

Award No. 14320
Docket No. MW-15465

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Murray M. Rohman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN 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 position of track foreman as advertised by Gary Division Bulletin No. 3234 to Track Laborer A. Papadopoulos and assigned the position to junior Track Laborer M. Gutierrez. (System Case TG-8-63) (Carrier's File No. VM-15-63).

(2) Claimant A. Papadopoulos be awarded the position of track foreman, with a seniority date in that class as of the date of Gary Division Bulletin No. 3234-A.

(3) Claimant A. Papadopoulos be allowed the difference between what he was paid at the section laborer's rate and what he would have received at the track foreman's rate had he properly been awarded the position referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The Carrier issued Gary Division Bulletin No. 3234 advertising a position of Track Foreman.

Claimant A. Papadopoulos, who holds seniority as a Track Laborer from June 22, 1955, placed his application for the aforesaid position.

The Carrier subsequently issued Gary Division Bulletin No. 3234-A, assigning Mr. M. Gutierrez, who holds seniority as Track Laborer from June 4, 1957, to the position of Track Foreman as advertised in Gary Division Bulletin No. 3234.

The Agreement in effect between the two parties to this dispute dated August 1, 1952, together with supplements, amendments, and interpretations thereto, is, by reference, made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: In recent years, the Organization has been endeavoring to have the Carrier interpret and apply Rule 8 as though it was strictly a seniority promotion rule. At the same time, the Organization has been endeavoring to limit and water down the principles in its Agreement which require an employee to express his desire for further advancement and/or promotion and to exhaust and make maximum use of

"Rule 8. Promotion shall be based on ability, merit, and seniority. Ability and merit being sufficient, seniority shall prevail, management to be the judge of ability and merit, subject to appeal."

"Rule 12. (g) An employee bidding for and who is awarded a position in a lower rank will forfeit his seniority in all ranks higher than the one in which he takes service."

* * * * *

"Rule 12. (i) An employee promoted from a lower to higher rank will rank above an employee declining promotion. An employee accepting promotion will have priority in consideration for further promotion."

OPINION OF BOARD: Two employees submitted bids for a Relief Track Foreman's position which was subsequently awarded to the junior employee. Thereafter, the Organization filed the instant claim on behalf of the senior employee, the Claimant herein. At time of the bid, both employees were Section Laborers in the Track Sub-Department, with the Claimant holding greater seniority.

The Carrier declined the instant claim on the grounds that the seniority factor was not the sole criterion, as the Organization appears to contend. Rather, it must be considered in conjunction with ability and merit, as prescribed by the various rules of the effective Agreement.

The Organization supports its position by citing Rules 2, 3 and 4, as being applicable herein. On the other hand, the Carrier argues that the above rules could only be interpreted in the manner urged by the Organization, if a part of each of the above rules was omitted — namely, in Rule 2—"Except as otherwise provided in this rule;" in Rule 3—"as hereinafter provided;" and in Rule 4—"except as otherwise provided herein." Therefore, the Carrier stresses that the aforementioned rules contemplate that other rules are required to be considered in connection therewith — namely, Rules 6 (a), 8, 12 (g) and 12 (i).

The pertinent portions of the various rules in question are hereinafter quoted:

"SENIORITY DATUM

Rule 2. (a) Except as otherwise provided in this rule, seniority begins at the time employee's pay starts, as of the last entry into the service of the Bridge and Building, Track, or Scales and Work Equipment sub-Department.

(b) Seniority of employees promoted to bulletined positions will date from the day of their assignment on the bulletined position, except that when an employee so promoted fails to qualify on such bulletined position within sixty (60) calendar days, he will not acquire a seniority date as a result of filling such position.

(c) An employee qualifying for and accepting a position in any rank will thereby establish the same seniority date for himself in all lower ranks in the seniority group in which employed.

CONSIDERATION

Rule 3. Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad as hereinafter provided.

DEPARTMENT LIMITS

Rule 4. Seniority rights of all employees are confined to the sub-department and group in which employed, except as otherwise provided herein. The sub-departments are as follows:

1. Bridge and Building.
2. Track.
3. Scales and Work Equipment.

ASSIGNMENTS

Rule 6. (a) Except as provided in paragraphs (b) and (c) of this rule, vacancies or new positions will be filled first by employees holding seniority in the group and rank in which the vacancy or new position occurs; if not so filled, they will be filled by qualified employees in succeeding lower ranks in that seniority group in accordance with Rule 8. In the event that vacancy or new position is not so filled by employees in the seniority group in which it occurs, then it will be filled by qualified employees from other seniority groups in the respective sub-department desiring it before employing new men. Employees so assigned will retain their seniority rights in their respective groups from which taken.

MAKING PROMOTIONS

Rule 8. Promotion shall be based on ability, merit, and seniority. Ability and merit being sufficient, seniority shall prevail, management to be the judge of ability and merit, subject to appeal.

Rule 12. (g) An employee bidding for and who is awarded a position in a lower rank will forfeit his seniority in all ranks higher than the one in which he takes service.

(i) An employee promoted from a lower to a higher rank will rank above an employee declining promotion. An employee accepting promotion will have priority in consideration for further promotion."

It appears that a careful analysis of the various rules referred to by the parties require us to conclude that the Carrier's contentions are meritorious. Rules 6 (a) and 8 cannot be isolated from our consideration. These rules explicitly provide that promotion shall be based on ability, merit and seniority. However, the seniority factor is considered only after the first two factors, — ability and merit — are determined to be sufficient. We would also mention that the rule expressly grants management the right to judge ability and merit.

We are mindful of the vigorous attitude and vicarious tenacity exhibited by Organizations wherever the issue of seniority is involved. However, in the instant dispute, prior elements are required to be considered before the seniority factor is reached, hence, we are not privileged to exclude those other factors. Inasmuch as the parties have seen fit to negotiate a modified seniority clause in their effective Agreement, we are prohibited from substituting our predilections for that of the parties. In the absence of a demonstrated abuse of judgment by the Carrier, this Board is required to accept management's decision that the senior employee did not possess sufficient ability and merit.

The Carrier, furthermore, has abundantly buttressed its position with respect to the issue of qualifications. Included in the record is substantial

documentation that the junior employe was selected only after serious consideration of the requisite factors. Consequently, in the absence of credible proof by the Organization that the Carrier exercised such judgment arbitrarily or capriciously, it is our considered opinion that the claim should be denied.

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.

A W A R D

Claim denied.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of April 1966.