

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee.

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
BOSTON AND MAINE RAILROAD**

STATEMENT OF CLAIM: (1) That the Carrier violated the agreement by assigning the position of Welder in Extra Gang Number 1, Boston, to Trackman T. J. Foley instead of Trackman J. Lionetta who was the senior bidder, on May 18, 1948;

(2) That Trackman J. Lionetta be awarded the position of Welder in Extra Gang Number 1 with a seniority date in that class of May 18, 1948;

(3) That Trackman J. Lionetta be reimbursed for all monetary loss suffered by him on account of the Carrier's improper action.

EMPLOYEES' STATEMENT OF FACTS: Prior to May 18, 1948, Trackman J. Lionetta, and Trackman T. J. Foley were employed, and held seniority in Extra Crew No. 1, Headquarters, East Somerville.

Trackman J. Lionetta being the senior employe of the two.

Prior to May 18, 1948, the position of Welder in Extra Crew No. 1, became vacant and several of the Trackmen in Extra Crew No. 1, made application for the position.

In the applications submitted for the position of Welder, were those of Trackman J. Lionetta and Trackman T. J. Foley.

On May 18, 1948, the Carrier assigned the position to Trackman T. J. Foley the junior applicant.

Claim that senior trackman J. Lionetta be awarded the position of Welder and reimbursed for the difference between Welder's and Trackman's rate of pay, was filed with the Carrier and claim was declined.

The Agreement in effect between the two parties to this dispute dated May 15, 1942 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rule 1 of the effective agreement reads as follows:

"Seniority begins at the time the employes' pay starts in the class in the sub-department on their seniority districts. An employe awarded an advertised position in a higher class than

Consider the application of the suggested interpretation:

"A temporary welder's vacancy is posted for bid. The senior applicants, as here, are not qualified welders. The vacancy is to last for only thirty-five (35) days. Under the suggested interpretation the senior **unqualified** applicant must be given a sixty-day trial, or at least until he is willing to admit he cannot perform the work. Next, the second senior applicant must be afforded a similar trial, and so on down the list of senior **unqualified** applicants. In the meantime the welding work which needs to be done remains unfinished."

Carrier does not believe that the Board will accord much credence to such an absurd interpretation. It was to avoid precisely the claim that was made in this docket that Carrier insisted upon the use of the adjective "qualified" in Rule 16-A. Under this language the senior applicant **must** be able to perform the required duties of the position bid for or it will not be assigned to him. By qualified it is meant that he must have "sufficient ability and merit" as outlined in Rule 16-A which clearly states—

"Ability and merit being sufficient in the judgment of Management".

It has been a long established policy of the several divisions of the National Railroad Adjustment Board that, where such language appears, the "judgment of the Management" will not be disturbed unless there is a positive showing of ill-considered, arbitrary or capricious judgment.

No such showing has been made here. In fact, Petitioner has made no attempt to discredit the "judgment of the Management" that claimant did not possess "sufficient ability and merit". Claimant's seniority, therefore, did not become a factor, in the final determination.

Petitioner has merely attempted to rely upon the utterly absurd theory that his rules require the assignment, or awarding, of a bulletined position to the senior applicant, whether qualified or not, and a trial on said position under Rule 18-A. Carrier has clearly proven that such is not the intent of the cited rules. Carrier is frank to say that a dispute could be provoked if the parties disagreed with respect to a senior applicant's qualification. But here there is none. Petitioner, at no time, has urged that claimant was a qualified welder, able to perform the duties of the bulletined temporary vacancy, and Carrier does not understand that he does so now.

SUMMARY: Carrier has tried herein to carefully analyze the rules cited by Petitioner in support of the claim in this docket and has shown that the applicable rules do not support the claim. Carrier has shown that the senior qualified applicant was awarded the bulletined temporary position and that claimant was not a qualified applicant. Carrier has shown that Item (1) of the claim cannot be sustained; that Item (2) is moot for the position (temporary) as a welder cannot be awarded to Lionetta since he is not an employe of the Carrier (resigned 8-11-49); that Item (3) is unsustainable because it is not a "dispute between an employe and a carrier" properly referable to the Adjustment Board.

