

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

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

(1) The Agreement was violated when the Carrier assigned junior employees W. L. Maus, A. R. Narvaez and F. W. Tom instead of Messrs. J. Rojas and J. Santistevan to system gang laborer positions on the System Gang established in Las Vegas, Nevada on May 18, 1988 (System File S-46/880616).

(2) As a consequence of the aforesaid violation, Messrs. J. Rojas and J. Santistevan shall each be allowed:

'... wages lost beginning on May 18, 1988, until they are rightfully allowed Group 26 positions establishing Group 26 seniority dates of May 18, 1988, and seniority ranking ahead of junior employees Maus, Tom and Narvaez. This claim is considered continuous until such time as they are recalled to service, as Group 26 Laborers as they are now furloughed.'"

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

The Claimants were employed as Track Laborers on Division Extra Gang 7865. On May 17, 1988, Division Extra Gang 7865 was abolished, and the Claimants were placed in furlough status on Roster 4018. On May 18, 1988, a System Extra Gang was established under Seniority Group 26, Roster 9026, a separate seniority group from that on which the Claimants were listed. Because the Group 26 Roster was exhausted, furloughed employees from other rosters were permitted to apply for such positions.

As a result, two employees with less seniority than the Claimants were selected for the System Extra Gang. The Organization contends that, under Rule 19, the Claimants were improperly denied the right to be selected for these positions. Rule 19 reads as follows:

RULE 19. PROMOTIONS

"(a) Promotion shall be based on ability, qualifications, and capacity for greater responsibility and where these requirements are sufficient, seniority shall prevail.

(b) Positions of foremen and supervisors will be filled by promotion of available qualified employees. Positions of foreman or supervisors, or other positions that are not filled through bulletining to employees in seniority class, will be filled from available qualified employees in the other classes of the seniority group, and in the event not so filled will be filled from available qualified employees in the other groups of the subdepartment, and where ability and qualifications are sufficient, seniority shall prevail, the Management to be the judge with respect to positions covered by this section."

While the pay level of Track Laborers in a Division Extra Gang and a System Extra Gang are identical, the Organization makes a creditable case that movement to the System Extra Gang should be considered a "promotion" in view of the additional seniority rights attached thereto. The issue therefore is whether or not the Claimants had "sufficient" ability and qualifications in order for the selection to be based on seniority.

During the Claim handling procedure, the Carrier indicated that the Claimants had a "work record showing a history of absenteeism and poor work habits." This was enforced by statements of supervisors who previously supervised the Claimants. The Board must necessarily be guided by the limitation in Rule 19 that "the Management [is] to be the judge with respect to positions covered by this section."

It is recognized that in this situation the vacancies were not to be filled solely by seniority standing, it being necessary to go outside the Group 26 seniority list. Under these circumstances, the discretionary authority of the Carrier, as provided in Rule 19, must be respected. It cannot be found that the Carrier acted in an arbitrary or discriminatory manner in this instance.

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Award No. 29351
Docket No. MW-28999
92-3-89-3-418

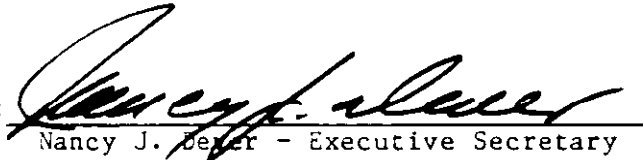
The Carrier raises a procedural issue in contending that the Organization failed to appeal the Claim denial within the specified 60 days. The facts involved do not clearly establish violation of Rule 49(a)2.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 25th day of August 1992.

LABOR MEMBER'S DISSENT
TO
AWARD 29351, DOCKET MW-28999
(Referee Marx)

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THIRD DIVISION

The Majority was correct when it determined that "*** The issue therefore is whether or not the Claimants had 'sufficient' ability and qualifications in order for the selection to be based on seniority." However, it was clearly in error when it determined through an unsubstantiated "work record showing a history of absenteeism and poor work habits" constitute insufficient ability and qualifications.

Ability and qualification clearly go to the employees' ability to perform the particular tasks pertinent to the position to which assigned or to the position to which the employee makes application for. In this docket, the employees were attempting to place themselves on System Extra Gang Laborers' positions. The Carrier did not dispute their ability or qualifications to perform laborers' tasks. Since this record is void of any evidence establishing insufficient ability or qualifications, under the pertinent Rule seniority should have prevailed and this claim should have been sustained.

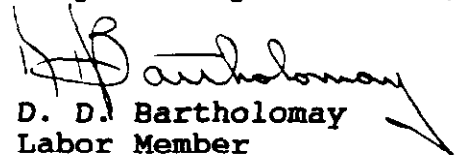
Assuming arguendo, that the Claimants did have absenteeism problems and "poor work habits", those incidents should have been handled through the discipline procedure. Absenteeism is self explanatory and this Board has handled numerous dockets involving discipline therefor. However, "poor work habits" is an ambiguous

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term and was not explained at all by the Carrier during the handling of this dispute on the property. If that term is to be related to safety rule infractions or perhaps not performing enough work to suit the supervisor, then those actions would be subject to discipline had the Carrier thought them to be serious enough to pursue. Again, this docket is void of any such record for the Claimants. Obviously, the Majority did error when it used unsubstantiated disciplinary allegations to deprive the Claimants of a promotion.

Therefore, this award is palpably erroneous.

Respectfully submitted,


D. D. Bartholomay
Labor Member