Award No. 2490
Docket No. CL-2464

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE SAINT PAUL UNION DEPOT COMPANY

STATEMENT OF CLAIM: (a) Claim of the Terminal Committee of the Brotherhood that the Carrier violated the agreement between the parties hereto when it failed to assign James Crandale and E. J. Gibson to fill the positions of Foremen for the Christmas period, December 11 to December 25, 1941 inclusive, and James Crandale to fill the position of Foreman for the Christmas period December 9 to December 25, 1942 inclusive.

(b) That the employes named shall now be compensated for wage loss suffered as a result of the above violations.

EMPLOYES' STATEMENT OF FACTS: During the Christmas period from December 11 to December 25, 1941 inclusive, additional positions of Foremen were established and worked. Again in 1942, from December 9 to December 25, inclusive, James Crandale was not assigned to the position of foreman which was established and worked. These positions were not bulletined. The Carrier filled them with employes who were younger in service than the above named employes and without regard to seniority as was the practice other years. Crandale and Gibson have filled positions of this kind in the past.

POSITION OF EMPLOYES: The employes contend that this unilateral action on the part of the Carrier was not in accord with Rules 1, 3, 4, 6, 29, and others of the agreement between the parties hereto reading as follows:

ARTICLE 1—SCOPE

"**Rule 1—Employes Affected.** These rules shall govern the hours of service and the working conditions of the following employes, subject to the exceptions noted below, and will supersede all previous schedules, agreements, practices and working conditions:

(1) Clerks.

(2) Other office and station employes, such as office boys, messengers, chore boys, and operators of office equipment and devices.

(3) Train announcers, information clerks, gatemen, platform men, checkers, baggage, mail and parcel room employes, milk and railroad supply house employes, truck watchmen, and railroad mail sorters.

(4) Telephone switchboard operators and elevator operators.

(5) Laborers employed in and around station and warehouses.

OPINION OF BOARD: The record in this case shows, without dispute that the claiming employes were not assigned as extra foremen during the annual Christmas rush seasons, as alleged in the statement of claim, even though they were senior in point of service to the employes used. The sole question in issue is whether the Carrier properly interpreted the applicable agreement in so doing.

The Carrier contends that the Clerks' Agreement does not require that these assignments be in accordance with seniority, and, in addition thereto, that neither of these employes had sufficient fitness and ability to perform the work. A correct result is dependent upon the proper application of the pertinent parts of Rules 4 and 12 of the 1941 agreement (identical with Rules 8 and 11 of the 1942 current agreement).

Rule 4, in part, states: "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 * * *." Rule 12, in part, states: "Positions or vacancies of thirty (30) days or less duration, shall be considered temporary, and may be filled without bulletining."

We think these rules require that the senior employe having sufficient fitness and ability be assigned to the positions involved in this claim. The fact that they were temporary positions of less than 30 days duration does not remove the requirement that seniority rights be given effect even though bulletining is not required. This is in line with many previous holdings of this Board to which we adhere. See Awards 105, 132, 2341 and 2426.

The Carrier contends that the correct rule is expressed in Awards 1124, 1150 and 1177, all of which were prepared by Referee Sharfman. We have carefully examined the reasoning contained in the foregoing awards and while it should have great weight as a basis for negotiation, it does not appear to us, strictly speaking, to be an interpretation of the agreement. Rule 12 merely provides that positions or vacancies of less than 30 days duration shall be considered temporary and need not be bulletined. This language is plain of meaning and nowhere is there even an implication that seniority rules are affected by it.

There are positions on a railroad, no doubt, that must be filled instantly; positions so important that it would disrupt transportation if the Carrier was required to wait only a few days before filling them. The intent was that such positions could be filled temporarily without taking time to bulletin them. But seniority rights are not in any sense mentioned, modified or abrogated by the rule. The language of Award 132 appears to state the correct interpretation of the rule: "It will be observed that this section, while expressly limiting the duty of the Carrier to bulletin positions, does not contain any express limitations upon its duty to respect the seniority rights of employes in filling positions covered by this section. If, therefore, the section in question does limit the right of seniority, it does so by implication and not by an express provision. The Division cannot accept the view that the parties to the Agreement under consideration intended that Section 5 of Article IV should by implication limit the seniority rights guaranteed to employes by Section 3 of Article III."

