

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23860
Docket Number MW-23969

T. Page Sharp, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(5e Atchison, Topeka and Santa Fe Railway Company

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

(1) **The Carrier violated** the Agreement when L. T. Whatley was not promoted to B&B Mechanic in recognition of his seniority and request (System File 14-S-26-4/11-1740-40-14).

(2) The Carrier now establish a seniority date of August 8, 1979 as B&B Mechanic for Claimant Whatley and compensate him for the difference in the rate he receives as B&B Helper and the rate of B&B Mechanic beginning August 8, 1979 continuing until he is allowed to fill position of B&B Mechanic."

OPINION OF BOARD: Claimant was a B & B Helper with a seniority date of October 4, 1978. On August 8, 1979 another B & B Helper with a seniority date of October 26, 1978 was promoted to B & B Mechanic. -Both helpers had complied with Article III, Section 1 of the Agreement by making their desire to be promoted known to their Superintendent. Claimant was denied the promotion on the grounds that he did not merit promotion because of his ability. Additional correspondence between the Carrier and the Organization further revealed that Claimant had not demonstrated his fitness and ability and the Carrier had not been able to fully evaluate his fitness and ability because of excessive and lengthy absenteeism.

Claimant countered that decision of the Carrier by submitting three letters, two from B & B Mechanics who served as Relief Foreman and one from a B & B Foreman. These letters stated that in the opinion of the writer the Claimant was qualified for promotion to B & B Mechanic.

It is a long established principle that the determination of fitness and ability is a function of the Carrier. After this determination has been made the burden of proof is on the Claimant to establish that the reason articulated by the Carrier was an arbitrary and capricious exercise of judgment and the Claimant has the requisite fitness and ability to perform the job. See Awards 12394, 12338, 12013 and a host of others.

In this case Claimant relied on the aforementioned letters to establish his fitness and ability. 5e Carrier's response was that it was the province of the General B & B Foreman and Assistant B & B Foreman to determine the fitness and ability of an employe who sought promotion pursuant to Article III, Section 1 of the Agreement. It was admitted that recommendations of Foreman were considered but nowhere is it stated that such recommendations would be determinative.

The record reveals a long history of absenteeism on the part of the Claimant. This record is entirely consistent with the statement of the Carrier that Claimant had not demonstrated fitness and ability and that the Carrier had been unable to evaluate the same. Letters from colleagues who had limited opportunity to supervise the work of Claimant are not sufficient to prove that Claimant demonstrated the requisite fitness and ability. A further claim was made that Claimant had long years of experience before he joined the Carrier as an apprentice carpenter. This is not relevant to the burden of proof because Carrier cannot be held to know what these outside duties were or how well he performed them. The Carrier can only observe Claimant's performance on its property.

Carrier contends in its Rebuttal Submission that Claimant had not followed the mandates of Articles III, Section 1 of the Agreement in that he had not submitted his request for promotion in writing to the Carrier. This was not raised in the correspondence between the parties and was not utilized as a reason to deny the claim. If the request was not in writing, this Board holds that the defense was waived by the Carrier and will not now be considered.

This Board holds that in view of all the evidence it will not substitute its judgment for that of the Carrier.

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 Employee involved in this dispute are respectively Carrier and Employee 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.

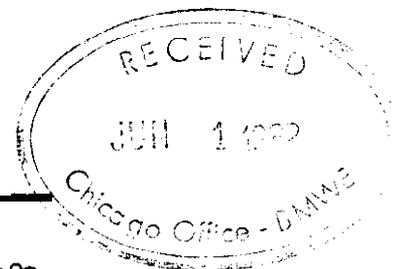
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

BY Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant



Dated at Chicago, Illinois, this 28th day of April 1982.