

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21399

Docket Number MW-21339

Walter C. Wallace, Referee

(Brotherhood of Maintenance of Way **Employees**

**PARTIES TO DISPUTE:** (

(Akron, Canton & Youngstown Railroad Company

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

(1) The Agreement was violated when the Carrier used **Trackman** Draper Williams and Assistant Section Foreman D. A. Lewis to fill a vacation vacancy of Bridge and Building Foreman for the period beginning August 6, 1973 extending through August **31**, 1973.

(2) B&B Carpenter F. E. Newman shall be allowed the difference between the B&B Foreman's pay and the pay of a B&B Carpenter for a number of hours equal to that worked by Messrs. Williams and Lewis in performing B&B Foreman's work from August 6, 1973 through August 31, 1973.

**OPINION OF BOARD:** This dispute involves the interpretation and **application of the agreement between the Akron, Canton and Youngstown Railroad Company and the Brotherhood of Maintenance of Way Employees**. When Bridge and Building Foreman E. J. Cole was on vacation during August, 1973 the carrier assigned Lewis and Williams of the Track Department to fill the vacation vacancy. The claimant, F. E. Newman was employed in the B-6 B Department as a qualified carpenter with seniority dating from August 10, 1970. **It is his contention that carrier violated the agreement using Lewis and Williams insofar as he was the senior employee in the B & B Department. For its part carrier maintains Claimant lacks merit and ability to be a foreman and supports its contention with three affidavits from B & B Department employees.** The claim progressed through the appropriate levels on the property until submission here for resolution.

At the outset we must consider Carrier's **claim** that the dates of claimant's asserted vacation replacement time are incorrect. The claimant maintains the period involved begins August 6, 1973 and ends August 31, 1973. The carrier **claims** it did not begin until August 13, 1973. Both sides submitted evidence in support of their claim and the conflict is clear. Insofar as this Board has no way of resolving conflicting **statements** or contentions and, based upon the state of this record, we have no choice but to dismiss this claim for the period August 6 through August 12, 1973 on this basis, See Award 18545. The claim for the period August 13, 1973 through August 31, 1973 remains for consideration.

It is also clear that this Board will not consider issues that were not raised in the handling of the question on the property. The function of this Board is to consider questions raised within the confines of the record established between the parties on the property prior to submission at this level. A key issue here is the matter of claimant's **merit** and ability to be promoted to foreman. As might be expected carrier places great stress upon that aspect while claimant emphasized the seniority requirements. A diligent search of the record established on the property fails to disclose any evidence introduced by carrier **on** this question other than the affidavits of the three **employees** in the B & B Department who worked with claimant. In its **sub-**missions to this Board the carrier **made** repeated references to the on-the-job appraisal of claimant made by his supervisors. But such appraisals are not included in the record here and we have no way of evaluating them or the credentials of the people who made them. Moreover, such supervisory appraisals were never **part** of the record **wade on** the property. In the early stages of progress the carrier made certain **conclusionary** and unsubstantiated statements that claimant had not displayed or demonstrated merit or ability to be promoted to foreman.. Eventually when it was pressed for evidence in support of this assertion the carrier, at the final level on the property made reference to the three affidavits of the **employees** who worked with claimant and copies of those affidavits were included in the record. No mention was made of supervisory on-the-job appraisals of claimant. For its part the Brotherhood asserted claimant was qualified and repeatedly made reference to his qualifications as a B & B Carpenter over several years. **As a** consequence we must conclude that the only evidence **submitted** by the carrier in support of its contention that claimant lacks merit **and** ability to be a foreman are these three affidavits. If other evidence exists it is not part of this record and it is outside the **ambit** of our consideration. That such evidence may be part of a record developed in a companion case does not alter our view. The practice is too well established to admit of exceptions that this Board may consider only the evidence developed on the property, nothing more. Even if we assumed that claimant waived any objections to such consideration it would not help us. We cannot consider what is not before us without engaging in an impermissible form of speculation.

When we consider this issue substantively we note that carrier **makes** a forthright claim that the carrier must be the judge of an **employee's** ability and merit. In support of this it **quotes** from Third Division Award 4687 (Stone) as follows:

"... This Division has uniformly held that determination as to ability and fitness is exclusively a managerial function and will be sustained unless it appears that the decision of the carrier was capricious or arbitrary; that

the burden is **on** Claimant to establish that such was the case, and that if the decision of the carrier is supported by substantial evidence it **will** not be disturbed."

We are in full **agreement** with this statement and it is our purpose now to fulfill this rule, not to oppose it. Therefore, on the record before us, the question emerges, did the Carrier base its decision on substantial evidence when it asserts claimant lacks merit and ability to be a foreman? The answer to this question requires an analysis of the three affidavits of the **employees** which is the evidence offered by carrier. For our purposes we may rely on carrier's synopsis of their contents with full confidence carrier extracted the most from **them**. The carrier's **brief** states:

"Among the statements made by each of the three men interviewed, these affidavits reveal that Mr. Newman has threatened his fellow workers to the extent they fear for their families safety; that Mr. Newman **is** perceived as 'bad for morale'; that he on occasion does **a hasty** job in order to relax in the **time** remaining; that he stirs up resentment against the company and its supervisors; that he once took off a day for no other purpose than to go fishing; and that the consensus is that more work is accomplished in his absence than in **his presence**."

