

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

George E. Bushnell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of Tony Mendolia, Section Foreman, that his bid on Bulletin 3 of May 5, 1939, advertising position of Section Foreman on Section 4, Penn Ave., Kansas City, Missouri, be recognized, and he be assigned in line with his seniority rights; and that he be paid the difference between \$170.20, the established rate for Section 4, Penn Avenue, and \$147.50, the established rate for Section 8, Tower 2, Kansas City, Missouri, on which he is employed, from May 16, 1939, the date Mr. W. M. Huff, a junior employe, was assigned to Section 4, Penn Avenue."

EMPLOYEES' STATEMENT OF FACTS: "In compliance with Rule 12, current Agreement, Bulletin No. 3 was issued May 5th, 1939, advertising for bids for positions of section foremen on Section 4, Penn Avenue.

"Tony Mendolia and W. M. Huff filed bids for this position. As per Bulletin 4, issued May 15, 1939, W. M. Huff, the junior of the two foremen bidding for the position was assigned."

POSITION OF EMPLOYEES: "Rules 12 and 13 of current Agreement reads:

'Rule 12. All new positions or vacancies, except track laborers, will be promptly bulletined for a period of ten (10) days. Bulletin will show location, descriptive title and rate of pay.'

'Rule 13. Employes desiring bulletined positions shall file their application with the officer whose name appears on the bulletin. Assignment will be made to the senior applicant possessing the necessary fitness and ability, and the name of the successful applicant posted within fifteen (15) days from the date bulletin is posted. Senior qualified unassigned available employes in the class will be given preference in filling temporarily bulletined positions or temporary positions of thirty (30) days or less which need not be bulletined.'

"As stated in Employes' Statement of Facts a bulletin was posted in conformity with these rules for the position of a section foreman. Two men who had long ago been promoted to positions of section foreman bid for the position advertised. In conformity with Rule 13 above quoted, the senior applicant possessing the necessary fitness and ability was entitled to assignment to the position.

"In Award Number 592, Rule 5 (a) reads:

"Employes covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail except, however, that this provision shall not apply to the excepted positions."

'**OPINION OF BOARD:** This case involves wholly a question of fitness and ability. The junior man awarded the position of crane operator had some experience on the position while the petitioner, who is a senior, merely thinks he could operate it if accorded some instructions and practice; quite possibly he could but the carrier is under no obligation to assume this hazard when it has available a known qualified man. It is not a question of relative qualifications; the man awarded shows actual qualifications; the petitioner mere potentiality.

* * * *

'This Division has also denied claims in a number of awards where the rules, alleged to have been violated, were very similar, giving precedence to seniority where ability and fitness were sufficient. In some of them there was a clause "the management being the judge," but in others, there was no such clause.'

Award No. 1147:

"The opinion of the Board reads, in part, as follows:

"The applicable rules of the Agreement governing the exercise of seniority embrace fitness and ability, as well as seniority, as a relevant consideration. Only when there is sufficient fitness and ability is it provided that seniority shall prevail.'

"Concluding, the Carrier avers that the responsibility for the selection and assignment of its supervisory forces must necessarily rest with it, and when such selection is based on its judgment of the sufficiency of ability and merit and without bias, prejudice or ulterior motives, the agreement cannot be held to have been violated. Certainly the words 'necessary fitness and ability' and 'ability and merit' in Rules 13 and 16 must be given consideration in the making of assignments. If it had been intended that 'seniority' would be the only requirement necessary to promotion, then the 'fitness and ability' clauses of the rules would have been omitted. They were not omitted, however, and the Carrier does not believe they can rightfully be written out of the agreement now, as would be the effect of an affirmative award in this claim.

"The Carrier respectfully requests that the claim be denied."

OPINION OF BOARD: Decision in this case turns upon the application of Rule 13 covering assignment to bulletined positions. This rule provides that "assignment will be made to the senior applicant possessing the necessary fitness and ability. * * *."

Since claimant Mendolia is the admitted senior to Foreman Huff, assignment must turn upon whether Mendolia possesses "the necessary fitness and ability" to fill the position. The carrier contends that the determination of this question rests with it and relies upon Rule 16 where the determination of "fitness and ability" in the case of promotions is expressly placed in the hands of "the Management."

While the instant award is involved with the filling of a bulletined position rather than with a promotion, thus making Rule 13 rather than Rule 16 controlling, we agree that the discretion as to necessary fitness should rest with the management. This board is not disposed to interfere with the deci-

sion made by a carrier "so long as it acts in good faith, is without bias or prejudice, and indicates no disposition to purposely or carelessly evade or disregard the rules as well as the spirit and intention thereof." (See Award No. 96.)

In the application of Rule 13, all that is required is "necessary fitness and ability." Though a junior may have more ability, the rule requires the assignment of a senior whose ability amounts to what is necessary.

The record shows that claimant has been in the employe of this carrier for over 22 years; that claimant has been performing the identical type of work he is now seeking, section foreman, for over 20 years; and that for 19 days claimant had been assigned to the very section here involved. The carrier should not be permitted to arbitrarily deny seniority rights. The Claimant's record testifies to his ability. In the absence of more conclusive proof as to lack of fitness than is contained in this record, this claim should be sustained.

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 employe involved in this dispute are respectively carrier and employe 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 claims of Tony Mendolia should be sustained.

AWARD

Claims (a) and (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of May, 1941.