Award No. 10072

Docket No. MW-8549

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Webster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO GREAT WESTERN RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it failed and refused to assign the position of extra gang foreman as advertised in Bulletin No. 494 to Section Foreman Walter Osten and assigned the position to Section Foreman J. P. Waigand, a junior applicant;

(2) Walter Osten be allowed the difference between what he received at the Section Foreman's rate and what he should have received at the Extra Gang Foreman's rate had he properly been awarded and assigned to the position of Extra Gang Foreman advertised in Bulletin No. 494, dated April 8, 1955.

EMPLOYES' STATEMENT OF FACTS: Under date of April 8, 1955, the Carrier issued Bulletin No. 494, advertising the position of Extra Gang Foreman.

On April 17, 1955, Section Foreman Walter Osten, who holds seniority as such from July 30, 1938, placed his application for the above referred to position.

On May 9, 1955, the Carrier issued Bulletin No. 500, assigning Mr. J. P. Waigand, who holds seniority as Section Foreman from March 9, 1943, to the position of Extra Gang Foreman as advertised in Bulletin No. 494.

Claim was filed in behalf of Section Foreman Osten requesting that he be allowed the difference between what he received at the Section Foreman's rate and what he should have received at the Extra Gang Foreman's rate had he been properly awarded and assigned to the above referred to position of Extra Gang Foreman.

Claim was declined.

The Agreement in effect between the two parties to this dispute dated April 15, 1940, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

In **Award 5802**, the rule merely said:

> "Ability and merit being sufficient, seniority shall prevail in the appointment."

yet, this Division held that Agreement language to mean:

> "The Agreement permits the Carrier to consider ability and merit before seniority becomes effective."

The foregoing Awards were summed up in **Award 6829** as amounting to **a general rule**, in this language:

> "It is the general rule, as established by Awards of this Division, that in the first instance the employer must be the judge of the fitness and ability of an employe if there is nothing in the rules of the parties' agreement abrogating it."

The Carrier affirmatively states there is nothing in the current Maintenance of Way Agreement which abrogates the Carrier's right to determine the ability of any employe who has made application for an assignment. Conceivably it could be contended that under Rule 7 reading:

> "Employes accepting promotions will be given a fair chance to demonstrate their ability to meet the practical requirements of the position, and failing to qualify within sixty (60) days will have the right to return to their former positions."

an employe will be given an opportunity to qualify for **promotion**, however, the instant case involves assignment, not promotion, and obviously a discussion of Rule 7 is not pertinent in this case.

In view of the circumstances in this case, the language of Rule 6 (d) and the numerous Awards of this Division which recognize the Carrier's exclusive right to judge the ability of an employe, claim should be denied.

OPINION OF BOARD: The Claimant is regularly assigned as a Section Foreman for the Carrier. In April of 1955 the Carrier advertised a position of Extra Gang Foreman. Claimant was one of three bidders for the position and was the Senior man. The Carrier, however, awarded the position to the second senior man on the list. As a result of this action a grievance was filed. The claim was properly processed and denied at all steps and was finally processed to this Division for adjudication.

The principal sections of the agreement which it is alleged were violated are Rule 6(d) and Rule 7 which provide:

> "Promotions and assignments shall be based on ability and seniority. Ability being sufficient in the judgment of the Management, seniority shall prevail."

> "Rule 7. Employes accepting promotions will be given a fair chance to demonstrate their ability to meet the practical requirements of the position, and failing to qualify within sixty (60) calendar days will have the right to return to their former positions."

The contention of the Organization is that inasmuch as the Claimant had seniority over the successful bidder and that he was qualified, he should have been awarded the position.

The Carrier, on the other hand, while admitting that the Claimant had seniority, contends that he has never worked as an extra gang foreman prior to his bidding on this position and that in the judgment of management he was not qualified to perform the duties.

In answer to this the Organization has raised the issue that under Rule 4, "Section and Extra Gang Foremen" are classified as the same.

The Carrier also contends that Rule 7 is only applicable to promotions and this was not a promotion.

In light of the manner in which Rule 6(d) is worded wherein it provides that "**ability being sufficient in the judgment of the management,** seniority shall prevail" (emphasis ours), this Division's power to set aside a decision of management is even more limited than under some of the agreements found involving other Carriers. See Award 7369, 9818. Furthermore, this Division has been loathe to set aside a decision unless management's action is shown to be arbitrary and capricious. Awards 8196, 5966. By such terms, of course, it is not meant that only upon a showing of bad faith will this Division act. A failure to follow the mandate of the Agreement for whatever reason would be arbitrary and capricious.

The Organization's other contention is that Rule 7 required the Carrier to give the Claimant a fair chance to demonstrate his ability and that failure to comply with this Rule also was a violation of the Agreement. The Organization has cited among other Awards No. 105 and 8051. An analysis of those cases and the agreement in question militates against this position. While Rule 6(d) talks of **promotions and assignments,** Rule 7 only talks of **promotions.** (Emphasis ours.) This being so it is the judgment of this Division that this was an assignment as envisaged by the drafters of this Agreement and therefore Rule 7 is inapplicable.

In light of the above, the claim must be denied.

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 Employe involved in this dispute are respectively Carrier and Employe 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 was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of September, 1961.