

**Award No. 2455**

**Docket No. MW-2470**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Howard A. Johnson, Referee**

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
WABASH RAILROAD COMPANY**

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

(1) That J. F. Sandell should, by reason of his seniority, have been awarded the position of Foreman Painter, Paint Gang No. 11, Moberly Division, on July 21, 1941;

(2) That J. F. Sandell be paid the difference between what he received as a painter and lead painter and that which he would have received had he been properly assigned by the Carrier as foreman painter, Paint Gang No. 11; and

(3) That the seniority of J. F. Sandell as foreman painter be corrected to include the time that an employee junior to him worked as a foreman painter.

**EMPLOYEES' STATEMENT OF FACTS:** On or about July 17, 1941 a position of painter foreman was bulletined on the Moberly Division.

On July 21, 1941, Paint Gang No. 11 was organized on the Moberly Division, to which Russell Farrell was assigned by the Carrier as painter foreman. Russell Farrell was seventh man—his date on the seniority roster being 4-12-37.

Upon expiration of the time limit on the bulletin for this position, H. Mathews was awarded the position and assigned to it. Mathews was fourth man in line for the position and his seniority date on the roster was 7-8-27.

J. F. Sandell bid on this position. He was the senior bidder. However, his bid received no consideration, Sandell was third man in point of seniority, for the position, and his seniority date on the roster was 4-28-24.

After Paint Gang No. 11 was established and a total of more than seven painters and helpers were assigned, as per Memorandum of Agreement dated April 24, 1941, the position of lead painter for this gang was bulletined. J. F. Sandell was, by direction of the Carrier, assigned to the position of lead painter.

In the absence of Foreman Mathews, J. F. Sandell, lead painter, was assigned as foreman of Paint Gang No. 11, on which occasions Sandell had complete charge of the work and made out daily time reports as well as all other reports usually made out by the foreman.

During his employment Sandell filled the position of foreman painter on several occasions. As early as 1925 Sandell performed this work when, owing

The promotion of Mr. Mathews and his assignment on the position of painter foreman effective August 4, 1941, was in keeping with the provisions of Rule 14 of the agreement effective June 1, 1940.

The alleged claim in favor of Mr. Sandell is without foundation as he did not possess sufficient ability to properly perform the duties of the position involved. In support of the position of the carrier in that connection attention is invited to Bridge and Building Supervisor Lankford's letter of August 2, 1941 (quoted in the Carrier's Statement of Facts) directed to the Division Engineer, which shows that Mr. Sandell did not possess sufficient ability to properly perform the duties of the position of painter foreman.

Attention is also invited to Mr. J. F. Sandell's letter of April 28, 1942 (quoted in the Carrier's Statement of Facts) directed to Mr. Lankford, which definitely shows that he (Sandell) is not qualified to perform the duties of painter foreman in an efficient and satisfactory manner.

Furthermore, Rule 14 clearly provides that the Management shall be the judge as to the ability and merit of individuals aspiring promotion, and further provides that seniority shall prevail only when ability and merit of two or more individuals aspiring promotion is equal, which was not the case in the alleged dispute referred to herein.

As provided by Rule 14 of the agreement it is the duty and the responsibility of the Management to pass on the ability and merit of employees in the Maintenance of Way Department aspiring promotion, and that is particularly true in cases where employees aspire promotion to supervisory positions such as painter foreman; and so long as the Management acts in good faith and does not abuse the rights of the employees under the agreement, which was not done in the case under consideration, no one, including the Board, has any right to substitute their judgment for that of the Management.

The submission of this alleged dispute to the Board is without question an attempt on the part of the Committee to change the provisions of Rule 14 to an extent whereby promotions will be based solely on seniority without regard to the ability and qualifications of the individual involved, and, therefore, is equivalent to a request for a new rule.

The foregoing definitely shows that the alleged claim set up in Paragraphs 1, 2, and 3, of the Committee's ex parte Statement of Claim is without foundation under the rules of the agreement effective June 1, 1940, covering employees in the Maintenance of Way Department, and, therefore, the contention of the Committee should be dismissed and the claim denied.

**OPINION OF BOARD:** Applications having been received from five painters for the paint foreman's position, it was assigned to Harley Mathews, the third in point of seniority, and this claim is made in behalf of J. F. Sandell, whose seniority is more than three years' greater.

Rule 14 provides that in making promotions "ability and merit being equal and sufficient, seniority shall prevail, the management to be the judge, subject to appeal."

Under that particular rule seniority prevails if "ability and merit" are "equal and sufficient." Consequently Sandell is entitled to the position unless his merit and ability are not sufficient or, if sufficient, are not equal to that of his junior in seniority, to whom the job was given.

There is no contention that Claimant's merit is not sufficient nor equal to that of Mathews. The Carrier does contend by use of a written statement made by Sandell during the year after his assignment that he was "not very good at laying out, can't handle gold leaf" but there is no showing as to the qualifications or lack of qualifications of Mathews in those respects, or that the Carrier has any gold leaf work to be done, or that the foremen's work includes either the handling of gold leaf or the actual "laying out" of work

as distinguished from allotting and supervising it. The question is Claimant's ability to fill the foreman's job in question, not to do all phases of a painter's work, some of which obviously involves specialized ability and experience which no one would ordinarily be expected to have in all the lines of work.

