Award No. 12480
Docket No. MW-11959

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Lee R. West, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PACIFIC ELECTRIC RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when, in lieu of calling and using B&B Welder Winfield S. Haddow to perform bridge inspection work in connection with the installation of drainage facilities at Military Avenue on the Santa Monica Air Line during overtime hours on April 16, 17, 18, and 19, 1959, it assigned and used B&B Plumber Carl Davenport, a junior employe to perform said work.

(2) Mr. Winfield S. Haddow now be allowed pay for twenty-three and two-thirds (23⅔) hours at the B&B Inspector's time and one-half rate, because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The currently effective seniority roster shows that both the claimant and Mr. Carl Davenport have established and hold seniority in the Bridge and Building Sub-department as follows:

Name	Date Entered Service	Group A Carpenter	Group B Plumber	Group B Welder
Winfield S. Haddow	10-15-48	None	None	10-15-48
Carl Davenport	10-16-56	1-3-57	11-1-58	None

The Claimant has been regularly assigned to the position of B&B Welder, Group B, since October 15, 1948, whereas Mr. Davenport has been regularly assigned to the position of B&B Plumber, Group B, since November 1, 1958. Each was regularly assigned to a 40-hour work week, consisting of five days, eight hours each, Monday through Friday, with Saturdays and Sundays as designated rest days.

claim is merely for the overtime and is a request for additional unwarranted compensation for a period during which no service was performed by the claimant.

As set forth in the carrier's statement of facts, Claimant Haddow was performing his regularly assigned duties on two of the dates in question at a location approximately fifteen miles from the job site at which inspection was required. The inspection performed during overtime hours by the temporary inspector was a continuation of such service begun during regular hours except on the one assigned rest day, April 18, 1959, which was "normal" but requiring overtime rate by application of other rules.

3. In presenting his claim, and apparently the organization in progressing the claim has concurred with the contention, claimant stated that he had performed "duties" on inspection of bridges" at some prior period of time (see carrier's Exhibit A). There was no bridge inspection involved in the project on which the temporary inspection service was performed. The carrier's statement of facts sets forth that the project in question involved the jacking into position of a concrete box under the carrier's right of way during course of construction of an underground Flood Control Project by a contractor of the United States Army Corps of Engineers.

SUMMARY

In deference to the position of the carrier as to the amended claim involved in the instant dispute, the carrier requests that its position with respect to the claim be sustained in view of the specific provisions of the controlling agreement.

(Exhibits not reproduced.)

OPINION OF BOARD: It is the opinion of this Board that the agreement involved has not been violated.

This claim arises on behalf of Winfield S. Haddow, a welder by reason of Carrier's assigning Carl Davenport, a plumber, to perform bridge inspection work during overtime hours on April 16, 17, 18 and 19 of 1959. It is admitted that Haddow holds seniority as a welder since October 15, 1948 and that Davenport holds seniority as a plumber since November 1, 1958. Neither hold seniority as a bridge inspector, but the Organization contends that Haddow should, as senior employe, have had the assignment as bridge inspector. They assert that he is also shown to be qualified and available.

The Carrier asserts that Rule 10 authorizes them to assign the work to Davenport, who is admittedly a junior employe, albeit in another seniority district. Rule 10 reads as follows:

"PROMOTIONS

Promotion shall be based on ability, fitness and seniority. Ability and fitness being equal, seniority shall prevail, the **management to be the judge.**" (Emphasis ours.)

It is Carrier's contention that the emphasized portion authorizes them to assign the work involved to Davenport absent a showing that such assignment was a gross abuse of discretion." In support of such contention they cite Award 7810 (Larkin) as follows:

"The claim here is that the foreman's position on consolidated Section No. 3 should have been assigned to Mr. McCullar Smith, who was senior to Mr. Reynolds. **It is not denied that claimant has greater seniority, nor that he had performed service as a foreman both prior to and subsequent to this assignment** on Section No. 3. It is pointed out that the Carrier had not previously questioned claimant Smith's fitness or ability to serve as a foreman.

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.**'
> (Emphasis ours.)

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."

It is our opinion that Award 7810 is controlling. We find nothing in the record that Carrier has abused the discretion vested in them by the last provision of Rule 10. We therefore hold that the agreement has not been violated.

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 the Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1964.