

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21284  
Docket Number M-21301

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**  
(The **Baltimore and Ohio Railroad Company**)

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

(1) The Carrier violated the Agreement when It failed to assign Mr. **J. W. McKenney** to the position of extra gang foreman on **Bulletin** No. 36, dated March 25, 1974 but assigned Mr. **A. Cummings** thereto (System File **B-E-100/2-MG-1356**).

(2) Mr. **J. W. McKenney** be allowed the difference in what he received as **trackman** and what he should receive as extra gang foreman from April 1, 1974 until such time as he is assigned to the aforementioned position.

(3) Mr. **J. W. McKenney** be accorded a seniority date as extra gang foreman as of April 1, 1974.

OPINION OF BOARD: Claimant **J. W. McKenney** is a **Trackman** with seniority dating from **April 3, 1972** on **Sub-Division** No. 4 of Carrier's **Baltimore West End Division**. He bid on a job of Extra Gang Foreman which was advertised by **Bulletin** No. 19 on March 11, 1974. The job was awarded to another **Trackman** on the same **Sub-Division** who had seniority dating from **August 23, 1972**. Claimant herein alleges that in awarding the position to the junior man Carrier violated his right under Rule 3, the general Seniority Rule, as well as **Rules 34** and 38. The latter two cited rules read as follows:

"RULE 34

BASIS OF PROMOTION

A promotion is an advancement from a lower rank to a higher rank. Promotions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail."

\* \* \*

"RULE 38

FAILING TO QUALIFY

Employees accepting promotion and failing to qualify within thirty (30) calendar days may return to their former positions without loss of seniority. Employees demoted will have the right to displace other employees junior in service in lower ranks."

There is **no** disputing that Claimant holds greater seniority than the **employee** who **was** successful in bidding to the promotion. Under the clear language of **Rule 34**, therefore, Claimant must prevail if he has "**sufficient**" ability and merit. As in met such **cases**, the initial determination of sufficiency must be made by management subject to **challenge** and review through the arbitral **process**. There is no evidence of an arbitrary or bad faith exercise of that managerial discretion herein, but the parties do have sharply differing **views** both of the facts **and** of **the** meaning of Rule 34.

Relative to the interpretation of Rule 34, we find Carrier's assertions on the property that 8 "**more** qualified" junior man can prevail over a "qualified" senior man to be without merit. As we read the rule, so long as the senior man has "sufficient" ability **and** merit he is entitled to the **job**. Thus, the sufficiency of these qualities must be measured absolutely in terms of adequacy to meet the job requirements, not relatively in terms of competing applicants.

The foregoing principles are of cold comfort to the Claimant **in** this case, however. **As** the moving party, **Claimant** has the burden of proving that he possessed sufficient ability and merit to **qualify** for the higher rank job. Concededly, Rule **38** affords the **promotee** a **30-day** trial period, but the latter rule is a condition subsequent which **es** mt arise unless the senior applicant **fulfills** the condition precedent of sufficiency of ability and merit. **The** record before **us** doe6 not contain any **evidence**, but for bare assertions from **Claimant**, **to** support his claim to the job. Carrier has put the sufficiency and **adequacy** of his ability **and** merit in issue by evidence of **poor** attendance **and** lack of experience **in** track work. Claimant has not met **his** burden of proof in rebutting this evidence or **offering** positive evidence of the merit of his claim. **See** Awards 16471, 17948, 18353, et **al.** The claim must be dismissed.

**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 **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 ha6 jurisdiction over the dispute **involved** herein; and

**That** the Agreement was **not** violated.

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Claim ~~dismissed~~.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: *A. W. Pauls*  
Executive Secretary

Dated at Chicago, Illinois, this 12th day of November 1976.