

Award No. 13861
Docket No. MW-15000

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ALTON AND SOUTHERN RAILROAD**

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

(1) The Carrier violated the Agreement when it assigned a track laborer who is junior to George Thorp to work as a welder helper on March 15, 1963.

(2) George Thorp be allowed the difference between what he should have received at the Welder Helper's rate and what he received at the Track Laborer's rate for March 15, 1963.

EMPLOYES' STATEMENT OF FACTS: On March 15, 1963, a temporary vacancy of one day duration on the position of Track Welder was created when the incumbent failed to report for work. The Welder Helper, who was assigned to work with said Track Welder, was used to fill such vacancy, thereby creating a similar temporary vacancy in the Welder Helper's position. Instead of using the claimant to fill said temporary vacancy, the Carrier used a junior Track Laborer from the same gang.

The claimant was available, willing and qualified to perform the subject Welder Helper work but was not notified or given an opportunity to do so.

The Agreement in effect between the two parties to this dispute dated October 31, 1949, together with supplements, amendments, and interpretations threto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Carrier's highest appellate officer declined the instant claim in a letter reading:

"ALTON AND SOUTHERN RAILROAD

P. O. Box 270
East St. Louis, Illinois
BRidge 1-6600
August 14, 1963

For these reasons, the carrier feels that there was no violation of the agreement and respectfully requests that the claim be denied.

OPINION OF BOARD: This dispute involves a claim by the Organization that Carrier violated the Agreement when it assigned a track laborer, who was junior to the Claimant, work as a Welder's Helper on March 15, 1963. This was a one-day vacancy. Neither had acquired seniority as a Welder Helper. Claim is for the difference between what Claimant should have received and what he received at the track laborer's rate on March 15, 1963. No dispute that Claimant was senior and equally available as the junior employe who filled the vacancy.

The Organization's basic contention is that Claimant was not given consideration in accordance with the provisions of Rule 11(c); that seniority is the only criterion upon which the instant assignment could be made, as it is seniority that is to be given consideration, not fitness or ability. Rule 11(c) — Bulletin Notice, reads:

"New positions or vacancies of thirty (30) days or less duration shall be considered temporary and may be filled without bulletining, except that senior men will be given consideration."

Carrier denied the claim (R, p. 15) as follows:

"Rule 11 paragraph (c) to which you refer, permits in the filling of a temporary vacancy of thirty days or less, the senior men will be given consideration. This means fitness and ability will be taken into account in giving consideration to the senior men.

This being done . . . your claim is declined."

Further, Carrier contends that it has the right to exercise judgment in the selection of employes to fill vacancies and that there is no mandatory requirement in application of seniority under Rule 11(c).

The issue is whether under Rule 11(c), Claimant, senior man, was given "consideration" in the filling of the temporary vacancy.

Many Third Division Awards have set forth the principle that selection of personnel for positions is a matter of managerial judgment, unless limited by the contract provisions. Carrier in such selection must not abuse its discretion by arbitrary or capricious action. Likewise, the courts have construed "seniority" as a very valuable property right for the employes. Each case must be judged on its merits and being limited to the record in the instant case, we hold in favor of the Carrier.

We are of the opinion that Rule 11(c) leaves the selection of personnel to the judgment of the Carrier. We cannot read into the rule as is the contention of the General Chairman, (Record, p. 18):

" . . . that senior employes be given an opportunity to demonstrate their ability to perform positions of this nature and then to determine whether or not they possess the necessary fitness and ability to perform such operations."

This qualification and interpretation by the Organization is not contemplated by the rule.

Rule 11(c) does not make it mandatory that Carrier select the Claimant in the instant case. Seniority alone, as alleged by the Petitioner, is not the only criterion upon which the assignment was to be made. In the selection of an employe for an up-graded position there certainly is an implied criterion that an employe must possess necessary ability, fitness, etc. to meet the requirement for the job. Certainly these attributes, or lack of, of an employe, will be given "consideration" along with seniority.

The facts in the record support Carrier's action. In correspondence exchanged on the property, letter dated August 14, 1963, Carrier showed compliance with Rule 11(c). It reads in part:

"When filling the position of Welder Helper on March 15, 1963, consideration was given to Track Laborer Thorp as well as other available employes senior to to E. Restoff and the position was assigned to Mr. Restoff because in our judgment he possessed the necessary ability to perform the work." (Emphasis ours.)

The Organization has not shown by probative evidence, other than reliance upon Claimant's seniority, that Carrier's action was arbitrary or capricious, or that Claimant possessed the necessary qualifications for the work. The Employes have the burden to so prove.

Carrier had the right to exercise managerial judgment in the instant case, and we cannot, under the circumstances related in the record, find that Carrier's action was arbitrary or capricious or that it made no effort to observe the principle of seniority or "consideration" within the meaning of Rule 11(c).

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 29th day of September 1965.