Carrier. Since the Claimant does not have seniority rights as a Carman, the issue before this Board is not the question of whether the Carrier violated his seniority rights but, as shown above, is a question of whether the Claimant is qualified to move by means of promotion from one class of employment to a higher class of employment. Carrier reiterates that the decision in such a case rests with management and does not come within the province of this tribunal.

Carrier respectfully submits, therefore, that the claim of Mr. Maga should be dismissed for lack of jurisdiction or should be denied on the basis that the claim is without merit.

All data incorporated herein have been made known or available to the Organization.

Oral hearing is desired.

(Exhibits not reproduced.)

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Parties to said dispute were given due notice of hearing thereon.

This dispute stems from Carrier's failure to promote Claimant to carman and to afford him an opportunity to qualify for promotion to that position.

Nothing in the rules makes promotion automatic and mandatory. Rule 39(a) provides that "the oldest man" bidding for the promotion will be awarded the position "providing he possesses the necessary fitness and ability". It is well settled that management has the right to determine the qualifications of employees seeking promotion and that its judgment in that regard will be upset only when it has been exercised in an arbitrary or discriminatory manner. See Awards 2469 and 4844.

In the present case, we cannot validly find that Carrier lacked a reasonable basis for denying Claimant a promotion or an opportunity to qualify for a promotion. His only experience as a carman consisted of two months of employment in that capacity back in 1948 when he first went to work for Carrier. He then resigned, according to Carrier, on the ground that he disliked the work; Petitioner did not deny this but merely stated that Claimant resigned for personal reasons. Thereafter, from October 4, 1948, until he was furloughed on April 12, 1958, Claimant was employed as a carman helper. While on furlough he declined opportunities in March 1960 and December 1964 to return to work as a carman helper because he could not operate mobile equipment. It does not appear that he attempted, or requested an opportunity, to learn to operate mobile equipment.

Under the circumstances, while we certainly are not in a position to assess his qualifications, no sound justification is perceived for concluding that Claimant took reasonable measures to make himself available as a helper within the meaning of Rule 21(a) or that Carrier acted cavalierly or in bad faith in deciding that he lacked "the necessary fitness and ability" at the present time for the position. Rules 21(a) and 39(a) and (b) are not helpful to Petitioner's case and the claim will be denied.

In view of our finding, it is unnecessary to pass upon Carrier's additional contentions that Petitioner failed to comply with procedural requirements of Rule 38.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1967.