

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24331
Docket Number MW-24408

William G. Caples, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ Seaboard Coast Line Railroad Company

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

(1) The Carrier violated the Agreement when it assigned junior Apprentice Foreman C. T. Wilkins to perform overtime service on February 2, 1980 instead of calling and using Apprentice Foreman A. Powell who was senior, available, qualified and willing to perform that service (System File C-4(36)-AP/12-5 (80-47) G).

(2) Apprentice Foreman A. Powell shall be allowed eight (8) hours of pay at his time and one-half rate because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: Claimant A. Powell and C. T. Wilkins are regularly assigned as Apprentice Foreman to Section 8015 headquartered at Franklin, Virginia. The Claimant entered the Carrier's service on October 18, 1971 and subsequently established seniority as Apprentice Foreman on February 22, 1977. He established Assistant Foreman and Foreman seniority on August 20, 1979. C. T. Wilkins established seniority as Apprentice Foreman on July 2, 1979, hence Claimant has superior seniority as apprentice foreman as between him and Mr. Wilkins. They were regularly assigned to work Monday through Friday, with Saturdays and Sundays designated as rest days and worked under the supervision of Roadmaster Jones.

On Saturday, February 2, 1980 cold weather had induced the need for track inspection on Section 8015. Instead of calling and using the Claimant, the Carrier called and used junior Apprentice Foreman Wilkins to perform eight (8) hours of track inspection work for which he received pay at his time and one-half rate.

The Carrier did not question the Claimant's availability to perform the work in question. He was fully qualified and willing to perform this track inspection work and would have done so had the Carrier called him to do so.

The Carrier's use of a junior employe to perform the subject work deprived the Claimant of his right to perform work to which he was contractually entitled.

It is the Carrier's emphatic position that there is no merit to this claim and it should be denied. Carrier was faced with an emergency situation which demanded that the tracks be inspected following sub-zero weather. Difficulty had been experienced with broken rails in a segment of welded rail in the territory involved and it was necessary to have someone who was familiar with the territory make the inspection. Therefore,

Apprentice Foreman Wilkins was utilized since he had been on the territory for seven months. Claimant Powell had been assigned to the territory for only two weeks.

There is nothing more to this claim than the propriety of Carrier utilizing the employee qualified to perform the emergency inspection. In this case, it was Apprentice Foreman Wilkins.

The facts in this case are not in controversy. The Claimant has seniority in an assignment, which the Carrier deems to have been an emergency, was not scheduled when the person in a lesser seniority position was given the work to do. In effect it is the Carrier's position that this was an emergency and in such instance that the act was an exercise of managerial discretion and under these circumstances, exception to the seniority rule.

Seniority is one of the cornerstones of a collective bargaining agreement and the rules as written should be strictly followed unless a variation meets with some exception to the contract over all in an area which is not covered by the contract. Award No. 4040 (J. S. Parker) stated certain fundamental principles which prior to the time of decision had been announced by the Third Division and which might be applicable in the determination of this case in which there is a contention that seniority should not prevail. Referee Parker puts the matter in these words:

"Summarizing, those principles can be stated as thus: In its consideration of claims involving fitness and ability for a position, this Division of the National Railroad Adjustment Board will not substitute its judgment for that of the Carrier or disturb its action, (1) if it appears such action was taken in good faith and with due regard for both the letter and the spirit of the Agreement; (2) except in those instances where action is so fraught with bias and prejudice or with manifest intent to circumvent the Agreement as to lead to the conclusion its conduct with respect thereto was arbitrary, capricious and unreasonable; (3) if it appears there was just and reasonable basis for such action; and (4) if it appears from the record the evidence supporting such action was substantial even though there was other evidence of such character reasonable minds might differ as to the construction to be placed upon all the evidence when considered in its entirety.

Many decisions of this Division support the foregoing principles. For a few of the more recent ones, see Awards Nos. 2350, 2692, 3057, 3151, 3273 and 3573."

Not wanting to fall into the error of substituting our judgment for that of the Carrier we have considered the factual situation in this case against each of these criteria. The only one which seems to be a question, is whether the evidence

of the record is of such character that reasonable **minds** might differ **in** the **construction to be placed on such evidence when considered in its** entirety.

As **contended** here an emergency to exist does not **in any way** make it a fact regardless of how vigorously the assertion **is** made. But for the sake of **argument** let us **assume that** there was an emergency and the Carrier agrees that the Claimant is qualified as an apprentice foreman. He had worked on the particular **portion** of track as inspector for two years prior to transfer of five **months from which he had returned two weeks before** the incident. **The record as a whole indicates that Claimant's** ability and experience to perform the subject track **inspection is not** refuted. Since this is alleged as an exception to the seniority rule, burden is **upon** the Carrier. The Carrier has failed to establish such proof. The claim, therefore, should be sustained.

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 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of April 1983.