

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Grady Lewis, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY
COMPANY**

(Joseph B. Fleming and Aaron Colnon, Trustees)

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

(1) That senior qualified B&B Mechanic G. W. Evans, Western Division, instead of junior B&B Mechanic Alva Hock should have been assigned to the temporary position of B&B foreman, relieving a regular B&B foreman, from May 7 to 15, 1945, inclusive;

(2) That G. W. Evans shall be paid the difference between what he received at B&B mechanic's rate of pay and that which he should have received at B&B foreman's rate of pay from May 7 to 15, 1945, inclusive.

EMPLOYEES' STATEMENT OF FACTS: The employees desire to quote "Joint Statement of Facts," signed by R. H. Spicer, superintendent, Chicago, Rock Island and Pacific Railway Company, and Jay W. Cope, assistant general chairman, Brotherhood of Maintenance of Way Employees, on November 21, 1945:

"On May 7, 1945, B&B Foreman George Bobst, Gang No. 1, working at Albright, Nebraska, laid off account sickness, and A. Hawk, second class carpenter, was used as foreman in place of Bobst.

"George W. Evans, second class carpenter and a senior man, was not used.

"Foreman Bobst was off sick from May 7 to May 15, inclusive, 1945."

Agreement effective May 1, 1938, between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rule 4 (c) of the agreement in effect between the parties provides as follows:

"(c) Positions or vacancies of thirty (30) days or less duration shall be considered temporary and may be filled without bumping. Senior employees in the respective seniority groups will be given preference on such temporary positions."

It will be noted that in the "Joint Statement of Facts" referred to in the Employees' Statement of Facts that the superintendent on the division

Mr. Evans has never worked as a foreman while Mr. Hock, referred to as Hawk in Joint Statement of Facts, has in the past worked temporarily both as a B&B foreman and as a lead mechanic. Mr. Hock acted as a foreman temporarily for the following periods and his services in that capacity were satisfactory:

March 5 to 11, 1943
June 9 to 14, 1943
July 17 to 23, 1944
January 27 to 31, 1945

He worked as a lead mechanic from January 20 to 25, 1945.

The Carrier has no record of any claim or protest being made by the claimant at the time Mr. Hock was previously used as foreman.

Consistent with Rule 10 Mr. Hock was used in this instance for the temporary period of Mr. Bobst absence for the reason that the ability, merit and fitness of Messrs. Hock and Evans were not equal and therefore seniority would not prevail. Promotion, according to Rule 10, is to be based upon ability, merit, fitness and seniority. Seniority is not a determining factor until it has been definitely established that ability, merit and fitness of the applicants are equal. They were not equal in this case.

In accordance with the wording of Rule 10 and pursuant to the awards of your Board it is the prerogative of the Carrier to judge the fitness, ability and merit of an employe for the purpose of promotion provided that judgment is reasonable and fair. In this case there can be no question about the judgment of the Carrier having been reasonable and fair and that the assignment of Mr. Hock was based upon an objective and fair appraisal of the respective merit, fitness and ability of both Mr. Evans and Mr. Hock.

In Award No. 96 of your Board it is stated:

"Seniority cannot be applied irrespective of fitness and ability. The latter elements are of very great importance to the Carrier. In this particular case or dispute this division is of the opinion that the Carrier was justified in the opinion that the Carrier was justified in making the decision that the petitioner did not possess sufficient fitness and ability to perform the duties of the position. . . ."

In Award No. 3204, Docket MW-2952, involving both this Carrier and organization which is a party to this dispute, your Board said:

"This Board has held that the Carrier must be permitted to exercise managerial judgment on applications for promotion under Rule 10."

In summary the Carrier urges that (1) there was no violation of Rule 10 and the use of Mr. Hock on the dates in question as B&B foreman was strictly in accordance with Rule 10. (2) ability, merit and fitness were not equal between Messrs. Evans and Hock; Mr. Hock, by reason of his previous service as foreman and leadman, had superior ability, merit and fitness; therefore, seniority could not prevail; and (3) the Carrier had the prerogative of judging the ability, merit and fitness in accordance with Rule 10 and the awards of your Board. We respectfully petition your Board to deny the claim of the employes.

