# Award No. 2225
# Docket No. MW-2193

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

**Fred L. Fox, Referee**

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

## THE DELAWARE, LACKAWANNA AND WESTERN R. R. CO.

**STATEMENT OF CLAIM:** Claim of System Committee of the Brotherhood:

(1) That the Carrier violated the provision of the agreement when it denied to Michael Gilsenan, Track Foreman, Division No. 1 the right to exercise his seniority as a track foreman over junior foremen from October 15, 1938 to October 16, 1940;

(2) That Michael Gilsenan was unjustly disqualified by the Carrier as a track foreman on October 30, 1940 and assigned to a position of crossing watchman; and

(3) That he shall be paid the difference between what he earned in the lower classification and what he was entitled to receive for all dates he was not permitted to place himself in accordance with his seniority during the period from October 15, 1938 up to and including the date he shall be permitted to exercise his seniority and assigned as a track foreman.

**EMPLOYES' STATEMENT OF FACTS:** Prior to October 15, 1938, Michael Gilsenan was regularly assigned to a position of track foreman and located on Section 52 at South Orange, New Jersey.

During the month of October 1938 the Carrier abolished a number of sections on Division No. 1. On October 15, 1938 Michael Gilsenan was displaced as foreman of the South Orange section by a senior man who had been affected by the abolishment of his section. Gilsenan, when relieved as track foreman at South Orange, requested that he be permitted to displace Frank Radler, who was holding position of track foreman of a regular established extra gang.

On October 16, 1940 the Carrier assigned Gilsenan as a track foreman and he served the Carrier in that capacity until October 30, 1940.

Michael Gilsenan has a seniority date of May 1, 1927 as track foreman, whereas the seniority date of Frank Radler was September 1, 1927.

Gilsenan's request to be permitted to displace Radler was denied by the Carrier,—which resulted in Gilsenan's being compelled to take a position in a lower class.

During the period from October 15, 1938 up to and including October 30, 1940, Gilsenan served at various intervals as a relief foreman. On October 30 the Carrier relieved Gilsenan from the position of track foreman and

Mr. Gilsenan was given ample opportunity to demonstrate his fitness for the job. He was afforded a full and fair hearing and his case was reviewed by the Chief Engineer whose decision under Rule II of the agreement is final. The Chief Engineer's decision and the record moreover were reviewed by the Vice President of the Carrier who was Chief Engineer of the Company for many years and is personally and thoroughly familiar with track work. The question of the competency of Foremen and Assistant Foremen was left to the Chief Engineer by the terms of the applicable agreement, which provide in Rule II that "his decision shall be final." Accordingly, his decision after an actual field inspection of Mr. Gilsenan's work in October 1940, and a full and fair hearing, is dispositive of this case, and it is respectfully submitted that it should prevail. Therefore the claim should be declined.

**OPINION OF BOARD:** The petitioner, Michael Gilsenan, was first employed by the carrier on April 1, 1920. On May 1, 1927, he was promoted to the position of track foreman, and, except for short periods when he was displaced by a senior employe, on account of reduction in force, served in that capacity until October 15, 1938, a period of more than eleven years. In October, 1938, the carrier rearranged its sections on which track foremen and assistant track foremen worked, lengthening the same, the result of which was to reduce the number of track foremen required, and the further result of which was to displace the petitioner by a track foreman having superior seniority, of which action no complaint is made. This displacement occurred on October 15, 1938. On that date the petitioner asked to displace one Frank Radler, whose seniority as a track foreman dated from September 1, 1927, and was, therefore, inferior to that of petitioner, as track foreman of an extra gang, which request the carrier denied. Petitioner continued to assert his seniority rights, and, we think, the record shows that he was willing to undertake any track foreman's work to which he might be assigned. The carrier did not give to petitioner the work he sought, except that on occasions he worked as a foreman and assistant foreman on a temporary basis. As we see the matter, no question of discipline ever arose; no charges were preferred; and no situation requiring an investigation developed. The petitioner was merely displaced by an employe having superior seniority, without in any way impairing his right to exercise his seniority in other directions, and which he sought to do without avail. The gravamen of the charge laid at the carrier's door is that it failed and refused to permit the petitioner to exercise the rights to which his service and seniority entitled him.

