

Award No. 13620
Docket No. MW-13796

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

STATEMENT OF CLAIM:

(1) The Carrier violated the Agreement when, instead of recalling and using furloughed Track Laborer Juan Estrella to fill a position of Power Track Wrench Operator from June 7 to September 15, 1961, both dates inclusive, it assigned said position to Thomas R. Church (son of Roadmaster R. D. Church) who was newly hired for that purpose during his school vacation.

(2) Juan Estrella be allowed the same amount of pay as was credited to Thomas R. Church by the Carrier for the period referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Claimant Juan Estrella has established and holds seniority in the track sub-department on the Rio Grande Division as of June 6, 1946.

On February 1, 1961, the claimant was furloughed because forces were reduced within Extra Gang No. 6. On February 6, 1961, he filed his name and address and renewed same on March 27, May 20, and June 25, 1961, in conformance with the provisions of Rule 21.

On June 7, 1961, the Carrier hired Mr. Thomas R. Church (son of Roadmaster R. D. Church), who holds no seniority within the scope of the subject Agreement, and assigned him to a newly established position of Power Track Wrench Operator, a position which is encompassed within the scope of the Agreement.

Mr. Thomas D. Church had previously been used as a power track wrench operator during his school vacation in 1960, and was then used from May 23 to September 7, 1960, at which time his school vacation ended. He was relieved of the assignment here in question on September 15, 1961, which coincided with the termination of his school vacation and his return to classes for the 1961-62 term. As Division Chairman Scarbrough advised the undersigned General Chairman in a letter dated August 28, 1961:

the qualifying period provided in Rule 25, unless the Senior has something else to offer than potentiality (Award 5292). In the final analysis, Management was the judge of ability and fitness and only if they were equal, seniority would prevail. We cannot make such a finding that they were equal, upon the record as it stands as of the date of the selection of employee Reed."

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: On June 7, 1961, Carrier employed Thomas Church as a Power Track Wrench Operator, in Group 2, of the Track Sub-department. He worked until September 15, 1961. The Claimant was a furloughed extra gang laborer, and he like Church, held no seniority as a Power Track Wrench Operator. Claimant was in Group 1, Class 3 of the Track Sub-Department and held seniority date of June 6, 1946. At the time Carrier needed to fill this position, there were no employees available who held seniority as Power Track Wrench Operator.

Carrier states, in support of its position in hiring Thomas Church as a Power Track Wrench Operator, that neither Claimant nor any other available employee held seniority as a Power Track Wrench Operator, when Carrier required the services of such an operator; that Thomas Church, son of one of Carrier's roadmasters, had worked as a Power Track Wrench Operator for several months during the immediately preceding year and was admittedly a full qualified and capable operator; that Claimant has never worked as a Power Track Wrench Operator; that Claimant had no seniority in Group 2; Claimant was a furloughed extra gang laborer; Claimant would have admittedly required at least "a minimum amount of instruction and training" before he "would have been capable of handling" the position. Carrier in accordance with Rule 1 hired Church who established seniority as Power Track Wrench Operator immediately when his pay started. Carrier specifically relied on Rules 23 and 24 to support its position as the controlling Rules in the instant case.

The Organization claims that Carrier violated the Agreement when, instead of recalling and using furloughed Track Laborer Juan Estrella to fill a position of Power Track Wrench Operator from June 7 to September 15, 1961, both dates inclusive, it assigned said position to Thomas R. Church (son of Roadmaster R. D. Church) who was newly hired for that purpose during his school vacation, and that Claimant be allowed same amount of pay as was credited to Thomas R. Church by the Carrier for the period of June 7 to September 15, 1961. Petitioner recites Rules 1, 2, 3, 4, and 5 governing Seniority rights and specifically relies upon Rule 7, and includes a charge of nepotism on the Carrier's part in the hiring of Church.

Upon the facts presented by both Parties, the Board cannot sustain the Organization's position, that the Claimant Juan Estrella, was entitled to fill the position of Power Track Wrench Operator available in Group 2 based upon his seniority rights as a track laborer in Group 1 of Class 3 of the Track Sub-Department. There is no dispute between the Parties that Rules 1, 3, and 4 relied upon by the Petitioner establish Claimant's seniority rights as a track laborer in Group 1 of Class 3 in the Track Sub-Department. In this designated Group and Class, Claimant is Senior. The Board notes how-

ever, that the position of Power Track Wrench Operator is not listed in the Claimant's Class and Group, but is included in Group 2 of the Track Sub-Department.

The Board's decisions are limited to strict interpretation of the contract provisions between the Parties which are set forth in the Agreement, therefore, Rules 1, 2, 3, 4, 5 and 7 which are the Seniority rights afforded Claimant in the Agreement are not disputed by the Carrier, as stated above, as to his Group and Class.

Further, however, Petitioner has not denied that Claimant does not hold any seniority as a Power Track Wrench Operator; that Claimant had not requested to transfer from one seniority Group to another; that Claimant had not qualified himself as a machine operator. The Petitioner only states that the Claimant is Senior and that even though he doesn't qualify with fitness or ability for the promotion but if given consideration, he could learn with the proper training, and in time. Therefore, we must concur with the Carrier that any consideration given to the Claimant in transferring him to the Power Track Wrench Operator positions would in effect be a promotion for the Claimant. This position receives higher pay than a track laborer and Claimant to be considered in this case would have to be considered under Rules 23 and 24 of the Agreement. They read:

"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.

RULE 24.

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

We find that these rules are controlling in the interpretation of the claim filed by the Petitioner. Award 12650 (McGovern), same parties and same rules, also is controlling in the instant case.

"There is no evidence in the record to the effect that the Carrier arbitrarily and capriciously disregarded the seniority rules in assigning an employe 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 employe 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 employes 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.)"

Petitioner is, in a sense, asking this Board to enlarge upon the provisions of Rule 2 when no proof is offered of Claimant's qualifications. Rule 2 reads:

"RULE 2.

Rights accruing to employes 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."

This Rule is clear. Claimant has a right to be considered for a position on the basis of seniority, but limited, "as provided in these rules." The Board has no power to enlarge upon or detract from the Parties' Agreement. Petitioner has not met the Burden of Proof that Claimant did possess fitness and ability equal to that of Thomas Church.

As to the charge of Nepotism by the Petitioner, the Board disagrees. The selection of Church was made on a basis of fitness and ability necessary to fill the position of Power Track Wrench Operator in Group 2. The Organization has admitted the prior experience of Church in the Record. Therefore we do not find that the Carrier was biased, in bad faith or abused its discretion in the hire of Church. Once again, we must have substantial and competent proof from the Petitioner that favoritism existed in this selection, not inuendos unsupported by facts.

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 Agreement has not been violated.

AWARD

Claims (1) and (2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of May 1965.