

Award No. 1543

Docket No. MW-1531

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

E. L. McHaney, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DELAWARE AND HUDSON RAILROAD

STATEMENT OF CLAIM: "Claim of Harold R. Deso, Section Foreman, Champlain Division; first: that the Carrier violated Schedule Rule 3 (e) by denying him the opportunity to exercise his seniority rights in displacing a junior Track Foreman when he, Deso, was laid off in force reduction in October, 1939, and that he shall now be afforded an opportunity to displace a junior Track Foreman. Second: that he shall be paid the difference between what he has earned as an Assistant Track Foreman—60¢ per hour—and that which he would have earned as an extra gang foreman—\$185.40 per month—retroactive to October 17, 1939."

EMPLOYES' STATEMENT OF FACTS: "As results of force reduction that became effective October 1, 1939, Harold R. Deso, Section Foreman at Crown Point, New York, was displaced on October 1st by a senior Section Foreman. Being displaced at Crown Point, Section Foreman Deso requested the privilege of exercising his seniority rights by displacing Thomas Coates, Section Foreman at West Chazy, New York, who was junior to him as Section Foreman. The Carrier had indicated its willingness for Foreman Deso to displace Foreman Thomas Coates, but before Foreman Deso could arrange to go to West Chazy to displace Foreman Coates, J. C. Baker, a Section Foreman senior to both Deso and Coates, who was likewise affected by force reduction, exercised his seniority by displacing Section Foreman Coates at West Chazy. Section Foreman Thomas Coates being displaced by Foreman J. C. Baker exercised his seniority rights by displacing an extra gang foreman in charge of a small extra gang. After Thomas Coates was assigned as foreman of this small extra gang, Foreman Harold Deso requested the opportunity to exercise his seniority rights by displacing Thomas Coates as foreman of this small extra gang. The Carrier denied him that privilege.

"Harold R. Deso holds seniority rights as Track Foreman as of May 15, 1926.

"Thomas Coates holds seniority rights as Track Foreman as of June 1, 1927."

POSITION OF EMPLOYES: "Rule 3, paragraphs (d), (e), and (f) of agreement in effect between the Carrier and this Brotherhood reads:

'(d) **FORCE REDUCTION:** When force is reduced, senior employees shall be retained.

'(e) **FORCE REDUCTION—DISPLACEMENT RIGHTS:** When force is reduced, employees may exercise displacement rights according

"The attention of the Board is respectfully directed to Awards Nos. 489 and 772 which involve a similar principle."

OPINION OF BOARD: It is undisputed that Deso, the claimant, holds seniority rights as Track Foreman as of May 15, 1926, whereas Thomas Coates, whom Deso sought to displace, holds seniority rights as of June 1, 1927. So, if seniority alone is to prevail, the claim must be allowed. Rule 3, paragraphs (d), (e) and (f) govern displacements in force reduction, rule 3 (d) providing, "When force is reduced, senior employees shall be retained," and rule 3 (e), "When force is reduced, employees may exercise displacement rights according to their seniority." There is nothing in that language that justifies an exception. There is no reference to "ability" or "merit" and properly so, for as between two Track or Section Foremen, both will be presumed to have sufficient ability and merit, else they would not be Section Foremen.

The Carrier cites and relies on rule 2 which provides: "Rights of employees to positions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail." Also it cites and relies on rule 27, which provides: "Promotions to positions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail." And it is contended that Deso was not qualified, having spent most of his service as Foreman on a branch line. His service record shows that this is true, but also shows that he has, for about 17 years in this class of work, also been Foreman on the Main Line, Yard Foreman and Extra Gang Foreman, and there is nothing in this record to show that his services have been unsatisfactory.

There is no question of promotion in this case, unless it be so regarded because of an increase in pay from \$160.40 to \$185.40, or unless being a Foreman of an Extra Gang is a superior office to that of a mere Section Foreman. We think neither is to be so regarded. See Award 1089, by Referee Hilliard, and Award 1416 by Referee Bushnell.

A Section Foreman continues to be such even though in charge of an Extra Gang, and the junior must yield to the senior under the plain provision of the rules, and the claim should be sustained.

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 employee involved in this dispute are respectively carrier and employee 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 the claimant is entitled to the opportunity of displacing the junior Foreman of the Extra Gang, Thomas Coates, and to an award of the difference in pay between the rate received and what he would have received had he been permitted to displace the junior foreman.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago Illinois, this 5th day of August, 1941.

Dissent to Award Number 1543, Docket Number MW-1531

The impracticability of this Award will be evident to every railroad man who considers its implications, as evident in the concluding paragraph of the Opinion which declares:

"A Section Foreman continues to be such even though in charge of an Extra Gang, and the junior must yield to the senior under the plain provision of the rules, and the claim should be sustained."

