

Award No. 4525
Docket No. 4049
2-NYC-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 103, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

**THE NEW YORK CENTRAL RAILROAD COMPANY
(Western District)**

DISPUTE: CLAIM OF EMPLOYEES: 1. That the Carrier violated the rules of the current agreement, particularly Note No. 1 to Rule No. 19, when it assigned Mr. T. Felix, an Electrician, to supervise Carmen, in the Elkhart Yards, Elkhart, Indiana.

2. That accordingly, Carrier be ordered to remove Mr. Felix as a supervisor of Carmen and assign a supervisor from the Carmen's craft.

EMPLOYEES' STATEMENT OF FACTS: On April 4, 1960, the New York Central Railroad Co., hereinafter referred to as the carrier, assigned an electrician, Mr. T. Felix, to supervise carmen only, employed in carrier's Elkhart freight yards, Elkhart, Indiana.

There are no electricians employed in carrier's Elkhart freight yards and shop.

There are 171 employes employed in the carmen's craft at Elkhart, 107 of whom are full fledged carmen.

This dispute has been handled with all officers of the carrier designated to handle such disputes, including the highest designated officer of the carrier, all of whom have declined to make satisfactory adjustment.

The agreement effective July 16, 1946 as subsequently amended is controlling.

POSITION OF EMPLOYEES: It is submitted that the carrier violated Rule No. 19 and Note No. 1 thereto when on April 4, 1960 they assigned Electrician T. Felix to the position of supervisor over carmen. For ready reference, Rule No. 19 reads as follows:

kind and risk the inefficient performance of railroad operations. The present case is not one that warrants any interference by this Board with the decision made by the Carrier."

The employes well know that when management promotes an employe to a supervisory position it gives careful consideration to the general qualification of the employes within the craft and/or crafts. Management's primary consideration is the selection of a supervisory employe who has always been directed toward the employe's fitness and ability.

Obviously, the carrier expects its local officials to select the individual best qualified to act as supervisor. These officials are charged with the responsibility of getting the work done in the most efficient manner. It is, therefore, to their own interest to select the individual best qualified to progress the work to a satisfactory conclusion.

Carrier maintains that Part 2 of the employes' claim is nullified due to the fact that Mr. Felix, in the exercise of his supervisor's seniority, returned to Root Street, Chicago, to position of relief electrical foreman and gang foreman on April 19, 1961.

CONCLUSION: The carrier has shown that:

(1) Shop craft agreement provisions were not violated when Mr. Felix was assigned to the assistant foreman position at Elkhart;

(2) Note 1 to Rule 19 only governs the selection of mechanics for promotion to foreman; and

(3) Supervisors seniority rights must be recognized if the bidder is qualified for the position he seeks.

It is therefore respectfully submitted that the claim is without merit and therefore should be denied.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The Carrier maintains a car yard at Elkhart, Indiana. About 107 full-fledged carmen, but no electricians, were employed there at the time here relevant. In March, 1960, three new positions of assistant foreman were established at the yard. The carrier contacted five carmen employed at the yard (A. V. Lese, A. J. Lese, H. Nichols, J. Gribbs, and E. Shaw) to ascertain whether they were interested in accepting the new positions. However, none were interested. In addition, general foreman Metzger offered carman R. M. Osowski one of said positions, but the record convincingly shows that the latter declined for personal reasons (Carrier's brief, dated May 6, 1964). The parties are in disagreement as to whether the Carrier also offered carman G. E. Doncaster, Jr. one of the positions under consideration.

On April 4, 1960, the Carrier assigned Mr. Felix, a supervisor at Root Street, Chicago, Illinois, and a former electrician, to one of the positions in question. The Organization filed the instant grievance in which it contended

that the Carrier violated the applicable labor agreement when it assigned Felix, instead of an Elkhart carman, to supervise carmen at the yard. It requested that the Carrier be ordered to remove Felix as supervisor of carmen and assign a supervisor from the carmen's craft. The Carrier denied the grievance.

On April 19, 1961, Felix returned to Chicago to take a position of relief electrical foreman and gang foreman. The record before us does not show who, if anybody, was assigned by the Carrier to fill the position previously held by Felix at the Elkhart yard.

In support of its position, the Organization primarily relies on Rule 19 of the labor agreement which reads, in pertinent part, as follows:

"(a) Mechanics in service will be considered for promotion to positions of foremen . . .

"NOTE 1: As vacancies occur or new positions are created for Shop Craft supervisors having supervision over mechanics and apprentices, mechanics of the respective Shop Crafts, if obtainable, shall be assigned to such positions . . ."

