

Award No. 3057

Docket No. MW-3168

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

WABASH RAILROAD COMPANY

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

(1) That the Carrier violated agreement in effect by assigning Junior Carpenter Floyd Derringer to position of B&B Foreman, Chicago Terminal Division, instead of assigning Senior Carpenter H. L. True;

(2) That H. L. True shall be assigned to the position of B&B Foreman with seniority as such as of August 18, 1944;

(3) That H. L. True shall be paid the difference between what he has earned in other occupations and that which he would have earned as B&B Foreman, retroactive to August 18, 1944.

EMPLOYEES' STATEMENT OF FACTS: On August 4, 1944, bulletin was posted advertising a temporary position of B&B Foreman on the Chicago Terminal Division.

Bridge and building carpenters H. L. True and Floyd Derringer submitted bids or made application for the position.

H. L. True holds seniority rights as carpenter as of June 8, 1923.

Floyd Derringer holds seniority rights as carpenter as of August 25, 1936.

See copy of seniority roster, Bridge and Building Department, Chicago Terminal Division, Employees' Exhibit "A".

Floyd Derringer, the junior applicant, was assigned to the position of temporary B&B foreman.

The Agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rules 14 and 15 of Agreement in effect between the Carrier and the Brotherhood of Maintenance of Way Employees governing promotion read:

"PROMOTION

Rule 14. Promotions shall be based on ability, merit and seniority; ability and merit being equal and sufficient, seniority shall prevail, the management to be the judge, subject to appeal."

"FAILURE TO QUALIFY

Rule 15. Employees accepting promotion and failing to qualify within sixty (60) days, may return to their former positions without loss of seniority."

2. The ability and merit of Messrs. True and Derringer were not equal, as Mr. True did not possess sufficient ability to properly perform the duties of B&B Foreman, accordingly, the promotion of Mr. Derringer and his assignment on the position of B&B Foreman, effective August 19, 1944, were in keeping with the provisions of Rule 14, quoted in the Carrier's Statement of Facts.

Further in that connection, Rule 14 of the agreement provides that the management shall be the judge as to the ability and merit of individuals aspiring promotion, and also provides that seniority shall prevail only when the ability and merit of two or more individuals aspiring promotion are equal, which was not the case in the instant dispute, as Mr. True held no seniority as a B&B Carpenter from which promotions to B&B Foremen are made.

Obviously, it is the duty and responsibility of the management to pass on the ability and merit of employees in the Maintenance of Way Department aspiring promotion, and that is particularly true in cases where employees aspire promotion to supervisory positions, such as B&B Foremen, and so long as the management acts in good faith and does not abuse the rights of the employees under the agreement, which was not done in the case under consideration, no one, including the Board, has any right to substitute judgment for that of the management.

The submission of this alleged dispute to the Board is without question an attempt on the part of the Committee to change the provisions of Rule 2 (d) and Rule 14 of the agreement, effective June 1, 1940, in a manner contrary to the provisions of Section 6 of the Railway Labor Act, as amended, therefore, the contention of the Committee should be dismissed and the claim denied.

OPINION OF BOARD: The Claimant contends that he should have been assigned to the position of Bridge and Building Foreman, Chicago Terminal Division, and that the Carrier violated the Agreement by assigning the position to Floyd Derringer. The decision must necessarily be based upon the interpretation to be given to Rule 14 of the current Agreement which is as follows:

"Promotions shall be based on ability, merit and seniority; ability and merit being equal and sufficient, seniority shall prevail, the management to be the judge, subject to appeal."

Much of the arguments of the parties are given over to the discussion of Claimant's correct seniority date. For the purposes of this award, the Board will assume, without deciding, the Claimant was senior in point of service as a carpenter to Derringer. We will also assume, without deciding, that Claimant had the merit and ability to handle the position sought. It will be noted from an examination of the rule that promotions are to be based on ability and merit,—and that seniority shall control only where ability and merit are equal and sufficient. We think the Carrier had ample support in the evidence for its assignment of Derringer to the position solely on the basis that his ability and merit exceeded that of the Claimant.

The record shows that Derringer had many years experience as a B&B Carpenter. He had considerable experience as a temporary B&B Foreman. Claimant had served for 14 months as a carpenter on the St. Louis Terminal Division and has performed service only as a welder and welder's helper since 1924. It is the duty and responsibility of management to pass on the merit and ability of employees for promotion under the foregoing rule. And where the evidence is sufficient to sustain the carrier's judgment that a junior employee is the better qualified within the meaning of the rule, this Board lacks the power to substitute its judgment for that of the carrier. The evidence produced is clearly sufficient to sustain a finding that Derringer was better qualified for and more experienced in the duties of a B&B Foreman. Under such circumstances under this rule seniority is not controlling. The Carrier having made this determination in good faith and with ample support in the evidence, the rights of the Claimant have not been abused and no basis for an affirmative award exists.

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 parties waived oral hearing thereon;

That the Carrier and the Employees involved in this dispute are respectively carrier and employees 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 current Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 20th day of December, 1945.