OPINION OF BOARD: A temporary vacancy in a foreman's position arose by reason of illness of the regular occupant. From May 7 to May 15 inclusive such vacancy was filled by an employe junior to claimant. He urges a grievance thereby and claims B&B foreman's pay for such length of time.

Claimant cites Rule 4-(c) as authorizing the claim. That rule provides:

"Positions or vacancies of thirty (30) days or less duration shall be considered temporary and may be filled without bulletining. Senior employes in the respective seniority groups will be given preference on such temporary positions."

Carrier relies upon Rule 10, reading:

"BASIS OF PROMOTION. Employees in these departments will be considered for promotion based on ability, merit, fitness and seniority. Ability, merit and fitness being equal, seniority shall prevail, the employing officer to be the judge, subject to appeal."

We hold that Rule 4-(c) is applicable here. This was a temporary position for less than thirty days and preference must be given senior employees for such employment.

Rule 10 affects promotions, and where promotions are involved, ability, merit and fitness must be considered before seniority shall prevail. That situation is not here presented.

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 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 agreement has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 22nd day of July, 1947.

DISSENT TO AWARD NO. 3637, DOCKET MW-3641

The statement that a promotion was not involved in the advancement of a B&B mechanic to fill a temporary vacancy of foreman is contrary to the facts and without precedent in the awards of this division.

The interpretation of the agreement here restricted to Rule 4-(c) disregards the provisions of Rule 10 to the end of ignoring the controlling factors of fitness and ability.

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

SUPPORTING OPINION TO AWARD NO. 3637

The dissent recites that the statement in the opinion to the effect that no promotion is involved is contrary to the facts of the case. I am wholly unaware of any dispute as to the facts. Certainly, dissenting members, nowhere, challenged the factual situation presented.

Since this is so, the most that can be said about the opinion is that the meaning of the word "promotion" is not fully set out. Roget says the word is synonymous with "advancement," "elevation," "preference," "betterment." Funk and Wagnalls says it means "to raise to greater dignity, rank, or honor." Any such definition connotes permanency and continuity. It is wholly repugnant to anything fleeting, passing, or temporary. Recog-

dition of this meaning was given to this term when the agreement was promulgated. Before an employe may be "advanced," "elevated" or "raised to higher dignity, rank or honor" the position affording such advancement and rank must first be bulletined to determine whether that employe is entitled to such elevation, by reason of his ability, merit, and fitness, or whether some other employe, possessing greater ability, more merit and better fitness, should be selected for preferment. Seniority governs such choice only when ability, merit and fitness are equal.

Where, however, it is not contemplated by the agreement that an employe be raised to higher rank, provision is made for substituting, without bulletin, one employe for another for thirty days or less. In such cases the governing qualification for such substitution is seniority in the affected seniority group from which the substitute is selected. And this is a reasonable and sensible provision. It would not be feasible nor, in most cases, possible to bulletin all such temporary vacancies with a view of measuring merit, ability and fitness of substitutes for work that might last for but a few hours. A provision that gives preference for such work to the senior employe does not do violence to reason. Normally, the senior employe is the better equipped.

Nor does the rule confine the temporary work, open to such senior employes, to positions equal in pay and responsibility to the regular assignment of such employes. The only limitation placed upon an employe's right to claim the work is the limitation of his seniority in his own seniority group. If it had been the intent of the agreement to limit the temporary work that a B&B mechanic could claim to B&B mechanic's work, suitable language could have been employed to effect that end. Since such language is not found in the agreement this division has no authority to supply it.

It, therefore, follows that since Evans was the senior employe in the seniority group in which he and Hook held seniority he was entitled to preference over Hook to the temporary position regardless of where such vacancy occurred.

/s/ GRADY LEWIS, Referee.