

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

E. L. McHaney, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE COLORADO AND SOUTHERN RAILWAY COMPANY**

STATEMENT OF CLAIM: "That Section Foreman Shelby Davis be assigned as Section Foreman in the South Denver Yards and compensated for any loss in earnings as a result of the assignment of this position to a junior foreman."

JOINT STATEMENT OF FACTS: "On August 1, 1939, Roadmaster J. J. McInerney issued bulletin No. 18 advertising for bids on South Denver section as follows:

'Permanent vacancy exists for position as Foreman, South Denver Yard Section, Location (West End Yard) Denver. Applicant bidding on the Denver Yard position will have to show service experience sufficient to show that he is able to fill same before assignment will be made. All bids to reach my office not later than Aug. 10th.'

"E. A. Romer was assigned to the South Denver Yard Section as per bulletin No. 19 dated Aug. 23, 1939, reading as follows:

'Mr. E. A. Romer is assigned to South Denver Yard.'

"Mr. Shelby Davis bid on this position.

"The respective seniority dates as Foreman of the two men involved are as follows:

Shelby Davis	Foreman	Sept. 22, 1917.
E. A. Romer	Foreman	May 5, 1929."

POSITION OF EMPLOYEES: "As evidenced by the Joint Statement of Facts a bulletin was posted by the Roadmaster on August 1, 1939 advertising for bids for position of foreman on the South Denver Yards Section. Section Foreman Shelby Davis, with seniority rights as foreman as of September 22, 1917, bid for that position. Section Foreman E. A. Romer, with seniority rights as foreman as of May 5, 1929, likewise bid for that position. Foreman E. A. Romer, the junior of the two bidders, was assigned.

"We maintain that by assigning the junior of the two foremen bidding, the Carrier violated the agreement in effect between the Carrier and the Brotherhood of Maintenance of Way Employees effective April 1, 1925, and particularly Article 17, paragraph (b) thereof, which reads:

'Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad, as hereinafter provided.'

for promotion to the more important and higher rated sections. He, however, elected to remain on the narrow gauge lines, where the work was very much lighter and with very much less responsibility. He did not bid on any standard gauge sections until his position at Idaho Springs was abolished and he was required by schedule provisions to place himself on another narrow gauge section, at Climax. He then bid on the South Denver section as covered by Bulletin 18, and this section is considered one of the most important and hardest sections to maintain on the entire Northern Division.

"Bulletin No. 18 stipulated applicants bidding for the position would be required to show sufficient service experience to fill duties required of Section Foreman on South Denver Yard section. Shelby Davis' application made no mention of his qualifications for the position—he simply stated 'Am hereby entering my bid on South Denver Yard.' He could not have shown 'sufficient service experience' to qualify for the position as he did not have it.

"In view of the foregoing facts that Shelby Davis' experience as a section foreman was practically all in connection with the maintenance of very light narrow gauge lines, and that although he had numerous opportunities to bid on and be assigned to standard gauge lines, it is our opinion that he was not entitled to be assigned under Bulletin No. 18, because he lacked the ability and experience to handle this important section and did not merit the assignment. Therefore, feel that your Board should decline his claim as the Management, under the rule, was permitted to select the employee who in its judgment was qualified for the position."

OPINION OF BOARD: As stated above, the question here presented is whether section foreman Shelby Davis be assigned as section foreman on the South Denver Yard Section, location (West End Yard), and compensated for any loss in earnings as a result of the assignment of this position to E. A. Romer, a foreman junior to Davis.

The position was bulletined by the Roadmaster on August 1, 1939, in this language: "Permanent vacancy exists for position as Foreman, South Denver Yard Section, Location (West End Yard) Denver. Applicant bidding on Denver Yard position will have to show service experience sufficient to show that he is able to fill same before assignment will be made. All bids to reach my office not later than August 10th."

In response to this bulletin two bids were submitted, one by Davis and one by Romer, whose respective seniority dates are September 22, 1917, and May 5, 1929, and the position was assigned to the latter. The bulletin was issued under the provisions of Article 18 (d) of the current Agreement between the parties.

The employees contend that the Carrier, in assigning Romer instead of Davis to this position, violate Article 17 (b), reading: "Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad, as hereinafter provided." There then follows 13 subsections of Article 17, from (c) to (o) inclusive, dealing entirely with seniority and reduction of force.

A part of the Carrier's contention is that Article 18 (a), relating to promotions and providing that "Promotion shall be based on ability, merit and seniority; ability and merit being sufficient, seniority shall prevail, the management to be the judge."

If this were all, the claim would have to be sustained. See Decision No. 1676, United States Railroad Labor Board. Also Awards of this Division: 1089, 1416, and 1481.

But this is not all. The record discloses that, on the request of the General Chairman in 1931, seniority districts for section foremen were consolidated so as to provide one district for each Superintendent's territory, and under date of March 21, 1931, the General Chairman and the Carrier

executed a memorandum of Agreement, reading, insofar as applicable here, as follows:

"It is hereby understood that seniority applying to Maintenance or Track Foremen covers a Superintendent's division, or the whole territory over which he has jurisdiction.

"Applicant bidding on position of Foreman in Denver Yard will have to show service experience sufficient to satisfy the operating officer that he is able to fill same before assignment will be made."

This Agreement specifically conferred on the operating officer, or the Carrier, a discretion in the matter of selecting foreman in the Denver Yard, which, at that time, covered seven sections and a like number of section foremen. It is not contended that the Management abused its discretion, or that it acted arbitrarily, or that it was biased or prejudiced in making the selection. Where discretion or judgment is conferred and it is fairly and honestly exercised, it must prevail.

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 employe involved in this dispute are respectively carrier and employe 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 discretion of the Management was exercised in conformity with the Rule.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of August, 1941.

Special Concurrence
to

Award No. 1555, Docket No. MW-1574

While we concur with denial of this claim, we are wholly in disagreement with that part of the "Opinion" holding that an employe's right to a new position or vacancy shall be based solely on seniority and without regard to the ability and merit of the applicant.

To so hold deprives the Carrier of its right to organize and efficiently conduct its business; it is an action not contemplated by either party to the agreement and one not heretofore practiced nor provided for by the agreement.

This Board is not authorized to substitute its judgment for that of the Carrier as to the ability and merit of an applicant where the agreement is applied in good faith and on the basis of substantial evidence of lack of ability.

See dissent to Award No. 1543.

/s/ R. H. Allison
/s/ A. H. Jones
/s/ C. P. Dugan
/s/ R. F. Ray
/s/ C. C. Cook