Practically the only showing is that Claimant is past fifty years of age and that in the opinion of the Supervisor of Bridges and Buildings he "has not shown \* \* \* \* that he had the ability and aggressiveness to make a paint foreman;" and that Mathews is "in his early forties, \* \* \* \* is aggressive and ambitious and has the ability to handle men \* \* \* \*." However the age difference, which seems to have been the first consideration, is obviously not a good reason for the discrimination; no reasons are given for the Supervisor's conclusions as to the relative aggressiveness of the two men; and while it is stated that Mathews has the ability to handle men, nothing whatever is said of Claimant's ability in that respect.

But the record does show that on numerous occasions the Claimant has acted temporarily both as foreman and as lead painter without any indication that he was unable to handle the work, or that his work was not satisfactory or was not equal with what Mathews could do on that job; in fact, except for the above opinion statement the Carrier's showing is entirely silent concerning Mathews' experience or ability as a foreman, which is the real question here. On the other hand, if Claimant did not handle the job satisfactorily the Carrier would certainly not have let him hold it on several different occasions, and would have shown his deficiencies in the record.

No proper basis being shown for the Carrier's action in passing over Sandell's seniority right in favor of his junior on the roster, it has clearly not exercised its judgment under a proper interpretation of the rules. If it had, the argument that its judgment should ordinarily not be superseded by the judgment of this Board would be tenable.

The claims must 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 there has been a violation of the Agreement.

#### AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 4th day of February, 1944.

#### DISSENT TO AWARD NO. 2455, DOCKET MW-2470

The Opinion states "There is no contention that claimant's merit is not sufficient nor equal to that of Mathews." Such conclusion is directly contrary

to the record wherein the Carrier stated that Sandell's "ability and merit" was not sufficient to fill the position, and also that his "ability and merit" was not equal to the "ability and merit" of Mathews.

The Opinion quotes the claimant's statement "not very good at laying out, can't handle gold leaf." The complete statement reads, "I can do rough sign work cut stencils but not very good at laying out, can't handle gold leaf." The record shows that when Sandell was used as foreman for four days during the absence of Mathews the work was laid out by Mathews before leaving; further the record showed that painter foremen had to be qualified to perform all work involved in connection with the painting of signs, and be familiar with all features of the work performed by painters working under their direction. These are primary duties of a painter foreman in which Sandell admits a deficiency, and as to which the record exhibited his abilities to be inferior to those of Mathews'. But the Opinion states there is no showing as to the qualifications or lack of qualifications of Mathews in those respects, or that the foreman's work includes either the handling of gold leaf or the actual "laying out" of work, and the decision apparently largely rests upon that understatement of the record.

Here again a conclusion is reached apparently on a choice of words that appears to support the decision reached but ignores the claimant's admitted deficiencies and the record's confirmation thereof,—all of which constituted evidence of the correct judgment of the Carrier's Supervisor in selection of the employee entitled to the position. The Carrier affirmatively stated Mathews had the ability and merit to fill the position of Painter Foreman, with the complete knowledge of its previous statements that such foreman had to be qualified, among other requisites, in the specific things that Sandell has admitted his deficiency. This can be construed as nothing but a specific statement on the part of the Carrier that Mathews had the qualifications to do the laying out, sign work and handle gold leaf, the same as if those exact words had been used.

The judgment by the Supervisor of Sandell's insufficiency and of his lack of ability and merit equal to that of the appointee, Mathews,—a judgment which in the first instance is the responsibility of that officer,—was disclosed by the evidence of record to be without prejudice or bias in respect to the employees involved. So far as the claimant is concerned, the Supervisor's judgment is confirmed by the claimant's acknowledgment of deficiency in certain duties including the "laying out" of work,—a major essential of a Painter Foreman's job,—unappreciated by this Opinion in its statement in the fourth paragraph, that " \* \* \* there is no showing \* \* \* that the foreman's work includes \* \* \* the actual 'laying out' of work as distinguished from allotting and supervising it."

The responsible officer, the Supervisor, knew the ability and merit of both these men, one of whom lacked even sufficient ability and merit let alone being "equal and sufficient," and selected the one that met the full requirements of the position and as provided for in the rule. But by this award a record inclusive of recorded deficiency in fitness for a position has been used by this Division to overrule the judgment of the Carrier and of its officer responsible for exercise of such judgment. Such overruling is not only unwarranted by the record but is contrary to the provisions of the Agreement between the parties and to the sound precedent thereupon represented in a preponderance of decisions by this Division. The conclusions reached are unsupportable, and the Award therefore is in error.

/s/ A. H. JONES  
/s/ C. C. COOK  
/s/ R. H. ALLISON  
/s/ C. P. DUGAN  
/s/ R. F. RAY

**REFEREE'S COMMENT UPON DISSENT TO AWARD NO. 2455**

The dissent ignores the difference between statements of conclusions and statements of facts. Obviously the adjudication of controversies must depend, not upon the conclusions stated by the contesting parties, but upon the facts shown by them. Naturally in any controversy each party states conclusions which it hopes the Board will adopt; but the contention is somewhat unique that those conclusions should overcome the facts, and should thus govern the award in spite of those facts. No further comment on the dissent seems necessary.