Award No. 11668
Docket No. MW-10982

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Jim A. Rinehart, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

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

(1) The Carrier violated the effective agreement when on February 4, 1957 it failed to assign Track Apprentice S. D. Dees to position as Multiple Tie Tamper Operator on the Memphis Division as per his seniority and written request.

(2) Claimant S. D. Dees be reimbursed for the difference in what he would have earned as Multiple Tie Tamper Operator beginning February 4, 1957 until such time he is allowed to operate this machine in accordance with his seniority and application for operator of this machine.

EMPLOYES' STATEMENT OF FACTS: The Claimant S. D. Dees holds seniority date as trackman on the Memphis Division as of July 31, 1950. James Clark, the employe assigned to this machine by the Carrier, has a seniority date of January 7, 1954. The Claimant S. D. Dees made application in writing to the Division Engineer for the operator's position on this machine on January 4, 1957 and on February 2, 1957. The machine started to work on February 4, 1957.

The Carrier placed the junior employe on this machine without giving any consideration to the senior employe's application for the position. The Claimant has operated several different kinds of Maintenance of Way machines over the division at other times and was ready and willing to operate this machine as per his request and seniority.

The Agreement in effect between the two parties to this dispute dated September 1, 1934, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The issue here involves the relative right of two employes to promotion "from a lower grade to a higher grade position" as set forth in Rule 20 (a) which reads:

Beyond alleging that Dees' experience operating a tractor mower was significant, the Organization has made no attempt to assume the burden of proof but rely instead on the theory that Dees should have been given a trial period on the Track Maintainer. No competent evidence has been offered tending to show that Dees was in fact qualified to operate it, and nothing has been shown to indicate that the Carrier's decision might have been wrong.

The Board's particular attention is invited to the following sentence from Rule 20 of the agreement: "Promotion shall be based on ability and seniority; ability being sufficient, seniority shall prevail, **the Management to be the judge,** subject to appeal." Rule 20 as it currently exists was negotiated by the parties and became effective November 1, 1950. It replaced a promotion rule reading in part, "Employes will be regarded as in line for promotion, advancement depending on faithful, intelligent and courteous discharge of duty and capacity for greater responsibility. Where these are sufficient, seniority will govern." The phrase, "the Management to be the judge," was not in the superseded rule, and it represented in the new rule an intention to invest in the management a substantially greater degree of discretion than under the superseded promotion rule. A recent decision under a similar rule was Third Division Award 7810, where the Board said: (Emphasis ours.)

> "Rule 8(a) of the parties' Agreement of September 1, 1949, provides that:
>
> > 'In filling vacancies and new positions and making promotions, ability, merit, fitness and seniority shall be considered. Ability, merit, and fitness being sufficient seniority shall prevail, **the Management to be the judge.**'
>
> "If the language of the parties' Agreement were different, we might sustain this claim. Many such claims have been supported by the Board; but in all such cases brought to our attention the factual circumstances were different and different language was used. Where the parties have specified that 'the Management is to be the judge' where matters of ability, merit and fitness are considered, we are bound by that language. Only upon a showing of gross abuse of discretion should we overrule management's decision in these matters, where the parties have said that Management shall be the judge. This record does not establish proof of serious abuse."

In the present case no proof has been presented that the management abused its discretion as the judge of ability under Rule 20 of the agreement. There is no basis for the claim, and it should be denied.

All data in this submission have been presented in substance to the Employes and made a part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: This case involves the interpretation of Rule 20(a) of the effective Agreement.

> "Rule 20. (a) Promotion is an advancement from a lower grade to a higher grade position covered by this agreement. Promotion shall be based on ability and seniority; ability being sufficient, seniority shall prevail, the Management to be the judge, subject to appeal."

Claimant S. D. Dees held seniority date as a trackman as of July 31, 1950. James Clark, also a trackman, held seniority of January 7, 1954. On January 4, 1957 and on February 4, 1957 Dees had requested assignment to the position of Operator of a Jackson Track Maintainer Machine. The Carrier on February 4, 1957 assigned the position to James Clark.

Neither Dees or Clark had any prior experience operating the Track Maintainer Machine.

On March 30, 1957, Dees made claim for difference of rate of pay as track apprentice and Maintainer Machine Operator also asking the job be bulletined. T. M. Pittman, Division Engineer for Carrier refused both requests in a reply letter dated April 30, 1957, which contained the following:

> "I explained to Mr. Dees he was practically first out for relief work and if we placed him on this machine, it would virtually destroy the effectiveness of the work being done by it, as he would be frequently called for relief work which would necessitate an inexperienced man having to be put on in his place while he was gone."

Pittman's letter made no mention whatever of insufficiency of ability on Claimant's part as a reason for refusing his bid for the Operator's position. It did give other reasons but those are not the ones set forth in the rule and therefore amount only to excuses. That letter was dated some 54 days after the position had been assigned to Clark and the question of Dees ability or lack thereof had long since been judged by the Carrier if in fact that had been considered the reason for his rejection.

The defense of the Carrier is that the Rule does not make it mandatory to assign the senior employe to the position, if in its judgment his ability is not sufficient. That it was Carrier's judgment that he did not possess the required ability because in October 1955 while operating a tractor mower he had allowed it to slip into a ditch become ignited and destroyed. The record does not show any disciplinary action was had against him. It does show that he was still employed by the Carrier and had perhaps operated similar light machinery in the meantime. This testifies to sufficient ability on his part. The record also shows that Clark learned to operate the machine in two days (Record p. 11) and that it was not difficult to operate. No tests, or trial runs were used to determine Dees ability and in light of his successful Operation of Machinery for the Carrier after October 1955, the use of that occurrence as a reason to disqualify him is not reasonable, is insufficient and amounts to an arbitrary action. It was to correct such a situation that the rule provided an appeal to this Board. Award 8051 by Beatty—Award 11279 by Rose—Award 10424 by Dolnick.

The appeal was filed in time.

Accordingly, the claim must be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute one 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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of August 1963.