

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(Baltimore and Ohio Railroad Company

Dispute: Claim of Employees:

1. That the Baltimore and Ohio Railroad Company violated Rules 16 of the controlling Agreement when they failed to place Carman J. L. Robbins on the Foremen's seniority roster at Benwood, West Virginia.
2. That accordingly, the Carrier be ordered to compensate Carman J. L. Robbins, Benwood, West Virginia, for the difference between Carmen's rate of pay and Foremen's rate of pay, beginning with September 5, 1979, which is considered as a continuous claim, until such time it is adjusted to the satisfaction of the Claimant. Also, that he be allowed a foreman's seniority date of July 20, 1979.

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 waived right of appearance at hearing thereon.

On June 6, 1979, a position for a car foreman was advertised at the Carrier's Benwood, West Virginia yard. No bids were received from any individuals holding seniority under the foreman's agreement. The Claimant, a carman, as well as two other carmen requested the opportunity to demonstrate their qualifications for the assignment. Beginning June 15, 1979, the Claimant commenced filing the assignment.

On August 14, 1979, the local chairman brought to the attention of the General Chairman that the claimant had been placed on the position and that as of that date "no assignment has been made in regard to this position." On August 24, the General Chairman wrote the manager of the car department claiming a violation of Rule 9 of the Supervisors Agreement and requested advice as to whether the Carrier intended to give the Claimant a foreman's seniority date under the Supervisors Agreement. The Claimant was removed from the position on September 5, 1979.

On September 10, 1979, the Manager of the Car Department advised the General Chairman that in response to the Claimant's request to work the vacancy that the Carrier "... agreed to allow him to work the position on a trial basis and he was advised that we would evaluate his supervisory abilities and determine at a later date his fitness for the position." Further, the Carrier claims no violation of Rule 9 occurred since there had been no assignment. Later, in response to a claim filed on behalf of the Claimant, the Carrier advised the General Chairman that in connection with the evaluation of the Claimant during the trial period, that "at a point in time between 60 and 90 days, it was our considered opinion that Carman J. L. Robbins did not progress or show sufficient initiative to continue working a supervisors position ..."

The claim was progressed on the basis that the Carrier violated Rules 9 and 10 of the Supervisors Agreement and Rule 16 of the Shopcraft's Agreement. The case was ultimately appealed to both the Second and Fourth Divisions of the Board. The Fourth Division gave consideration to the claim as appealed there, however, in Fourth Division Award 3889 which was rendered on February 11, 1982, they held that inasmuch as the Claimant's regular classification was a carman that the Second Division properly had jurisdiction and they dismissed the case.

Generally speaking, it is the Employees' contention that the Claimant was deprived of foreman's seniority to which he was entitled. They assert he did in fact establish seniority under the provision of Rule 9 of the Supervisors' Agreement which states:

"Rule 9.

Bulletins and Assignments:

(a) New positions, permanent vacancies and temporary vacancies of a known duration of thirty days or more will be promptly bulletined for a period of five (5) days in places accessible to all employees affected in the seniority district. Bulletin shall show location, title, hours of service, rate of pay and whether positions or vacancies are of a permanent or temporary nature. Copy of bulletins shall be furnished General Chairman. Employees desiring to be considered for bulletined positions shall submit written application to the officer issuing the bulletin, with copy to General Chairman.

New positions and vacancies will be awarded promptly and assignment to positions under this Agreement shall be based on the following:

- (1) Fitness for positions.
- (2) Previous record of faithful service.
- (3) Seniority

Chief Mechanical Officer will be the final judge.

(b)(1) Notice of assignment showing the name of employee awarded the position and the effective date of the award (as set forth by the bulletin awarding the position) will be posted and copy of notice shall be furnished the General Chairman.

(2) Any employee under this Agreement who has bid in an assignment and has been assigned to it, cannot bid for his previous assignment when advertised as a vacancy until it has been bid in and held by at least one other employee.

(3) Should an employee be displaced off of an assignment after being the successful applicant, he could rebid his previous assignment without it having been held by another employee in the interim.

(c) Employees holding seniority under this Agreement assigned or awarded positions and failing to qualify within thirty days shall be returned to former position under this Agreement where they retain seniority; if relinquishing the position at their own request, they can only displace the junior supervisor over whom they hold seniority. Employees returning to the ranks of shop craft mechanics will be governed by Paragraph (g) of Rule 8."