In award No. 19432, this Board dealt with the weight to be assigned the evaluation of supervisors' in a promotion situation and said:

"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 **reasonable-**ness. There is no doubt that a supervisors' 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."

Here we do not have the opinions of supervisors to evaluate (they were excluded as discussed previously). Instead, we have the opinions of three employees supervised. We are of the opinion that accepting their statements at face-value would accord them greater weight than is appropriate. **None** of these individuals had **more** than two months seniority and it defies credibility to suggest they may be in a position to judge whether an experienced and qualified B & B carpenter performs properly. Nevertheless, if we afford their affidavits the same test suggested for supervisors, the rule of reasonableness, it does not help the carrier. A careful review of their statements forces the conclusion, in accordance the above-quoted Award 19432, that these statements are not supported by objective evidence or explanations in a degree of specificity sufficient to permit the underlying basis of their opinions to be tested by this rule.

These affidavits amount to a collection of corroborated complaints with the substantiability and precision of shop talk. They are the gripes one might expect from new employees **condemning** a more senior, albeit unpopular **employee**. They are **hardly** the basis, without more, for depriving him of rights assured under the agreement. In the single instance where there is an attempt at specificity, we learn that claimant once "took off **a day** for no other purpose than to go fishing." We also learn the affiants overheard claimant say this to the vacationing foreman Cole. We may observe that the foreman listening to such statement was in a better position to evaluate whether or not it was serious or facetious.

Gleaning all that is possible from these affidavits **we reach** the conclusion that the carrier has not produced substantial evidence, in this record, in support of its assertion that claimant lacks merit and ability to be a for-.

It follows from this that claimants basic stand that he is the senior qualified B & B carpenter with several years experience must be examined. Under the awards of **this Board** and the facts in this record there is no question that he is the senior **employee** in his sub-department. When claimant is tested against the two employees who were assigned to the position by carrier, **Trackmen** Williams and Lewis, it is clear they are senior in years of service in Maintenance of Way service and they present credentials as for- that are superior to claimants. But that is not the test and that is not the basis for consideration. Article 12 (b) of the National Vacation Agreement which is applicable here, provides:

"As employees exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement.

When the position of a vacationing employe is to be filled and regular relief employe is not utilized, effort will be **made** to observe the principle of seniority."

This necessarily invokes **Rule** 3 of the Agreement which provides:

**"Limits.** Seniority rights of all **employees** are confined to the sub-department in which employed, on the Chief Engineers Seniority District as follows:

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1. Bridge and **Building Gangs** in the Bridge  
and Building Department.
  2. Section Gangs, extra gang **trackman** and track patrol **foreman** in the Track Department.
  3. Extra Gang Foreman and Assistant Extra Gang Foreman in the Track Department.
  4. Welders & Helpers in the Bridge and Building or Track Department.
  5. Misc. Equipment Maintainer and Helper in the Track Department."

It follows that Claimant alone can claim seniority rights in the Bridge and Building Department. Those holding seniority in the Track Department can make no **claim** to entitlement to this work under the terms of this Agreement. If there is any question in this regard, it may be quickly resolved by reference to the awards of this Board which support the proposition that a carrier may not turn over work of **employees** on one seniority roster to employe of a different roster even where they are all covered by the same agreement. See Award 6021 (and awards cited therein) and Awards 4603 and 8034 as illustrations.

Having reached this conclusion there is no need to consider the additional questions presented by the parties related to other provisions of the agreement including such questions as claimants right to a trial period.

All that remains is to give consideration to Award 20700 which received extensive treatment in the submissions to this Board. Were that not the case we might be inclined to avoid reference to it entirely. It is our conclusion that Award 20700 is not relevant here and as a consequence we are not presented with the usual questions of following precedent under the concepts of **stare decisis**. That award has been referred to in this record as a **companion** case insofar as it involves **essentially** the same parties, the **same** agreement and the same property and arises out of the same happening. There the similarity ends because the records

developed in each case are different. A singular prop of that award is the fact that claimant admitted he could not supervise the work involved. There is no similar admission in this case. More important, we have concluded in this case that carrier has not sustained its **claim** that **claimant** lacked merit and ability to be **considered** for **foreman**. On these grounds the issues involved **are** different and Award 20700 presents questions and considerations inapposite to this case.

We **conclude** carrier violated the agreement insofar as it failed to use **claimant** to fill the vacancy of Bridge and Building Foreman for the period beginning August 13, 1973 extending through August 31, 1973 and **claimant** shall be compensated for the difference between such pay and his regular rate for the time involved.

**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 has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim is sustained in part in accordance with the Opinion.

RATIONAL RAILROAD **ADJUSTMENT** BOARD  
By Order of Third Division

ATTEST:

A.W. Pauls  
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1977.

