

**Award No. 13961**  
**Docket No. MW-15404**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**John H. Dorsey, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**TEXAS AND PACIFIC RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement when it failed and refused to assign the foreman's position in Extra Gang No. 220 as advertised in Bulletin No. 62-A to Track Foreman L. L. Collins and assigned the position to Track Foreman D. Hernandez, a junior applicant. (Carrier's File T-33719.)

(2) Track Foreman L. L. Collins be assigned to the foreman's position in Extra Gang No. 220 as advertised in Bulletin No. 62-A.

**EMPLOYES' STATEMENT OF FACTS:** The claimant has established and holds seniority as a track foreman as of January 23, 1952.

The claimant submitted a timely and proper bid on the foreman's position in Extra Gang No. 220 as advertised in Bulletin No. 62-A.

The Carrier assigned the position to Track Foreman D. Hernandez. Mr. Hernandez has established seniority as a track foreman as of November 12, 1958.

Claim was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated September 1, 1963, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

**POSITION OF EMPLOYES:** Rule 1(d) reads:

"Rights accruing to employees under this seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad".

The aforequoted rule was carried forth verbatim from previous Agreements between the Missouri Pacific Railroad and this Organization and it has

of the employe, his habits, personality and character, and many other items bearing upon his fitness and ability which cannot be reflected in the record presented before this Board. We are limited, therefore, to a close scrutiny of the record to determine whether there is evidence of favoritism or prejudice, and if there is sufficient evidence to support the determination made by the Carrier."

Special attention is called to Award No. 5603, Third Division, Brotherhood of Maintenance of Way Employees vs. Abilene & Southern Railway Company, a subsidiary of this Carrier. The Board, in denying the case, had this to say:

"The record reveals that Carrier has assigned the Claimant at various times to vacancies as a relief foreman. Carrier asserts that although he has had many years of experience in track work it was found that Claimant did not have the ability and apparently did not realize the responsibilities required of a section foreman while performing relief section foreman's service. That general statement is supported by citations of specific instances of dereliction of duty while Claimant was acting as a relief foreman prior to July 1, 1950, and by statements of supervisors who had requested Claimant's foreman to speak to Claimant about his seeming lack of interest in the work. Nowhere in this record are these statements of the Carrier effectively refuted by the Employees. Apparently, the Employees rely on the fact that Carrier had seen fit to permit Claimant to act as a temporary foreman on previous occasions as establishing his satisfactoriness and ability for promotion in July of 1950. Any inferences or presumptions as to qualification of Claimant which might arise from that fact, however, are dispelled by Carrier's contention to the effect that he had been tried and found wanting which contention is supported by substantial unrefuted evidence. It is apparent, therefore, that the Employees have not sustained the burden of establishing Claimant's ability and merit and that this claim must be denied."

Attention is also called to Third Division Awards Nos. 2031, 2299, 2791, 3057, 3466, 5292, 6178, 8196, 8763, 8770, 10072 and Fourth Division Award No. 1888.

The Organization has failed to cite any rules to support claim and for reasons heretofore given, the Carrier respectfully requests the Board to dismiss or deny the claim involved. (Exhibits not reproduced.)

**OPINION OF BOARD:** Under date February 14, 1964, Carrier issued Bulletin No. 62 advertising position of Track Gang Foreman on Extra Gang No. 220 in Seniority District C. Claimant at that time was assigned as Assistant Foreman on Track Gang at Kermit, Texas. He had previously qualified as a Foreman and continued to be on the seniority roster for that classification in District C. He bid for the advertised position. Carrier assigned the position to an employe with less seniority than Claimant. The Organization claims that the assignment deprived Claimant of his seniority rights in violation of the Agreement.

In a letter denying the claim, the General Roadmaster stated:

"Since Mr. Collins has never had experience as an extra gang foreman, and considering the type work involved, which consisted

of operation of wire surfacing equipment and conversion of No. 9 and No. 11 turnouts to No. 10 turnout, it is the opinion of the Management that Mr. Collins does not at this time have the ability to supervise this work."

Carrier avers that the applicable Rule is:

**"PROMOTION:**

Rule 10. (a) Promotion shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail, the management to be the judge subject to appeal."

And, it points to our Awards which hold that we will not disturb Carrier's judgment as to ability and merit unless we find it arbitrary, capricious or discriminatory.

The Organization contends that since Claimant had already qualified as a Foreman and was carried on the seniority roster for that classification his bid was not for a promotion; therefore, Rule 10 (a) is not applicable. It says that the applicable Rule is Rule 1 (d), under the caption "Seniority Datum," which reads:

"(d) Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad."

Further, the Organization contends that since Claimant had qualified for and was carried on the Foremen seniority roster his qualification for a position of Foreman was established and not subject to challenge by Carrier.

**THE ISSUES**

The issues are:

1. Is the Promotion Rule applicable?
2. If the Promotion Rule is not applicable was Claimant given "consideration" for the position within the meaning of that word as used in Rule 1 (d)?

**THE PROMOTION RULE**

In the abstract reasonable men may differ as to whether Claimant bid for a promotion. We look to the Agreement for enlightenment, particularly:

**"SENIORITY ROSTERS:**

Rule 4. (a) Seniority rosters of all employes, in each sub-department by seniority districts, will be separately compiled and will show the name, classification and date of entry of the employe into the service, and date of promotion." (Emphasis ours.)

From this we conclude that Claimant while not employed as a Foreman continued to hold the rank of Foreman. Therefore his bid was for reinstatement; not for promotion. We find Rule 10 (a) not applicable.

## RULE 1 (d)

We find that the applicable Rule is Rule 1 (d).

Carrier would have us hold that a mere look at Claimant's bid satisfies "consideration;" and, the fact that they rejected Claimant's bid for lack of qualification is proof that the bid was considered. We do not believe that the parties intended so narrow a construction. Were we to agree, the seniority provisions of the agreement would be for naught — the Carrier could evade by merely stating it considered. Yet, we recognize that Rule 1 (d) does not give an employe an absolute right to a position on the basis of seniority alone. No precise formula can be drafted as to what will constitute "consideration." The interpretations must be made in the light of the facts on a case by case basis.

The ultimate issue before us is whether Carrier had the contractual right to deny assignment to Claimant for lack of qualification. We look to the Agreement.

Rule 4 (a) provides for only one seniority roster for Foremen. No distinction is made for experience and ability. We cannot write such a distinction into the Rule. For the Rule to have effect as written we must conclude that all employes on the Foremen seniority roster are qualified to hold any position in that classification. We find support for this conclusion in Rule 11 (b) which reads in pertinent part:

"(b) When vacancies bulletined under this rule are not filled by reason of no bids from qualified employes, the position will be filled by (1) appointment of the senior unassigned employe in that classification, (2) appointment of the senior qualified employe, from the next lower classification, or (3) the hiring of a new employe, in that order." (Emphasis ours.)

In the reading of this Rule we find the word "qualified" used twice which makes its absence in (b) (1) striking. It is persuasive that the parties to the Agreement consider that all employes in a classification are for the purposes of the Agreement qualified for any position in that classification.

This Board respects the Carrier's judgment of fitness and ability of its employes. If the Promotion Rule was applicable in this case we would deny the Claim.

Having found that Rule 1 (d) is the applicable Rule we find that Carrier was contractually barred from rejecting Claimant's bid for lack of qualifications. We will sustain the Claim.

**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 Carrier violated the Agreement.

**AWARD**

Claim sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of **THIRD DIVISION**

**ATTEST: S. N. Schulty**  
Executive Secretary

Dated at Chicago, Illinois, this 11th day of November 1965.