

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY**

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

(a) That the Carrier violated the provisions of Agreement in effect by assigning junior B. & B. mechanic F. C. Carter to the temporary position of B. & B. Foreman at Kansas City on September 13, 1941, instead of assigning senior qualified B. & B. mechanic T. J. Reedy;

(b) That B. & B. Mechanic T. J. Reedy shall be paid the difference between what he received as B. & B. mechanic and that which he should have received as B. & B. Foreman from September 13, 1941, and all subsequent dates during which said junior B. & B. mechanic was engaged in the temporary position as B. & B. Foreman.

EMPLOYEES' STATEMENT OF FACTS: At noon of September 9, 1941 B. & B. Foreman Mr. Ollie Corwin, Kansas City Terminal, suddenly became ill. Following practice of long standing that when the foreman was away for any reason the senior mechanic T. J. Reedy would look after and supervise the work in place of the foreman, Mr. Corwin directed Reedy to assume charge of the work. Mr. Reedy continued functioning as temporary foreman from noon September 9th until evening of September 12th. Effective September 13, 1941 a junior B. & B. mechanic F. C. Carter was assigned as temporary foreman in charge of the gang.

T. J. Reedy holds seniority as B. & B. mechanic as of December 1, 1928.

F. C. Carter holds seniority as B. & B. mechanic as of July 30, 1938.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rules of Agreement in effect between the Carrier and the Brotherhood that are pertinent and governing in this case are Rules 3 and 19 reading:

"Rule 3. Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the railroad, and may be exercised only as hereinafter provided."

"Rule 19. Promotions shall be based on ability, merit and seniority; ability and merit being sufficient, seniority shall prevail."

The employing officer, (the Superintendent of Kansas City Terminal) considered the claimant in the instant case, and he made his knowledge of the ability of the claimant known to his superior officer in the following language:

"Tom Reedy, in my opinion, will never be able to handle a foreman's position where there is any responsibility of keeping time, reading blue prints, giving estimates on jobs or arranging the men so as to get the most out of each man and expedite the work. His schooling is limited and writing very poor, and in talking with him does not understand the importance of foreman's position."

Furthermore, the Superintendent talked with Mr. Reedy in his office and upon receiving a letter from the claimant employe, replied thereto under date of October 30, 1941, as per copy of letter marked Exhibit No. 2. He informed him that he had not been promoted to the foreman position, that he did not find him qualified, and indicated that he found it an unpleasant task to have to so inform him. Apparently, the claimant employe had the impression that because he was chosen to fill the foreman vacancy temporarily as heretofore explained, he was promoted. If so, that was a misunderstanding on his part, as Rule 9 (a) very plainly states that promotion does not take place in such circumstances. In this connection, it is not necessary in all cases that the employe who is used temporarily has the requisite qualifications for the position in the same degree that is required on a permanent basis. If the regular foreman had the work of the gang all laid out, if the employes in the gang were reasonably familiar with their part in carrying out his plans and if there were to be no change in the lineup, an employe lacking in the requisite qualifications to fill the position permanently could nevertheless get by temporarily. The employing officer, who is aware of the conditions, must be relied upon to determine the action to be taken. He did so in this case, and he complied with the Agreement rules.

In summing up, it will be found the gist of the dispute is whether the claimant employe possessed sufficient ability and merit to warrant his promotion to the B. & B. Foreman position. The employing officer found him lacking of the requisite ability. He exercised his best judgment in the matter sincerely and in good faith after due deliberation. There has been no showing and no claim that he acted capriciously, arbitrarily or unreasonably. The employing officer's judgment in the matter therefore must be upheld. According to prior awards of this Division, it will not impose its judgment on the carrier under such circumstances.

