

Award No. 772
Docket No. MW-760

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE MISSOURI PACIFIC RAILROAD COMPANY**

STATEMENT OF CLAIM: "Claim of C. E. Rohr for the difference in what he has earned as B. & B. motor car operator and what he could have earned as B. & B. foreman had he been assigned to the position of bridge and building foreman in line with his seniority rights, on which position he placed his bid and was entitled to by reason of his ability and merit, he being senior to and holding seniority rights over M. C. Guier, who was assigned to the position by bulletin dated September 15, 1937."

EMPLOYES' STATEMENT OF FACTS: "In August, 1937 a position or vacancy to be filled as bridge and building foreman on Southern Kansas Division of the Missouri Pacific Railroad was advertised as provided for in Rule 11 of the Agreement between the carrier and its maintenance of way employes, effective January 1st, 1928. Applications for this position were submitted in line with Paragraph B of Rule 11 of the above mentioned agreement by the following employes entitled to file their application for this position:

	B. & B.	Asst.		
	Service Date	Carpenter Date	Foreman Date	Motor Car Operator
Chas. A. Barnow	11- 1-24	6- 1-25	9-26-32	12-28-26
E. H. Elarton	3- 1-27	6- 1-27		4-30-27
C. Rohr	5-16-27	8-13-27		4- 1-29
M. C. Guier	7- 5-29	6-22-34		1-30-34

"The assignment being made on September 15, 1937, placing M. C. Guier on the position, Guier having the least seniority rights of four employes making application for the position."

POSITION OF EMPLOYES: "The employes contend that C. E. Rohr had sufficient ability and merit as mentioned in Rule 10, Paragraph A of Article 3 of the agreement entered into between the carrier and its maintenance of way employes, which we herewith quote:

'Promotions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail, the management to be the judge. This shall also apply in transferring employes to fill vacancies or new positions. Employes working nights, who may desire day work, shall be given preference when vacancies occur, according to their seniority rank.'

and should have been assigned to the position in preference to Mr. M. C. Guier. The employes further contend that Paragraph (d) of Rule 10 of Article 3, which we quote:

'Employes accepting promotion and failing to qualify within thirty (30) days, may return to their former positions.'

that the agreement with the Clerks' Organization did not include within its scope rule employees of the 'supervisory class,' whereas the agreement with the Maintenance of Way Employees not only included mechanics, helpers, laborers, etc., but extended to the supervisory forces of foremen in direct charge of certain other classes of employees included within the same agreement, hence it can be readily seen there was a sound and logical reason for specifically providing in the agreement with the Maintenance of Way Employees, that where ability and merit is sufficient, seniority shall prevail, but left it in the hands of the management to be the judge of the ability and merit of applicants and this particularly applies in the instant case where a position of foreman is being filled from employees in the lower ranks and said foremen, as well as the employees in the lower ranks are included within the scope rule of the same wage agreement with the Brotherhood of Maintenance of Way Employees.

"There are no ambiguities in the language of the rule; it specifically provides that the management is to be the judge of the sufficiency of the ability and merit of employees aspiring for promotion, particularly so of employees who have had no prior experience in supervisory positions such as foremen. So long as the management acts in good faith and without ulterior motives, which is not charged in this case, and does not abuse the right and privileges of the employees under the contracts, rules and regulations existing between the employer and employee, we question the right of your Honorable Board to interfere in a situation of this kind wherein the selection of supervisory forces must of necessity, and is so provided under the rules, be a responsibility of the management."

OPINION OF BOARD: The question here presented is whether this Board should substitute its judgment for that of the Management in the selection of an employee whose duties admittedly involved very important responsibilities. The Carrier states that the reason it assigned a junior man was because they considered the claimant lacked the necessary ability and merit. The record would be more satisfactory if there was a showing of the particular respects in which the Carrier deemed the claimant unqualified. No charge or claim of favoritism or prejudice is made, and the record discloses no grounds to challenge the good faith of the responsible Officer's opinion. The position of Bridge and Building Foremen is of too much importance and responsibility for this Board to say that the senior applicant here, should have been given a trial at the position.

We see no ground for disturbing the Management's conclusion.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

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 no violation of the rules is shown.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 2nd day of December, 1938.