

Award No. 2143
Docket No. MW-2020

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
GALVESTON WHARVES COMPANY

STATEMENT OF CLAIM: Claim of System Committee of the Brotherhood that:

(1) The Carrier violated the provision of Article II and III of the current agreement in assigning a junior man to a position of mechanic under bulletin issued May 24, 1940. When the position of mechanic was advertised Obleton Knight tendered his bid in the proper form for the position. The Carrier ignored Knight's seniority and assigned E. W. Zerbel to the position.

(2) That Obleton Knight, under the seniority provision of the agreement, was entitled to hold the position to which Zerbel was assigned.

(3) That Obleton Knight be reimbursed for the difference between what he received and what he would have earned had he been properly assigned in accordance with his seniority for the period which E. W. Zerbel, a junior man, held the position.

EMPLOYEES' STATEMENT OF FACTS: On May 1, 1940, the Carrier assigned E. W. Zerbel and on May 24 confirmed the assignment, on bulletin, denying Obleton Knight the right to place himself in accordance with his seniority on the roster dated May 23, 1940.

On the seniority roster dated May 23, 1940, Knight was accorded a date as of November 4, 1936.

On the same roster, Zerbel was accorded a date as of August 26, 1937.

The roster indicates that Knight was senior to Zerbel and should have been assigned accordingly.

POSITION OF EMPLOYEES: The agreement effective May 1, 1940, contains the following rules governing seniority:

"ARTICLE II, SENIORITY DATUM.

"Rule 1. Except as otherwise provided in this Article, seniority begins at time employe's pay starts."

"Rule 2. Applicants for employment when required must fill out prescribed forms and undergo physical examinations. The application of employe will be approved or rejected within sixty (60) calendar days and applicant will be considered as a temporary employe until application is passed on. Notice of acceptance or rejection will be furnished the employe."

"At the time the assignments were made I did not consider Mr. Knight competent for the position requested; therefore, I am unable to comply with your request to make change in this assignment."

This definitely proved that Knight did bid on the position. On what ground Mr. Fristoe arrived at the conclusion that Mr. Knight was not competent is not revealed.

However, at the time the assignment was made, Mr. Fristoe had full knowledge that Knight held seniority as a B. & B. mechanic and at no time was there any question raised as to Knight's ability to efficiently perform the duties to which he had been assigned for a number of years. Therefore, it is evident that Mr. Fristoe did not give any consideration to Knight's seniority when the assignment of Zerbel was made.

Exhibit "B" reveals further that when the matter was called to Mr. Fristoe's attention he declined to correct the error. The Employees can arrive at but one conclusion; i. e., that Mr. Fristoe willfully violated the provisions of the agreement and continued to violate the agreement in permitting Zerbel to continue on an assignment to which Knight was entitled through seniority.

The Employees earnestly request that your Board sustain this claim.

POSITION OF CARRIER: Claim of System Committee of the Brotherhood that the Galveston Wharves violated the provisions of Article II and III of the current agreement in assigning a junior man to a position of mechanic under bulletin issued May 24, 1940.

Mr. Knight was not entitled to any seniority rules as mechanic until he was definitely assigned as a mechanic and employed as a mechanic. Prior to this assignment Mr. Knight had been carried on our rolls as laborer both in our B. & B. gangs and on the pile driver, used on the pile driver as pile driver laborer when extra men were needed. Our Chief Engineer at that time did not consider Mr. Knight competent to be classed as a mechanic and on recommendation of Mr. C. C. Ray, District Chairman, we promoted Mr. Zerbel to position of mechanic instead of Mr. Knight. Under Article X of the contract, the officials of the Galveston Wharves have the right to be the judge as to a man's ability for promotion, subject to appeal by the Brotherhood of the Maintenance of Way Employees. As yet no appeal has ever been made on the promotion of Mr. Zerbel.

OPINION OF BOARD: The current agreement became effective May 1, 1940. Art. II, Rule 3, provides that seniority of employees on bulletined positions will date from the day of their assignment to such positions, and that the dating of an employee on the seniority roster shall determine his seniority status. Art. IV, Rule 1, provides that seniority rights of employees are confined to the subdepartment in which they are employed.

A seniority roster was posted May 23, 1940. This gave the date of entry in the service of the claimant as November 4, 1936 and of E. W. Zerbel, who the Committee claims was improperly awarded the position here in question as August 31, 1937. The position here in question was bulletined May 24, 1940. The claimant bid for it but it was awarded to Zerbel. The Committee claims that the awarding of the position to a junior man was a violation of the agreement.

The Carrier contends that the seniority roster carried no classifications and that therefore seniority could not be claimed. We cannot agree with this contention. It was at that time the only roster that was in existence and the mere fact that employees had not been grouped on rosters in their different departments is not of consequence, particularly where as here these two employees were entitled to the same classification.

The Carrier's real justification is based on its contention that under the provisions of Art. X, Rule 1, it had the right to determine the qualifications of applicants and that it had decided that the claimant did not have the necessary qualifications. This rule reads as follows:

"ARTICLE X, MAKING PROMOTIONS

"Rule 1. Promotion shall be based on ability and seniority. Ability being sufficient, seniority shall prevail. The Vice President and General Manager or his duly accredited representative shall be the judge, subject to appeal."

In spite of the designation of the Vice President and General Manager or his duly accredited representative as the judge of an applicant's qualifications, this power is not an absolute one. To so hold would wipe out all benefits accorded to employes under the rules governing seniority. As has been said in CL-2157, Award 2142: "This Board has a right of review to this extent,— that it must appear from evidence before this Board that the Carrier's decision is made in good faith 'and on the basis of substantial evidence of want of fitness on the part of the particular employe who deems himself aggrieved'." A careful reading of the record in the case now before us shows no evidence of any want of fitness on the part of the claimant. In fact such evidence as there is shows that he was fully qualified. In fact it is admitted by the Carrier that a few months later he was awarded a carpenter's job and made good at it.

The fact is that E. W. Zerbel was awarded a position which belonged to the claimant. The facts in this case are altogether different from those discussed in Docket CL-2157, Award 2142. Here there was nothing to justify the decision of the Carrier.

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 employes involved in this dispute are respectively carrier and employes 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 Carrier violated the agreement in awarding the position of mechanic bulletined May 24, 1940 to E. W. Zerbel instead of the claimant.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of April, 1943.