The declaration that a Section Foreman continues to be one though in charge of an Extra Gang, contradictory as it will appear to anyone, will impress itself upon railroad men to be unsound as a statement of fact.

The further statement that the junior must yield to the senior under the plain provision of the rules is made in the face of Rule 2, here quoted:

"Rights to positions. Rule 2. Rights of employes to positions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail."

That rule is identical with the rule upon promotions in that Rule 27, Promotions, declares promotions to be based upon exactly the same factors as Rule 2 declares the rights of employes to positions to be based, viz. ability, merit and seniority. Any logical construction of this Agreement will have to conclude that Rule 2 specifically is involved by the right to the position which this claimant expressed. Yet this award says that the junior must yield to the senior under the plain provision of the rules. Nothing could be more contrary to the provision of Rule 2, whose application cannot in reason be excluded.

The error of the Award is further indicated by the declaration in the second paragraph of the Opinion that the Carrier relied upon the Promotion Rule, Rule 27. The Carrier in its position referring to the rules upon which they relied listed one rule, Rule 2, and said:

"The Carrier contends this rule governs the action taken in this case."

Subsequently the Carrier in its argument expanded that contention to this extent:

"* * * that Rule 2 applies any time an employe becomes an applicant for a position due to the application of seniority rules. The Carrier further contends that Rule 27 applies in connection with promotion of an employe from a lower to a higher rank."

No fair inference can be drawn that the Carrier relied on Rule 27 applying to the circumstances of this case. The statement is representative of the confusion that brings about the decision.

The first paragraph of the Opinion cites certain paragraphs of the rule (Rule 3) relating to force reduction upon which the claimants relied, and declares that there is no reference therein to "ability" or "merit" in respect to exercise of displacement. To thus exclude another rule (Rule 2), of such evident application to this circumstance by reason of its inclusion in addition to the promotion rule in this Agreement, and thus dispose of the Carrier's right to consider merit and ability when an employe acts to exercise his rights to a position, is to give arbitrary, unwarranted and even unimplied limitation to an agreement.

The Award indicates that this dispute has been considered as one which by its circumstances limited the decision to a substitution of the judgment of this Board for that of the responsible officers of the management as to the ability of an employe for a given position of a restraint from such decision.

Such limited consideration is apparent in the exclusion of "ability" and "merit" as factors in the decision as made evident by the conclusion of the first paragraph of the Opinion. The Award elects to express the propriety of such substitution of judgment by this tribunal composed of members who cannot possibly have necessary knowledge of the character of work requirements and degree of capability of the various employes whose seniority may make them eligible at least for consideration.

There was no charge of bias or prejudice or unfair treatment otherwise of the employe involved. The Award was made in the knowledge that heretofore awards by this Division, both upholding and denying claims involving fitness and ability of employes, have universally clearly declared that there had been no violation of agreements and that the management's action in selection of employes of fitness and ability should not be disturbed except that its action may have been found to be arbitrary, not in good faith, or with evidence of favoritism, bias or prejudice. None of these faults here appeared or even were charged.

The assumption that this Board should substitute its judgment for that of responsible management officers as it did in this case, if it has any implications whatsoever, is one that does violence to the whole theory of any properly organized industry as well as to the employes of varying degree of fitness for positions engaged therein and one that is wholly impossible of practical application. The suggestion of the last paragraph of the Opinion that a Section Foreman continues to be such even though in charge of an Extra Gang of course is made in apparent ignorance of facts relating to Section Foremen's occupancy of their positions, such as their voluntary permanent retention of positions on branch lines or unimportant yard sections, which experience would never afford opportunity to fit themselves to fill positions in charge of extra gangs or section gangs on main line territory under high speed traffic, nor does it give recognition to the evident purpose of the negotiators of the Agreement, including the differential in rates of pay, which comprehended those practical facts and situations to which the provisions of the Agreement applied.

Constituting an erroneous interpretation of the Agreement and being in conflict with practical situations to which the Agreement was made applicable, as well as contrary to previous awards of this Division with their well-reasoned understanding of those practical situations involving the determination of employes' fitness and ability as therein consistently expressed, this extraordinary and exceptional Award, of necessity impractical if of any implication at all, becomes impotent as tested by its application to the conditions upon which the agreements were negotiated, and which still exist, and by comparison with the overwhelming contrary weight of opinion in the many sound and reasonable awards from this Division relating to the selection of employes with fitness and ability for the positions to be filled.

S/ C. C. COOK
S/ R. H. ALLISON
S/ A. H. JONES
S/ C. P. DUGAN
S/ R. F. RAY