We adhere to the proposition that a valuable right cannot be abrogated by implication in one section of an agreement when such right was expressly and plainly granted in another section. It will be assumed that the contracting parties intended that some effect be given to both sections and that limitations of one upon the other would not be made except when it appears clearly that they were so intended. We conclude, therefore, that the Carrier must give effect to seniority rights in filling the positions here in question even though they were not required to be bulletined.

The Carrier claims, however, that Crandale and Gibson did not have the qualifications of fitness and ability and that it was therefore justified in denying them the positions which they claim should have been assigned to them.

In this respect the record shows that Crandale had previously worked as relief foreman and as an extra foreman during Christmas rush seasons in previous years. The evidence is clear that he was entirely familiar with the work of the positions and that his fitness and ability had never been questioned prior to the filing of this claim. We find no evidence in the record which points to a single instance when this man had failed in his duties. We realize that the Carrier is the one to first pass judgment on the fitness and ability of an employe for promotion.

The Carrier in its managerial capacity is charged with the proper and efficient conduct of its operations and this Board ought not and will not interfere with the decision of the Carrier when a reasonable basis for its decision exists. We think the rule is that in considering the promotion of employes, the Carrier, in the exercise of its managerial judgment, is the party charged with making the final choice; and if it appears that such decision is supported by evidence and is not the result of capricious or arbitrary action, this Division cannot substitute its judgment for that of the Carrier by assigning an employe to the position whom it considers qualified but whom the Carrier does not. See Awards 2299 and 2350.

We think the burden rests on the Clerks' Organization to show, in the first instance, that the rejected employe had sufficient fitness and ability to fill the position. We think the Organization has sustained that burden as to Crandale. In the instant case, the Carrier has failed to produce any evidence upon which its decision can be sustained. A mere self-serving assertion by the Carrier, made subsequent to the filing of the claim that an employe lacks sufficient fitness and ability, will not justify a departure from the seniority provisions of the agreement when it appears that the Clerks' Organization has made a prima facie showing of sufficient fitness and ability. A decision based on no evidence is arbitrary and capricious even though the Carrier, as here, acted in good faith and without prejudice. We are obliged to hold that Crandale was entitled to the position of extra foreman as alleged in the Statement of Claim under the evidence shown in this record.

As to Gibson, the record shows that for the past six months he has worked as a car piler, starting his tour of duty at Minneapolis, piling the mail for the Omaha Railway and then following the car to St. Paul, where he completes his assignment. He has previously filled the position of acting foreman in charge of the belt system of dispatching mail from the Post Office to the mail room. The Carrier states that Gibson was disqualified from a similar position in 1942 because of his inability to properly do the work.

The employes state, and it is not disputed by the Carrier in the record, that Gibson was superseded in 1942 by a senior employe and that it was for that reason that he was not assigned. No other evidence of a lack of sufficient fitness and ability to perform the work of a foreman in charge of the belt system of dispatching mail is found in the record. It appears that this was the position which he claims was improperly denied him.

Applying the rules and reasoning which we discussed with reference to the fitness and ability of Crandale, we come to the conclusion that Gibson had sufficient fitness and ability for the position of foreman of the belt system of dispatching mail. Some question has been raised, however, as to whether this position or a foreman's position on the train shed level was the one of which he was deprived. The record does not show that Gibson has had any experience in or knowledge of the latter work, and consequently, if it was the latter position which was denied him, we conclude that the Carrier, in the exercise of its managerial prerogative, acted reasonably in denying him that position.

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 employes involved in this dispute are respectively carrier and employes 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 Carrier violated the Clerks' Agreement in failing to assign Crandale to the position of acting foreman as claimed;

That the claim is valid as to Gibson, if he was denied the position of acting foreman of the belt system of dispatching mail, otherwise an affirmative award is not justified.

AWARD

Claim sustained as to Crandale and claim conditionally sustained as to Gibson in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 6th day of March, 1944.