

**Award No. 12650**  
**Docket No. MW-12415**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**(Supplemental)**

**John J. McGovern, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**SOUTHERN PACIFIC COMPANY**

**(Pacific Lines)**

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

(1) The Carrier violated the effective Agreement when it failed to award and assign the position of Traveling Carpenter (bulletined on Advertisement Notice No. 7, dated 7-7-59) to the senior applicant (Claimant Vincent Ungaro) and assigned and awarded it to a junior applicant (Martin Ward) instead.

(2) Advertisement Notice No. 8, which assigned and awarded the Traveling Carpenter's position to junior applicant Ward, be cancelled and the Carrier be directed to issue a new or corrected Advertisement Notice which would assign and award the Traveling Carpenter's position to senior applicant Ungaro.

**EMPLOYEES' STATEMENT OF FACTS:** Both the claimant and Martin Ward have established and hold seniority as Bridge and Building Carpenters within the B&B Sub-department on the Coast Division. The claimant's seniority as such dates from November 27, 1950 while Mr. Ward's seniority dates from October 6, 1958.

Under date of July 7, 1959, the Carrier issued Advertisement Notice No. 7, advertising the position of Traveling Carpenter on the Coast Division in accordance with that portion of Rule 27, which reads:

"New positions and vacancies shall be advertised in the sub-department in which they occur once each month, between the first and tenth day of the month; except that temporary vacancies need not be advertised unless it is known that such vacancies will exceed sixty (60) days.

Advertisement notices shall show titles of positions, locations, hours of assignment, and rates of pay of the positions advertised.

respect to claimant's limited physical ability and his unsafe work habits. Thus, it is now beyond question that the management exercised honest judgment in passing upon claimant's fitness and ability; and under the explicit terms of Rules 23 and 24 such judgment is not open to review by others.

Rule 2, upon which the General Chairman relied in handling this claim with carrier, is not inconsistent with Rules 23 and 24. To the contrary, it explicitly states that employees' rights as outlined in Rule 2 are limited and governed by subsequent rules such as 23 and 24. Rule 2 reads:

#### **"RULE 2**

Rights accruing to employees under their seniority shall entitle them to consideration for positions in accordance with their relative length of service with the Company, as provided in these rules."  
(Emphasis ours.)

#### **CONCLUSION**

The claim should be dismissed as an improper request for a new rule. If it is not dismissed, Carrier respectfully requests that it be denied.

(Exhibits not reproduced.)

**OPINION OF BOARD:** There is no dispute in the instant case that the Claimant had seniority rights superior to the employee selected by the Carrier for the position of Traveling Carpenter. The principal contention of the Carrier, is that although the Claimant was considered for the above position, he was not given this assignment because of his accident record extending over a period of years, and because of his limited physical abilities, due largely to age. The Petitioner does not deny his accident record, but in each instance blames it on either improper equipment or shortage of personnel. He maintains that in view of the seniority rules of the Agreement he should have been awarded the position.

Carrier bases its decision on Rules 23 and 24 of the Agreement both of which are quoted below:

#### **"RULE 23**

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

#### **"RULE 24**

In transferring employees to fill vacancies or new positions, the provisions of Rule 23 shall apply."

There is no evidence in the record to the effect that the Carrier arbitrarily and capriciously disregarded the seniority rules in assigning an employee other than the Claimant to the position in question. There is no mention in the record that Claimant's ability and fitness are equal to the selectee of the Carrier. The clear connotation of Rule 23 is that the senior qualified employee does not have a right to a position such as the one under discussion, unless his fitness and ability are demonstrably equal to that of other employees available for the position. In the absence of this and in the absence of a gross and blatant abuse of discretion on the part of the Carrier, we must deny the claim. (Awards 7810 and 12480).

**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 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 19th day of June 1964.