

The Third Division consisted of the regular members and in addition Referee **Lamont** E. Stallworth when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employes**
(Southern Pacific Transportation Company
(Western Lines)

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

(1) The Carrier violated the Agreement when it awarded the assistant foreman's position on Bridge and Building Gang No. 14 as advertised by the **Advertisement** Notice dared November 3, 1982 to junior employe **R. Cabral** instead of Mr. A. B. Cundiff (Carrier's File **MofW** 3-151).

(2) Because of the aforesaid violation, Mr. A. B. Cundiff shall be accorded seniority in the assistant foreman's class dating from November 13, 1982 and he shall be allowed the difference between what he would have been paid at the assistant foreman's rate and what he was paid at the welder's rate beginning November 13, 1982."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

At the time this dispute arose, Claimant was employed by the Carrier herein assigned to its Bridge and Building Gang No. 8 at Davis, California. Claimant held seniority in the **Carrier's** Bridge and Building sub-department from June 4, 1970. His seniority covered the classes of Steelman, Welder, and Carpenter. He did not hold seniority in the class of Assistant **B&B** Foreman.

On November 3, 1982, the Carrier's Oakland District/Bay Region issued a bulletin advertising the position of Assistant Foreman on its B&B Gang No. 14, headquartered at **its** trailers. This is a Class 9 position. Under the

governing Agreement, that position was then open for bids from among employes in ~~the~~ seniority ~~district~~ holding seniority in the Assistant **B&B** Foreman class. None bid. At the **conclusion** of the bidding period, therefore, the Carrier considered the applications of two employes who did not hold seniority in that class. Those applicants were Claimant and another employe, R. Cabral. Cabral held seniority in ~~the~~ B&B sub-department from May 31, 1977, and thus was considerably junior to Claimant. Nevertheless, on November 22, 1982, the Carrier awarded the Assistant **B&B** Foreman position to Cabral, and gave him a seniority date in that class of November 13, 1982, the date the bidding period for the position had closed.

While neither Claimant nor Cabral held seniority in the Assistant **Foreman** class, both had filed applications with the Carrier under Rule 8 of the Agreement to be certified as qualified for such a position. Rule 8 provides, in part:

"(a) An employe covered by this Agreement desiring to qualify for a class in which he holds no **seniority** within his sub-department and seniority district shall file written application of such desire with the individual designated by the Company to receive such notice and with the General Chairman.

* * *

Employes who have filed written application, as above referred to, will be accorded cooperation by the employes' immediate supervisor in obtaining on-the-job training **in** order to acquire proficiency in the class for which applicatfo" was made."

Claimant's Rule 8 application was dated April 2, 1981, some 19 months before the instant position was advertised. **Cabral's** Rule 8 application was filed November 30, 1981. Neither had received a certification of qualification under Rule 8 at the time he applied for the instant position.

The record reflects that, at the time he applied for the position, Claimant had served seven years as a Carpenter, two years as a Steelma", and one year as a Welder **in** Carrier's **B&B** sub-department. He had also participated in the Carrier's Student Foreman Program before it was **discontinued**, and had filled the positions of Assistant Foreman and Relief Foreman on several occasions **in** the absence of the employes regularly assigned to those positions. The record reflects that when Cabral applied for the instant position, he had also participated in the Student Foreman Program, had occasionally served as Relief Foreman, had completed a Book of Rules examination, and had held seniority as a Class 5 B&B Foreman since February 27, 1980.

The Organization filed this claim on December 2, 1982, asserting that the Carrier violated, among others, Rule 7 of the Agreement **in** awarding the Assistant **B&B** Foreman position to Cabral instead of Claimant. Rule 7 **provides**, in pertinent part:

"RULE 7 - PROMOTIONS

A promotion is an advancement from a lower class to a higher class. Subject to applicable qualification requirements set forth in other rules of this agreement, promotions will be based on seniority. Fitness and ability being sufficient, seniority shall prevail." (Emphasis added)

On December 21, 1982, the Carrier's **Regional** Engineer replied to the claim, denying that the Carrier had **violated** the Agreement and stating:

"**[I]**nvestigation has disclosed that Mr. R. Cabral was awarded position of Assistant Foreman, **B&B** Gang #14, on the basis that he had already established and held seniority as a **B&B** Foreman, seniority date of February 27, 1980, and due to his experience as foreman, it was felt that he would be more capable of handling a" Assistant Foreman's position. This is solely the basis for the award, . . ."

The record also contains a subsequent letter dated May 20, 1983, written by M. N. Smith, the **Carrier's** Regional B&B Manager, whose name endorsed both the bulletin of November 3, 1982, which **advertised** the position in question, and the bulletin of **November** 22, 1982, which awarded the position to Cabral. Smith's letter stated that:

"**[T]**he basis for awarding R. Cabral the position of Assistant Foreman, **B&B** Gang No. 14 on November 22, 1982, was, in my opinion Mr. Cabral was a qualified Foreman, therefore, he was qualified for a lesser position, that being Assistant Foreman."