They also take the position that whatever right the Carrier had to evaluate the Claimant had been waived in light of the time lapse between the date of the assignment and the date of the removal. They believe he proved his ability within this time. The removal after this period of time amounted to an abuse of discretion and discriminatory treatment compared to at least one other employee whose circumstance was similar to that of the Claimant. Moreover, removal of the Claimant from the position without an investigation was a violation of the discipline rule according to the Organization.

The Carrier contends that there has been no violation of Rule 16 of the Shop Crafts Agreement applicable to carmen or any other rule of any other agreement. They point out that Rule 16 -- which was relied upon by the Organization -- requires only that mechanics, and in this case a carman, be given consideration and that it does not require the Carrier to award a position to a mechanic. Additionally, they assert, there is nothing in any agreement which alters their right to determine the qualifications of those it considers for foreman positions and moreover such judgment is within management's prerogatives. The Carrier also takes the position that their prerogative was not shown by the Organization to have been exercised in bad faith, arbitrarily or capriciously.

The Carrier also disputes that the Claimant's treatment was discriminatory noting that this assertion was based on a comparison to another carman, Mr. Bennett, who was assigned a foreman's date. They contend there are few similarities between Mr. Bennett's and the claimant's situation. They point out that Mr. Bennett had previous experience as a supervisor filling in on temporary vacancies before he was "assigned" as a foreman, thus establishing seniority and further that he worked approximately four months as a foreman before being assigned. They contend he was qualified whereas the Claimant was not.

The Carrier also contends the Board has jurisdiction only to consider issues relating to Rule 16 of the Shopcraft's Agreement. This is for two reasons. First, they note that in progressing the claim to the Board the Organization deleted all reference to an alleged violation of any rules contained in the Supervisor's agreement and has stated only "that the Baltimore and Ohio Railroad Company violated Rule 16 of the controlling agreement..." Under the circumstances, the rule in the Supervisor's Agreement had not been included in the specific dispute submitted to the Board and therefore the Board may not consider such rules and agreements. Secondly, the Carrier submits that the Second Division is not empowered by the Railway Labor Act to consider and interpret rules of the Supervisors Agreement. They believe this function is exclusively reserved to the Fourth Division of the National Railroad Adjustment Board. Even if the Supervisors Agreement applied there would be no violation under the circumstances, inasmuch as Rule 9 gives the right to the carrier to judge the fitness of employees seeking foreman positions.

A review of the record leads the Board to conclude that there was no violation of the Claimant's contractual rights. There is nothing in the record that convinces us that the Carrier did not have the right to judge the fitness and ability of mechanics seeking promotion to foreman positions. Rule 16 states the following:

"Promotion to Positions of Foremen.

Mechanics in service will be considered for promotion to positions of Foremen."

Thus, Rule 16 only extends consideration to mechanics and does not alter management's presumed right to promote whom they choose. Further, there is no language in the Agreement which mandates that after working a certain number of days that the Carrier would be required to assign the employee a seniority date as a foreman.

This is not to say the Claimant is totally without a basis to question management's decision. While management has the right to make their personnel decisions, there is an implied obligation in exercising those prerogatives that they do so in good faith and in a non-arbitrary and non-capricious manner so as not to constitute an abuse of discretion.

In consideration of the question as to whether management exercised its discretion appropriately or inappropriately, it is the decision of the Board that their decision was not arbitrary, capricious or discriminatory. While the fact he spent 60 days on the job might suggest he was qualified, it is apparent that at least from a comparison to Mr. Bennett that the Carrier customarily required employees to spend considerable amounts of time filing in on temporary vacancies etc. before making a final decision to assign a seniority date. Indeed, such a decision should not be taken lightly. For instance, Second Division Award 6578 makes us mindful of this point:

"The right to select employees and make judgments as to their competence is solely a function and responsibility of management, unless expressly limited by contract. (See Award 4525 and Third Division Award 3151 among others.) Even more emphasis must be placed on management's unimpaired right to select supervisors, who are in fact part of management. Unless there are specific Rule proscriptions or management has acted in an arbitrary and capricious manner, thus prejudging employees rights, there can be no invasion of management's prerogative to assess competence of its employees for purposes of promotion among other things." (Emphasis added.)

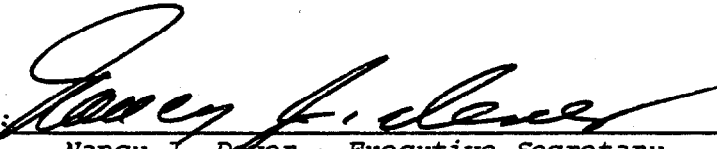
In view of the foregoing, the Claim is denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of November 1983.