OPINION OF BOARD: The material facts of this claim are briefly:

At noon, Sept. 9, 1941, Foreman Corwin of the Kansas City Terminal B. & B. Gang suddenly became ill and designated his senior mechanic, Claimant T. J. Reedy, to look after and supervise the work in place of the foreman. Mr. Reedy continued functioning as temporary foreman from that time until the evening of Sept. 12th. Upon learning that Foreman Corwin would be absent more than thirty days, B. & B. Mechanic Carter was promoted to position of foreman and worked as such from Sept. 13th to Oct. 31st, 1941. Foreman Corwin resumed service Nov. 1st, 1941. Claimant Reedy holds seniority as B. & B. mechanic as of Dec. 1, 1928. F. C. Carter holds seniority as B. & B. mechanic as of July 30, 1938.

The Employes rely on Rules 3 and 19 of the current agreement which we quote:

"Rule 3. Rights accruing to employes under their seniority entitle them to consideration for positions in accordance with their relative length of service with the railroad, and may be exercised only as hereinafter provided."

"Rule 19. Promotions shall be based on ability, merit and seniority; ability and merit being sufficient, seniority shall prevail."

In the Employees' brief on page 16 of the record they state:

"We agree with the Carrier's statement; the question is whether the Claimant, T. J. Reedy, possessed sufficient ability and merit to warrant his promotion."

This Board on numerous occasions has been confronted with the question involved in this case. We quote from only a few.

In Award No. 1147, this Board with Referee Sharfman said:

"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. In these circumstances a lack of adequate fitness and ability on the part of the applicant would clearly constitute a valid ground for the carrier's departure from seniority. Even on the assumption that the rule dealing with 'time in which to qualify' (which, by its express terms, refers only to 'employees entitled to bulletined positions') should be deemed to be applicable to such displacements of junior employees as are here involved, it would be necessary to establish the existence of reasonably sufficient fitness and ability before the obligation would attach to the carrier to afford an opportunity to the applicant to qualify for the positions."

In Award No. 2031 this Board, with Judge Shaw as referee, said:

"In the present case it is admitted by both parties that the Employer is the first judge to determine fitness and ability. This would necessarily be so unless the Carrier should renounce all ordinary attributes of management, and it follows from the bare statement of this rule that when the Carrier has made a decision as to fitness and ability the employee has the burden of showing some matter in the record to overcome that decision."

In Award No. 2142 this Division, with Judge Thaxter as referee, said:

"We have been over the record with the very greatest care to see if there is any reasonable ground on which this Board would be justified in overruling the decision of the Carrier. We can find none. It is not a question of what we would have done had we been in the Carrier's place. It is solely a question whether the Carrier has shown reasonable ground for its action."

In Award No. 2350 this Division, with Judge Carter as referee, said:

"Whether an employee is qualified for a position is a matter exclusively for the Carrier to determine, and such a determination once made will be sustained unless it appears that the action of the Carrier was capricious or arbitrary. See Award No. 2299."

With these awards in mind, we turn to the record and quote part of the Employees' reply brief:

"In the second paragraph, Page 3, the Carrier states that the right to determine whether an employee possesses requisite ability and merit for promotion to a particular position rests primarily on the employing officer, and that that employing officer alone is advised as to the nature and particular duties and responsibilities which the employee will be expected to assume and that he has access to the records disclosing the training, experience, efficiency and seniority of employees to be considered. We are in no disagreement with that the Carrier's statement, but have found that at times the employing officer may err in his judgment in determining whether an employee seeking promotion possesses sufficient ability and merit to serve in the position to which he seeks

promotion. We respect the opinion of Superintendent Mr. Maxwell, but maintain that he erred in his judgment in determining the degree of training, experience, and efficiency of B. & B. mechanic T. J. Reedy."

Thus, we find that on the Employees' statement they do not claim that the Carrier in this case was arbitrary or unreasonable but claim that it was an error in judgment. Mere error in judgment is not in itself a showing of being unreasonable or arbitrary and would not justify this Board in reversing the Carrier's findings.

The Employees cite Award No. 2455. That award as we read it is based on the fact that there is no proper showing for the Carrier's action and in this record there is a clear showing that the Carrier investigated the matter and its decision was based upon the conclusion it reached after the investigation.

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 Employees involved in this dispute are respectively Carrier and Employees 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 evidence of record does not disclose any violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of January, 1945.