Finally, on September 7, 1940, the carrier held what is termed an "investigation." It was, in fact, a hearing on petitioner's oft repeated requests for track foreman's work, to which, as he claims, his seniority entitled him. This hearing seems to have been conducted by General Roadmaster Lowe, and apparently resulted in Lowe saying: "OK Mike, you can go to work. What job do you want?" The petitioner selected a temporary vacancy on a regular section job at Dover, but, for reasons which will hereafter appear, the job was not given him. He was not given track foreman work until October 16, 1940. In the meantime, Lowe consulted with another carrier official, Langer, and the two decided, according to Langer's statement, "to place Mr. Gilsenan on an extra gang and find out definitely whether or not he could handle the work." When Langer was asked, "Are you satisfied that Mr. Gilsenan could handle the job as section foreman at Dover?" said: "He was there several times and while there was only two or three men in the gang, Mr. Lowe complained to me several times, not accomplishing enough work, and at this particular time we both agreed to find out once and for all whether Mr. Gilsenan could qualify in all types of track work." This attitude of the carrier officials makes clear why the Dover job, a position which the petitioner could probably have filled, was not given him. These officials wanted to give him a further test, and they assigned him to a more difficult job. We do not go so far as to say that their motive was to assign him to a job they hoped he could not fill, but we do not believe, that, considering all

the circumstances, the test set up was a fair one, and this being so, we are not inclined to give the petitioner's alleged failure to meet that test the finality and effect which the carrier claims for it, for these reasons: Petitioner was an employe who had worked as a track foreman for this carrier, on the same division, for more than eleven years prior to October 15, 1938, and was used, temporarily, as such foreman after that date. Certainly that long service is some evidence of his proficiency. We do not believe, that, on this important section of its line, the carrier would have permitted an inefficient foreman to continue to work. When petitioner was displaced in October, 1938, it was through the working of seniority rules, and not because of any claim that he was inefficient. If his supposed inefficiency was in the mind of the carrier at that time, that charge should have been made, and an opportunity given to defend against it. No such procedure was followed. On the contrary, the petitioner became a "forgotten man." Without giving him any reason for the discrimination against him, he was denied consideration, and his repeated requests to be accorded his rights ignored for nearly two years. Finally, when his importunities could no longer be resisted, he was told he could go to work, and asked what job he wanted. The job he asked for, a temporary vacancy on a regular section, was refused him. Good faith on the part of the carrier officials required that, conceding that petitioner was entitled to exercise his seniority as a track foreman, he should be given work he could efficiently perform. Not all track foremen have the same ability and efficiency. Human nature being what it is, some men possess greater talent than others. The petitioner's ability and efficiency, based on his past record, should have been appraised at its true worth, and he should have been assigned work, when opportunity afforded, in line with his capacity. Instead, he was assigned as foreman of an extra gang, organized to do special and difficult work. According to the record, petitioner had not, customarily, done that type of work, and it is assumed that the carrier knew of this fact. Why then, was he assigned to this most difficult work in the first instance, and refused regular section work at Dover? It may be admitted that a track foreman should be qualified to do all types of track work, and, if petitioner is to retain his rights as foreman, he will have to be able to do all such work; but, in the instant case, in view of his long service as a track foreman, does not fairness to the petitioner suggest that he should have been first given work which it was known he could perform, and permitted to build up for the more difficult work which in the routine course of employment he would be called upon to perform?

At some time during the dispute, the Chief Engineer of the carrier was brought into the picture. It is claimed that petitioner's work in connection with the extra gang, which was work connected with track signals at a particular point, Millburn, showed that he was not competent to supervise and direct that type of work. The Chief Engineer says he, personally, inspected the Millburn work, and that it was not satisfactory. For that reason petitioner was disqualified, not only for that particular type of work, but for all work as track foreman or assistant track foreman, and assigned to a position of crossing watchman, a grade of work lower than that in which the carrier had used him during the two years following his displacement as a track foreman, or October 15, 1938. Not only was petitioner displaced as track foreman, but he was demoted to work below the grade of an assistant track foreman. This action seems to the Board to have been arbitrary, harsh and unreasonable.

Rule 2 of the agreement in effect in 1938 and 1940 reads:

> "The Chief Engineer is responsible for the enforcement of rules, the maintenance of discipline and the determination of competency of employes. His decision shall be final."

The carrier relies on this rule, and contends that the action of the Chief Engineer in disqualifying petitioner is final. We concede not only the wisdom, but the necessity of such a rule, and the holdings of this Board have

sustained this or a similar rule in numerous awards. One of the first was Award 396, where the right of the carrier to judge as to the ability of competing employes was upheld, but it was there stated: "This does not mean, of course, that the carrier's right to determine the question of fitness may be exercised arbitrarily, to defeat the letter or spirit of the agreement; but neither does it vest in the Board authority to substitute its judgment for that of the carrier where the rule is applied in good faith and on the basis of substantial evidence of want of fitness on the part of the particular employe who deems himself aggrieved." Thus we see that there must be no arbitrary action on the part of the carrier, and it must act in good faith. The language of the rule, "His decision shall be final," adds nothing to the power of the Chief Engineer, as regards the manner in which he shall apply the rules; rather, it calls for greater circumspection on his part, to see that a ruling from which there is no appeal, shall be based upon the most solid and true foundation. This, in itself, is a challenge to the Chief Engineer to be scrupulously fair in any action he takes under the broad powers vested in him.