For all of the aforesaid reasons the claim should be denied.

OPINION OF BOARD: Claimant was a trackman holding seniority in Extra Crew No. 1, seniority date June 24, 1942. He bid on a welder's vacancy advertised by bulletin dated May 3, 1948. The position was awarded to one T. J. Foley, seniority date as trackman August 22, 1946. Foley had previously held seniority as a welder but had lost it by reason of having resigned from Carrier's service prior to his re-employment as trackman in 1946.

Carrier objects to this Board's jurisdiction because of the resignation of claimant while this claim was pending. We do not consider that as a bar to our acceptance of jurisdiction. He was an employe at the time of the rule violation. As said by Referee Carter in Award 4461, the Organization has the authority to police the Agreement. Unless penalties and wage losses can be asserted by the Organization, its primary method of compelling enforcement of its Agreement is gone. The fact that the claimant may have died since the claim first arose was not considered as a bar or a determination of the claim on the merits in Award 5190; nor that the individual involved disclaimed any right to reparations (Award 4461). The same principles apply with respect to an employe who has resigned after the occurrence of the violation.

The promotion rule in the applicable Agreement provides as follows:

"16-A Basis of Promotion

Promotion shall be based on ability, merit and seniority. Ability and merit being sufficient in the judgment of the Management, seniority shall govern."

The principles guiding this Board in the consideration of dockets involving claims based upon violation of promotion rules similar to that involved herein are so well known that it is not necessary to cite authority on the subject. Generally stated, it is the Carrier's responsibility and prerogative in the first instance to judge the fitness and ability of an aspirant for a position and in the absence of an arbitrary or capricious exercise of its judgment in that respect this Board will not interfere with the Carrier's decision.

Fitness and ability as indicated in Award 2427 cited with approval in Award 3273 does not mean that the applicant is immediately qualified to step in and assume the duties of the position without guidance or assistance. It means that the applicant must have such training, experience and character as to raise a reasonable probability that he would be able to perform all the duties of the position within a reasonable time.

In this instance, Carrier disclaims any knowledge that claimant had or did not have sufficient ability to learn how to become a welder. Carrier contends that the employe must have sufficient ability to fulfill the duties of the higher rated position at the time it is necessary to fill same and not at some future date. We think these contentions by Carrier indicate that in refusing this position to claimant, Carrier applied standards which are contrary to the rule as interpreted by this Board. Standards which, in our opinion, would completely nullify seniority as a factor in promotion. Obviously, an employe despite his seniority and potential would have no right to promotion, if it be required that he must have previously performed the work of the position to which he aspires. Here, apparently, neither potential nor seniority was given any consideration. It is apparent from the facts of record that claimant's potential could have been judged within a very short time since it appears that Mr. Foley when first employed as a trackman in 1929 was promoted to welder within ten days of his initial employment. Upon the facts of record and confining ourselves strictly thereto we find that Carrier's action herein was in arbitrary disregard of the promotion rule. It follows that items (1) and (3) of the claim should be sustained. Inasmuch as the claimant has resigned from the service of Carrier while this claim was pending the claim for compensation shall cease as of the date of his resignation. Item (2) of the claim is academic in view of the claimant's resignation.

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 Carrier violated the Agreement.

AWARD

Claim sustained as indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 24th day of April, 1951.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

INTERPRETATION NO. 1 TO AWARD NO. 5348

DOCKET NO. MW-5219

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employees.

NAME OF CARRIER: Boston and Maine Railroad.

Upon application of the representatives of the carrier involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

This application for an interpretation of Award 5348 is, in effect, a reargument of the original submission to this Board. The Award applies to the factual situation presented in the original record. The effect of the Award and its application is clear. Consequently the only question asked by the Carrier in this request for an interpretation which requires an answer is that which asks if the decision was meant to apply only to the facts in this particular case. The answer to that question is, obviously; Yes.

Referee Francis J. Robertson, who sat with the Division as a member when Award No. 5348 was adopted, also participated with the Division in making this interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

**ATTEST: A. I. Tummon
Acting Secretary**

Dated at Chicago, Illinois, this 27th day of September, 1951.