

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Union Pacific Railroad Company, for and in behalf of Signalman E. O. Sundberg, for the difference between the amount earned and the amount he would have earned had he been assigned to position of Assistant Signal Foreman, from May 4, 1951 until he is assigned to such position.

JOINT STATEMENT OF FACTS: Vacancy Bulletin No. 7, advertising position of Assistant Foreman with headquarters in Signal Gang No. 3113 located at Grand Island, Nebraska, was posted in the usual manner under date of April 20, 1951, by the Carrier's Signal Engineer (Eastern District). Applications for this position could be made until May 1, 1951.

Bids were received from:

E. O. Sundberg (Signalman, Gang No. 3113) who had Class 1 seniority date of March 1, 1948, Rank No. 43 on Signal Engineer's Roster No. 5.

C. B. Baker (Signalman, Gang No. 3113) who had Class 1 seniority date of March 1, 1948, Rank No. 44 on Signal Engineer's Roster No. 5.

By Assignment Bulletin No. 7, dated May 4, 1951, this position of Assistant Foreman was assigned to C. B. Baker.

There is an agreement between the parties to this dispute bearing effective date of January 1, 1951, which is by reference made a part of the record in this dispute.

POSITION OF EMPLOYEES: It is the position of the Brotherhood that the Carrier did not comply with the provisions of the current agreement covering Signal Department employees when it failed to assign Signalman E. O. Sundberg, a senior employee, to the position of Assistant Foreman advertised in bulletin No. 7 dated April 20, 1951.

The Organization is thus asking this Board to change the agreement. We submit this is the province of collective bargaining and under the Railway Labor Act is beyond the powers of this Board.

OPINION OF BOARD: The joint statement of facts discloses that on April 20, 1951, a vacancy bulletin was posted advertising the position of Assistant Foreman with headquarters in Signal Gang No. 3113 located at Grand Island, Nebraska. Bids were received from E. O. Sundberg, who had Class 1 seniority date of March 1, 1948, Rank No. 43 on Signal Engineer's Roster No. 5, and from C. B. Baker, who had Class 1 seniority date of March 1, 1948, Rank No. 44 on Signal Engineer's Roster No. 5. The Assistant Foreman position was assigned to C. E. Baker. The Employees now contend that E. O. Sundberg should have been awarded the position.

The rules of the applicable Agreement have been brought into consideration by the parties in this case. First, the "Note" to Rule 2 (c), which provides:

"Note: Positions of signal inspector, signal foreman and assistant signal foreman will be assigned one regular rest day per week, Sunday if possible, and rules applicable to other employees, covered by this Agreement, shall apply to service on such assigned rest days but will not be subject to the hours of services rules on other days. Conditions heretofore applicable to such employees on Sunday shall hereafter apply on the 6th day of the work week. Positions will be bulletined and appointments made with due consideration for seniority, fitness and ability—the Management to be the judge." (Emphasis added).

The second of the two rules, Rule 29 (a), provides:

"In filling vacancies and new positions covered by this agreement, ability being sufficient, seniority rights of employees covered by this agreement will govern."

The record discloses the Employees' position to be "that the carrier has acted in an arbitrary and capricious manner in this particular case." They state that "In the filling of positions ability and fitness being sufficient seniority must prevail." The Record clearly shows that Claimant Sundberg was the senior employee, and it reasonably establishes that he possessed "sufficient" fitness and ability for the position.

Were it not for the existence in the Agreement of the "Note" to Rule 2 (c), the position of the Employees might reasonably be found meritorious, for the effect of Rule 29 (a), as to positions covered thereby, is indeed that fitness and ability being "sufficient" seniority must prevail. But the "Note" to Rule 2 (c) is a special provision applicable to the Assistant Foreman position, removing this position from the coverage of Rule 29 (a). It is too well established to warrant citation that a special rule governs over a general rule.

The question, then, is as to the meaning of the "Note" to Rule 2 (c). Does it mean as contended by the Employees that fitness and ability being sufficient seniority must govern? If so, that part of the "Note" providing that appointments to assistant signal foreman positions will be "made with due consideration for seniority, fitness and ability—the Management to be the judge", must be treated as pure surplusage. This is so since Rule 29 (a), having the very meaning attributed by the Employees to the just-quoted part of the "Note", would be sufficient to accomplish the parties' intent without use of the just-quoted language of the "Note". Parties do not write terms into a formal agreement that they intend to have no effect. This recognized, a term or provision should not be considered surplusage if a reasonable meaning can be given to it consistent with the rest of the agreement. And it seems clear from the

wording of the "Note" itself that the parties intended to give the Carrier much greater discretion in filling assistant signal foreman positions than they intended regarding positions remaining under Rule 29 (a) after the adoption of the "Note" to Rule 2 (c) in its present form.

That the "Note" leaves a great deal of discretion to the Carrier in filling the position in question is emphasized by the words "the Management to be the judge." True, the Carrier must give due consideration to seniority, fitness and ability. But having done so, if the Carrier decides on the basis of such consideration that one of two, or several, competing applicants is the better man for the particular position, the requirements of the "Note" to Rule 2 (c) have been met. Only if the Employees show the Carrier's determination to be arbitrary or capricious, as would be the case were the Carrier not to give reasonable consideration to the three factors stated in the "Note", will there be reason for setting aside the Carrier's determination.

That the Carrier did give due consideration to all required factors is evidenced by the affidavit statement of Signal Engineer D. C. Bettison, as follows:

"In making the appointment, I gave full consideration to the fitness and ability, as well as seniority, of the two applicants. I have been in a position to observe the performance, ability and fitness of each of these two men.

"When Gang 188 was established at Rawlins, both Sundberg and Baker applied for the position of Foreman. At that time both were inexperienced in cab signal case wiring, although both had previously been assigned as foremen. Sundberg was assigned Foreman on Gang 188 and Baker as Signaller. He was later appointed Assistant Foreman on this gang. As the work of this gang progressed, I observed the fitness and ability of each of these men and as a result of my personal observation it was my considered judgment that Baker was displaying and possessed greater fitness and ability than did Sundberg. Thus, at the time the appointments to Gang 3113 were made, I decided that although Mr. Sundberg ranked one point higher on the Signal Engineers' Roster No. 5, that Baker was better qualified and better fitted for the position to which I assigned him. I felt he possessed more ability and great fitness than did Sundberg. Before making the appointment, I consulted with the General Signal Engineer and it is my understanding that he also fully considered the appointment. He concurred in my judgment."

The Record also contains an affidavit statement by General Signal Engineer T. W. Hays which, in addition to the statement by Signal Engineer Bettison, strongly supports the conclusion that the Carrier did not act capriciously or arbitrarily in this case.

In support of their contention that the Carrier did act capriciously and arbitrarily the Employees, on the other hand, seem to rely entirely on the fact that Claimant Sundberg had previously served as foreman with this Carrier and the fact that he holds Rank No. 43 on the seniority roster while C. B. Baker only holds Rank No. 44. These arguments would have great weight were Rule 29 (a) applicable here rather than the "Note" to Rule 2 (c). In the existing situation, however, the fact that Claimant Sundberg has previously served as foreman certainly does not make the Carrier's determination under the "Note" to Rule 2 (c) capricious or arbitrary. The Carrier does not deny that Sundberg was the senior employe nor that he had "sufficient" fitness and ability, but as has been noted above, mere "sufficient" ability plus seniority are not conclusive in determining who is to be awarded a position under the "Note" to Rule 2 (c).

In view of the above considerations it must be concluded that the claim in this case is without merit.

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 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 10th day of September, 1953.