Other awards could be cited sustaining the carrier's right to depart from seniority where ability and proficiency are involved. In Award 71, apparently a case of discipline, it was held by this Board that, "So long as the carrier management acts in good faith, and without ulterior motives and does not abuse the right and privileges of the employes under the contracts and rules and regulations existing between employer and employe, this Board is without the right to interfere in the action of the employer in disciplining its employes." We see no reason why this sound holding should not be applied to the case before us. Other awards on the question are Nos. 1147, 1479, 2031.

Accepting the awards cited and discussed as sound, we are left with the question of whether the carrier has fairly applied the rules and the agreement in its dealings with the petitioner. We do not have to hold, and we do not hold, that the carrier acted from ulterior motives; but we do think there was a failure to accord to petitioner a reasonable opportunity to maintain his seniority, which a fair application of the letter and spirit of the agreement required. This failure approaches, if it does not constitute, lack of good faith, and amounts to an abuse of the almost arbitrary power and discretion vested in the Chief Engineer. The action of the carrier, in making the alleged failure of the petitioner to properly perform a particular piece of work, the basis of a demotion to a grade of work below that he had been performing during the preceding two years, was, in our opinion, unjust and arbitrary.

Applying what we have said to the separate items of the claim of the petitioner, the only showing in the record that petitioner was not entitled to the position of track foreman in October, 1938, and to displace Radler therefrom, is the opinion of General Roadmaster Lowe, coupled with what occurred at Millburn two years later. The opinion of this official, expressed at a later date, is not, alone, sufficient basis for depriving petitioner of a valuable right; and we are not disposed to hold that the Millburn episode in 1940, should have a two years' retroactive effect, and serve as an excuse for the carrier's action taken in 1938. While it may be, and is, argued that the work done at Millburn was routine track foreman work, and that if petitioner could not do that work in 1940, he could not have done the same work in 1938, and, therefore, was not qualified to do a track foreman's work at the earlier date, it must be remembered that it is not shown that the extra foreman's job he sought in 1938 was substantially different from the work he had been doing for more than eleven years prior to that time, and we do not think his failure on one job, if it was a failure, necessarily shows that, with proper supervision and direction from his superiors, he could not have efficently performed the duties of a track foreman in 1938, even though such duties might embrace work of the character of the work assigned to him at Millburn in October, 1940. We are, therefore, of the opinion that Item (1) of the claim should be sustained.

Item (2) of the claim should be sustained, for the reason the action of the carrier in assigning petitioner to a position of crossing watchman, thereby, in effect, depriving him of his rights with respect to the positions of track foreman and assistant track foreman, positions he had filled immediately prior to his assignment as a crossing watchman, was arbitrary and unjust, and not that fair treatment contemplated by either the letter or spirit of the agreement.

It follows that petitioner is entitled to be paid the difference between what he has earned in the lower classifications since October 15, 1938, and what he would have received had he been permitted to exercise his seniority as a track foreman, but for such time only as his seniority would have permitted him to work as such foreman; this to extend to the effective date of this award. Whether such pay shall extend beyond that date depends, first, on whether his seniority entitles him to be placed as a track foreman; and, second, whether, upon a fair and unprejudiced hearing, he be found qualified to do the regular and routine work of a track foreman. We do not mean by this award to force upon the carrier the services of an unqualified employe. If upon a fair investigation, the petitioner is found to be incompetent, the carrier will be under no obligation to place him as a track foreman, or in any other position as to which his incompetency may exist. We make this award, not because we mean to unduly limit the right of the carrier to exercise its discretion in assigning positions to its employes on considerations of efficiency, but for the reason that, as to the petitioner, we do not think the rules and agreements have been fairly applied.

**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 (1) the carrier violated the provisions of the agreement in not permitting the petitioner to exercise his seniority rights as a track foreman, from October 15, 1938 to October 16, 1940; (2) in disqualifying the petitioner as a track foreman, and assigning him to the position of crossing watchman on October 30, 1940; and (3) that petitioner be paid the difference between what he has earned in lower classifications, and what he would have earned as a track foreman, for such time only as, under his seniority, he would have been entitled to work as such foreman.

AWARD

Claim (1) sustained. Claim (2) sustained. Claim (3) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1943.