I" another letter exchanged by the parties during their consideration of this claim on the property, the Carrier on August 30, 1983, asserted that "Claimant does not possess the necessary qualifications for the position." That letter did not specify any factual basis or reasoning behind that assertion. Before this Board, however, the Carrier has clarified that it has never regarded Claimant as unqualified for the Assistant Foreman position. Rather, the Carrier, in its Rebuttal Submission, has explained:

"Carrier has consistently maintained that claimant simply was not equal to the qualifications of the successful junior applicant for the desired position here in question."

The record also reflects that, effective April 27, 1983, some five months after the **position** in question was awarded to Cabral, the Carrier promoted Claimant to the Class 2 position of Foreman, Steel Bridge Gang No. 1002, at the Carrier's Santa Margarita location. Claimant did not receive any additional training or guidance in foremen's work in those intervening five months.

This dispute therefore turns upon the narrow question whether the Carrier has the right, under Rule 7 of the Agreement, to select a junior applicant over a more senior one to fill a supervisory assignment when neither employe holds seniority in the class and the senior employe is regarded by the Carrier as qualified for the position. The Carrier insists it has the right to make selections for promotions to supervisory positions based upon its good faith assessment of the relative qualifications of the applicants, and to award the position to the employe it deems best qualified even if he is junior to another qualified applicant. The Organization contends that Rule 7 requires the Carrier to award promotions to the senior applicant in such a case as long as the senior applicant has sufficient fitness and ability to be deemed qualified for the job.

The literal language of the Agreement supports the Organization's **position.**

It is well established that the Carrier enjoys discretion in determining the fitness and ability of an applicant for a particular position. See, Third Division Awards 17040, 11780. The Board will ordinarily defer to the Carrier's judgment in such a matter unless the Carrier is shown to have acted arbitrarily or capriciously. At the same time, it has often been held that the terms "fitness and ability" do not require that an applicant have the ability to immediately step in and fully perform all aspects of the position in question; it is enough that the applicant has the training, experience and aptitude to create a reasonable probability that he will be able to fully perform within a reasonable time, given proper guidance and assistance by the Carrier. Third Division Awards 14762, 11780, 8197. Claimant's record discloses that he possessed such training, experience and aptitude at the time of his application, and the Carrier does not claim otherwise. As stated earlier, the Carrier does not argue that Claimant was unqualified, only that he was less well qualified than Cabral.

Rule 7 expressly provides, however, that seniority must prevail in awarding promotions if the senior applicant is not unqualified. The Rule requires only that the senior applicant possess "sufficient" fitness and ability. This clearly means only enough ability to be considered qualified. Something is "sufficient" if it meets the level necessary for the task. Thus, to possess "sufficient" fitness and ability, the senior applicant need not demonstrate qualifications exceeding the level possessed by all other applicants.

Where the contractual language has been similar, the Board has repeatedly held that the senior employee need not be the best qualified. In Third Division Awards 11279, 8181, for example, the Board declared that the senior candidate's fitness and ability need not be greater than or even equal to that of junior applicants; his fitness and ability need only be sufficient for the purpose. Under such contractual language, "superlative fitness is not the determinative standard." Third Division Award 23185. In Third **Division** Award 8051, the Board succinctly analyzed the import of language like that of Rule 7 here:

"Under the language of this Agreement, the selection may not be based on relative ability and merit. The Carrier has bargained away its right to select its **employees** for promotion based solely on relative ability and merit. It is bound by its Agreement to tap the senior employee for promotion and give him at least a trial period . . . , if the senior employee has sufficient ability and merit." (Emphasis in original)

The cases relied on by the Carrier for its contrary interpretation are inapposite. Thus, in Third Division Award 10345, although the parties were the same as here, ~~the~~ critical contract provision stated:

"Promotions shall be based on ability, fitness and seniority. Ability and fitness being equal, seniority shall prevail, the management to be the judge." (Emphasis added)

The differences between that language and the wording of Rule 7 in the instant **case** are manifest. The same language was involved in Third Division Award 12650, also cited by the Carrier in this case.

Similarly, in Third Division Award 20724, again involving these parties, Rule 7 was quoted as then stating:

"A promotion is an advancement from a lower class to a higher class. Subject to applicable qualification requirements set forth in Rule 8, promotions will be based on seniority."

The Carrier in that case asserted that the Claimant was unqualified for the position in question, and the Board concluded that the record did not disprove that assertion. Significantly, Rule 7 as involved in the instant claim includes the additional words which dictate that seniority must prevail if the senior applicant's "fitness and ability [are] sufficient," and the Carrier here does not contend that Claimant was not qualified.

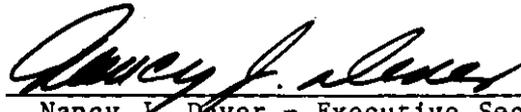
The language of Rule 7 as involved in this dispute is clear and unambiguous. Consequently, there is no warrant to construe its meaning by resort to policy considerations or other aids. The Rule must be given its plain meaning, derived from the words **themselves**. It requires that a promotion go to the senior applicant who possesses sufficient fitness and ability to be deemed qualified for the job. That person was Claimant in this case.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of March 1988.