

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19432
Docket Number MW-19470

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(The Atchison, Topeka and Santa Fe Railway Company
(- Western Lines

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

(1) The Carrier violated the Agreement when the position of foreman on B&B Gang No. 5 on the New Mexico Division (Old Pecos) was assigned to R. Casaus, who held no seniority on New Mexico Division (Old Pecos), instead of assigning it to Mr. E. J. Harpold who was the senior eligible and qualified applicant therefor (System File 130-103-1-1-H).

(2) The Carrier now allow Mr. E. J. Harpold the difference between the B&B foreman's rate and the rate he received as a B&B mechanic beginning September 25, 1967 and continuing until he is assigned as B&B foreman.

OPINION OF BOARD: This is a promotion case wherein Claimant, E. J. Harpold, contends (1) that he should have been promoted from B&B mechanic to B&B Foreman, effective September 25, 1967, and (2) that he should be paid the wage difference between the two positions from September 25, 1967 until the date of promotion to foreman.

There is no issue concerning competing seniority between Claimant and the employee who was placed in the subject foreman's position. The sole issue here is whether Carrier's determination that Claimant was not qualified for the foreman's position can be sustained by the record.

FACTS OF RECORD

On September 28, 1959 Claimant entered the service of Carrier, establishing seniority on the old Pecos Division as B&B Painter Helper, B&B Mechanic, and Bridge Inspector, which are subordinate classes of work in the normal line of progression to the higher position of foreman. (Article II, Section 2 of applicable agreement).

On September 22, 1967 Claimant, who was then performing service as B&B Mechanic in B&B Gang No. 5 on the Old Pecos Division, submitted his request to be promoted to the vacant position of Foreman of B&B Gang No. 5.

On September 25, 1967 an employee from the New Mexico Division Seniority District was assigned as Foreman of B&B Gang No. 5. Claimant continued as a B&B Mechanic in B&B Gang No. 5.

The reason given for not promoting Claimant was the Carrier's decision that he was not qualified to perform the duties of foreman. The basis for that decision, as stated by Carrier, is as follows:

"In line with Article III, Section 1 of the current Foreman's and Laborer's Agreement, General Foreman T. W. Taylor gave consideration to Claimant's seniority, fitness and ability and concluded, after observing Claimant's work habits and workmanship, that he did not possess the fitness and ability to fill the Foreman's vacancy which was created by the retirement of Foreman Clark. Due to no one on the Old Pecos Division being qualified to fill the Foreman's vacancy, R. Casaus was secured from the Old New Mexico seniority district."

In its submission in the case the Carrier gave the following as an additional reason for Claimant's non-promotion:

"When the foreman's position of B&B Gang No. 5 became vacant, E. J. Harpold was given consideration for the position; however, due to his having not completed Form 1690-D Standard, 'Questionnaire on the Rules of Maintenance of Way and Structures - Operating Department,' a prerequisite for promotion to B&B Foreman and his workmanship in the past, it was the judgment of the local officers of the Carrier responsible for such promotions who had knowledge of his fitness and ability that, at that time, he was not fully qualified for a supervisory position such as a foreman of a B&B gang."

The applicable agreement speaks as follows on the subject of promotions.

"ARTICLE III -- PROMOTIONS,
VACANCIES, NEW POSITIONS

Promotions, Assignments, Displacements

"Section 1. Promotions, assignments and displacements under these rules shall be based on

"seniority, fitness and ability; fitness and ability of applicants being sufficient, seniority shall prevail.

"NOTE: the word 'sufficient' is intended to more clearly establish the prior rights of the senior of two or more qualified employes having adequate fitness and ability for the position or vacancy sought in the exercise of seniority.

To be considered for promotion to a higher class in his seniority group an employe must signify such desire in writing to the Superintendent, with copy to the Division Chairman.

"Applicants for promotion may be required to pass oral and written examinations for the purpose of determining their qualifications, and in addition may be required to demonstrate their ability to perform the work in the higher class to which promotion is sought. Any such examinations will cover subjects pertaining to the work and duties of the class to which promotion is sought."

RULINGS ON PETITIONER'S CONTENTIONS

The thrust of Petitioner's contentions is that the Carrier's stated reason for its decision not to promote Claimant was but a bare assertion without adequate evidentiary support and explanation and, therefore, does not constitute a reasonable basis for the decision. Petitioner also contends that Claimant's many years of satisfactory service as a B&B Mechanic created a presumption of fitness and ability for promotion, and that such presumption has not been rebutted by Carrier.

On the record before us the Board finds merit in the Petitioner's contentions and that Carrier's action was so unreasonable as to amount to an abuse of discretion.

In reviewing the Carrier's actions in this case, the Board has been compelled to confine the scope of its review to issues raised during the handling of the case on the property. This means that this Board must determine whether its criteria have been met by the Carrier's initial statement for passing-over Claimant, namely, that, after observations by a General Foreman of "Claimant's work habits and workmanship," it was concluded that Claimant "did not possess the fitness and ability to fill the Foreman's vacancy."

The limits on our scope of review also means that we must not consider that Claimant did or did not complete Form 1690-D Standard, although we recognize that, in appropriate circumstances, this might constitute meaningful evidence in support of Carrier's actions.

After honoring the indicated scope of our review authority, the record remaining leads to the conclusion that Carrier's initially stated reason for the non-promotion does not manifest sufficient reasonableness to merit this Board's approval. It will serve no useful purpose to dissertate on presumptions of Claimant's fitness, and the shifting burdens of proof in contesting issues of an employee's qualifications. The crux of this case concerns the first action taken by Carrier, for therein lies the flaw which precludes this Board's approval.

The duration of the Carrier's observations of Claimant is not shown to be for a reasonable period of time. The job became vacant on Friday, September 22, 1967, and was filled on Monday, September 25, 1967, and, thus, was filled over a week-end. This brief period, under any objective standard, could not be said to constitute a reasonable period of time to make observations of the import involved here. True, the observations could have commenced prior to September 22, 1967 (especially since the vacancy resulted from a retirement) but the record contains no facts in this regard and the Board cannot supply them.

Most important though is that, standing alone, without adequate evidentiary support and explanation, the Carrier's initial reason for non-promotion is but a bare assertion which does not meet the controlling criteria of reasonableness. There is no doubt that a superior's opinions and judgments in a promotion case should be given great weight. But when such opinions are challenged, they must be supported with objective evidence or explanations in a degree of specificity sufficient to permit the underlying basis of the opinion to be tested by the rule of reasonableness. And since the record before us does not disclose a reasonable basis for the Carrier's decision, we must conclude that Carrier abused its discretion. To hold otherwise in the case at hand would be to condone an abridgement of the employee's seniority rights which are protected by the terms and spirit of the agreement.

We want to make it quite clear, however, that Article III, Section 2 of the applicable agreement gives the Carrier the unmistakable right to pass-over a senior employee, and to promote a junior employee, when the senior does not possess sufficient "fitness and ability" for the position in question. In exercising its rights in this area the Carrier must necessarily have wide discretion to make determinations and such determinations will not be lightly altered or set aside by this Board. The Carrier's right and discretion are not absolute, however, and the Carrier must be ever mindful that it may be called upon to demonstrate that its actions have a reasonable and fair basis.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 17th day of October 1972.