1. The Organization seems to conceive that the phrases "will be considered" appearing in Rule 19(a) and "if obtainable, shall be assigned" appearing in Note 1 must be construed as meaning that "carmen, if obtainable, shall be promoted" so that compliance with such mandate unqualifiedly required the Carrier to promote a carman from the Elkhart yard force to the position filled by Felix. We do not construe Rule 19(a) and Note 1 so narrowly. The selection of supervisory employes is generally an exclusive function of management. Unless clearly and unambiguously restricted by the applicable labor agreement, said right is wholly within the reasonable discretion of management. In the light of these considerations, we are of the opinion that Rule 19(a) and Note 1 thereto merely obligate the Carrier in the event of promotions to make a comprehensive, fair and impartial evaluation of obtainable carmen in an effort to find out whether they possess the qualifications required for the promotional position in question and then to promote only those, if any, who have been found qualified. In evaluating such qualifications primary consideration may properly be given to the employes competency to perform efficiently the duties of the position involved. In addition, ability to lead and direct other employes, accuracy, adaptability, dependability, experience, initiative, job knowledge, skill and training, as well as mere competence, are reasonable, non-discriminatory factors which may legitimately be used by Carrier in determining the qualifications of an employe for a promotional position. Since such determination necessarily involves the exercise of managerial discretion and judgment, we are of the opinion that the Carrier's determination can successfully be challenged before us only on the ground that it was arbitrary, capricious, discriminatory or an abuse of managerial discretion. Otherwise, we would usurp management's function reasonably to select employes for promotional positions.

Applying the above principles to this case, we have reached the following conclusions:

The record shows that the Carrier offered or intended to offer the new positions to six carmen at the Elkhart yard and that they declined. The Carrier has denied that it also offered one of said positions to carman G. E. Doncaster, Jr. because he did not, in its judgment, have sufficient qualifications for a permanent foreman's position. There is nothing in the record which would adequately refute the Carrier's denial, except Doncaster's self-serving

statements. The burden of proof convincingly to demonstrate that the Carrier did offer one of the positions to Doncaster rests upon the Organization but it has failed to meet such burden. Furthermore, the available evidence does not permit a finding to the effect that the Carrier's determination of Doncaster's lack of supervisory qualifications was arbitrary, capricious, discriminatory or an abuse of managerial discretion. Accordingly, we hold that the Carrier did not violate Rule 19(a) of Note 1 thereto when it failed to award one of the positions in question to Doncaster.

However, there were about 100 other carmen at the Elkhart yard. As pointed out hereinbefore, the Carrier was contractually obligated to make a fair and impartial examination of whether one or more of those carmen possessed the necessary qualifications for the position and if one was found qualified, to award it to him. The record is devoid of any evidence of indication that the Carrier made such examination before it assigned Felix to the position in dispute. Its omission to do so, violated Rule 19(a) and Note 1 thereto. In so far, Claim 1 is justified.

2. In defense of its action here complained of, the Carrier submitted that it was required under a labor agreement entered into by it and the American Railway Supervisors Association to post the three new foreman's positions for bidding by supervisors covered by said agreement. The answer to this defense is that we have no jurisdiction under Section 3, First (h) and (i) of the Railway Labor Act to interpret or apply a labor agreement covering supervisory employees. As a result, we refrain from expressing any opinion on the validity of the Carrier's defense. However, we note that the Organization only claims that the Carrier is obligated to consider bargaining unit employees for promotional positions when no bids from supervisors of the craft involved are received, as was here the case regarding the position filled by Felix (Organization's rebuttal brief, pp. 3-5).

3. The Organization has requested that the Carrier be ordered to remove Felix as a supervisor of carmen at the Elkhart yard. Since Felix returned to Chicago in April, 1961, the Organization's request has become moot.

Moreover, the Organization has requested that the Carrier be ordered to assign a supervisor from the carmen's craft to the position held by Felix at Elkhart. The Organization was aware of the fact that Felix had left Elkhart when it filed its submission and rebuttal briefs. The record does not reveal who, if anybody, was assigned to the position after Felix had left. No contention has been made by the Organization that the Carrier again failed to consider a qualified Elkhart carman for the position within the contemplation of Rule 19(a) and Note 1 thereto. Thus, the record is inconclusive and does not permit us to issue an order as requested by the Organization.

AWARD

Claim 1 sustained.

Claim 2 disposed of in accordance with the above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June, 1964.