Award No. 5940
Docket No. MW-5944

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

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

(1) That the Carrier violated the effective agreement when they failed to call Welder Lee Singletary to perform overtime service on February 25, 1950, and in lieu thereof, assigned the work to a junior Welder;

(2) That Welder Lee Singletary be allowed four and one-fourth (4-1/4) hours pay at his respective overtime rate because of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On February 25, 1950, the water pipes on this Carrier's building, identified as the South End Yardmaster's tower at East Joliet, became frozen due to severely cold weather.

The Carrier decided to employ the safest and fastest known method of thawing out frozen water pipes, which involves the application of heat to the necessary pipes through the medium of electrical current generated by an electric welding machine.

The principle involved therein, is identical to that used in the generation of heat in the ordinary household electric iron or toaster, in that the terminals of the welding machine's current carrying cables, are attached to the pipes, and the resultant flow of the electric current through the pipes produces the necessary heat to thaw out the frozen area within the pipes.

The Carrier assigned Welder Grimes, who lives approximately twelve miles from East Joliet, to perform the work of thawing out the frozen water pipes. Mr. Grimes worked from 7:00 P.M. to 11:45 P.M. in the performance of the aforementioned service.

Welder Lee Singletary, senior in service to Welder Grimes, who lives just a few city blocks from East Joliet, was readily available, but was not called.

Welder Singletary had in other instances, performed services for the Carrier that involved the use of an electric welding machine. In one other instance, Mr. Singletary was assigned to the position of Welder Foreman, supervising the work of other welders engaged in the construc-

justified in assigning Grimes to the work. Accordingly, even had the disputed work been included within the scope of the agreement between the Organization and the Carrier, the course followed by the Carrier would not have been in violation of the agreement.

The Carrier submits then, that the work for which claim is made was not within the scope of the agreement, and accordingly the claim should be denied. If the Board should find, however, that the work in question is in some way contemplated by the agreement so as to be included within the scope thereof, the Carrier contends that the course taken in assigning the work was justifiable, proper and in compliance with Rule 29 regardless of whether or not the work was included within the scope of the agreement, and accordingly the claim should be denied.

In the event the Board should find that the Carrier has violated the agreement so as to be liable for the claim herein, the Carrier requests that the Board specifically include in its findings the following:

(a) What rule of the agreement between the parties contemplates within its scope the work of thawing frozen water pipes.

(b) The basis upon which the Board concludes that Singletary was qualified to perform the work in dispute.

The data herein have been submitted to the Organization, either in correspondence or in conference.

OPINION OF BOARD: On February 25, 1950, the water in the pipes in Carrier's Yardmaster's Tower at East Joliet, Illinois, was frozen due to severe cold weather. The Carrier had in the past employed a method of thawing out frozen water pipes which involves the generation of heat in the affected pipes through the medium of electric current, the principle involved therein being identical with that by which heat is generated in the ordinary household electric iron or electric toaster. For this purpose the conductors of a suitable source of electric current are attached to the pipes and the resultant flow of electric current through the pipes produces the heat necesary to thaw out the frozen area. Upon introduction of this method Carrier devised a regular procedure, worked out with the use of an electric generator mounted on a truck, which generator was ordinarily used in the production of electric current for use in arc welding.

Much is to be found in the record regarding whether this was work covered by the scope of the current Maintenance of Way Agreement, the Carrier contending it was not and hence it could call any employe it desired to, but we need not labor the point since it is conceded that on the date in question the Carrier saw fit to and did use a Maintenance of Way Welder employed in one of Carrier's Track Subdepartment gangs. In such a situation the rule is well established under our decisions. See Awards 2341, 4841, 4947, 5142, 5604 and Award 5939, this day decided, holding that when a Carrier elects to call employes from an established seniority group to perform work belonging to some other group or groups it is required to take notice of the seniority rights of the men in the group called upon to perform the service.

It is undisputed that Carrier called one W. E. Grimes, a Welder employe, whose seniority in its Track Subdepartment was junior to that of Claimant, Lee Singletary, who was also a Welder in the same department. Therefore, in the absence of anything else, under the rule announced in the foregoing decisions, Carrier would have been required to first call Claimant, which it did not do, and use him before Grimes if he had been available. In fact, Rule 29 (a) of the Agreement provides that senior employes, if reasonably available in their respective gangs, will be given preference to calls. Even so it does not follow that Claimant is entitled to a sustaining Award under the existing conditions and circumstances.

The Carrier points out that the process used by it in thawing out pipes is somewhat intricate, involving more experience and knowledge than that ordinarily possessed by a welder employe and that based on inquiry and investigation it determined Claimant lacked the fitness and ability to perform the work in question. No useful purpose would be served by detailing the facts of record. It suffices to say that after carefully reviewing the facts and giving consideration to the arguments advanced by the parties with respect thereto we have concluded the record sustains the Carrier's position on this point. In fact, it does more than that. It discloses that Grimes, even though he had more training and ability than Claimant, lacked the necessary fitness and ability to do the job assigned and performed it in such manner as to cause the Carrier considerable extra and unnecessary expense.

The instant Agreement (see Rule 8), like most other agreements, recognizes that the exercise of seniority depends upon and is subject to fitness and ability to perform work. Therefore, we are convinced the conclusions heretofore announced respecting the confronting facts and circumstances of record bring this case squarely within the rule adhered to by this Division of the Board in Award 4687, where it is said:

> "The contract requires, in common phrase, that 'ability and fitness being sufficient, seniority will govern.' This Division has uniformly held that determination as to ability and fitness is exclusively a managerial function and will be sustained unless it appears that the decision of the Carrier was capricious or arbitrary; that the burden is on Claimant to establish that such was the case, and that if the decision of the Carrier is supported by substantial evidence it will not be disturbed."

Based on the well established principle announced in the foregoing Award and what has been heretofore stated we are compelled to hold that Carrier's action in assigning Grimes to perform the work in question was not in violation of the Agreement and that a denial award is required.

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 under the facts and circumstances disclosed by the record the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 18th day of September, 1952.