

**Award No. 2854**

**Docket No. MW-2775**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Richard F. Mitchell, Referee**

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA**

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

(a) That the Carrier violated the provisions of Agreement in effect by assigning Gilbert Ramos to the position of extra gang foreman on extra gang No. 84 on Sept. 21, 1943, instead of assigning relief track foreman G. W. Nunn to that position;

(b) That G. W. Nunn shall be assigned to the position of extra gang foreman with seniority rights as extra gang foreman as of Sept. 21, 1943, and that he be paid the difference between what he has received working in other capacities on the railroad and that which he would have received as extra gang foreman.

**EMPLOYEES' STATEMENT OF FACTS:** Vacancy in temporary position of foreman in extra gang No. 84, San Antonio Division, was duly bulletined. Relief Track Foreman G. W. Nunn submitted his bid or application for that position. Gilbert Ramos, an employe who had no seniority rights in the Track sub-department, San Antonio Division, was assigned to the position.

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

**POSITION OF EMPLOYES:** Rules of Agreement in effect between the Carrier and the Brotherhood, effective December 1, 1937, that are particularly pertinent in connection with this claim are Article I; Article II, Rule 6; and Article III, Rule 1, reading:

**"ARTICLE I. Scope.** These rules govern the Hours of Service and working conditions of all employes in the Maintenance of Way Department (not including supervisory forces above the rank of foremen) as follows:

Roadway Track Department: Section and extra gang foremen, assistant foremen and section and extra gang laborers.

Bridge and Building Department: Foremen, assistant foremen, mechanics (carpenters, painters and steel bridge mechanics, helpers and laborers.

Pumpers, bridge watchmen and bridge tenders, highway crossing watchmen and/or flagmen, watchmen at railway non-interlocking crossings.

judge as to ability, merit, and fitness. This Board has, on previous occasions, stated that to hold otherwise would destroy the basic attributes of Management. The Board has adhered to this elementary rule throughout a long series of awards and for convenience, is referred to Awards 52, 96, 324, 592, 1009, 1147, 1369, 1376, 1824, 1888, 2031, 2058, 2142, 2225, 2299, 2350, 2427, 2458, 2491 and 2573.

#### CONCLUSION:

The Carrier has shown that contrary to the allegation that it has violated the agreement, it has fully complied with the provisions of the agreement; that Gilbert Ramos acquired seniority as a foreman in the manner prescribed by Article 2, Rule 1; that the temporary vacancy of more than thirty days in position of foreman of Extra Gang No. 84 was bulletined and the assignment made in strict accord with the provisions of Article III, Rules 1, 2 and 3; that G. W. Nunn does not hold seniority as a foreman, has not established seniority as such, did not hold seniority, nor possess sufficient ability, merit and fitness, in the judgment of the Management, to fill the vacancy of foreman of Extra Gang No. 84, and has no basis whatever under the agreement and practice for the claim that he should be assigned as foreman to the extra gang and paid the difference between the wages of that position and those he has received in the capacity in which he has been employed since Ramos was assigned on October 11, 1943.

**OPINION OF BOARD:** A vacancy in the temporary position of Foreman of Extra Gang No. 84, San Antonio Division, was bulletined September 11, 1943. No applications were received from regularly assigned foremen, but G. W. Nunn and Gilbert Ramos applied for the position. Gilbert Ramos was appointed. Nunn had no seniority as foreman.

The Employees maintain that with the experience G. W. Nunn had gained in his capacity as relief foreman he possessed the necessary ability to fill the position advertised, and since Nunn was the senior qualified Track Department employee bidding for the job, he should have been assigned.

We quote the controlling rule involved, Article III, Rule 1, Basis of Promotion:

"Rule 1. In filling vacancies and new positions and making promotions, ability, merit, fitness and seniority shall be considered. Ability, merit and fitness being sufficient, seniority shall prevail, the management to be the judge."

This Division on various occasions has been confronted with this same question. We shall not attempt to set out all the awards but simply refer to two very recent ones. In Award 2673, this Division, speaking through Judge Shake as Referee, said:

"\* \* \* Under these circumstances it would amount to a substitution of our judgment for that of the carrier for us to say that the claimant has demonstrated sufficient fitness and ability as to entitle him to an opportunity to demonstrate his qualifications. No such an abuse of discretion has been disclosed as would warrant the intervention of this Board."

In Award 2692, this Division, speaking through Judge Carter as Referee, said:

"The record shows that Allison was on the extra list at the time the vacancy at Wickett was bulletined. The only experience that Allison had previously had was at Trent, a very small agency, where he had relieved the regular agent for a few days. The record shows that he not only did not keep the work up at this point but that he did not understand the basic duties of the position. There is evidence in the record that the Assistant Superintendent and Traveling Auditor of the Carrier, the officers in the best position to know, considered

Allison not qualified for the position. The reasons they give lend support to their conclusions. We think this record indicates that the decision of the Carrier was supported by evidence and did not constitute arbitrary or capricious action.

It is urged by the Organization that its position is supported by the fact that the position was filled, after it was denied to Allison, by persons with no previous experience with any carrier. Assuming the correctness of this statement, it does not raise an issue properly to be decided here. The only question before the Board is whether Allison was qualified,—if he was, the position should have been given to him; if he was not qualified, no basis for a claim exists. We having found that the decision is supported by substantial evidence and that it was not the result of arbitrary or capricious action by the Carrier, this Division cannot properly substitute its judgment for that of the Carrier by assigning an employe to the position which it deems qualified but which the Carrier does not."

The record in this case shows that G. W. Nunn had been employed as a section laborer from March 2, 1942, so that at the time this claim arose he had approximately 1½ years' service and that he had served as a relief foreman on some thirty-eight occasions, and that Gilbert Ramos had had more than twenty years' experience as a section foreman on the Dallas and Austin Division of the Carrier and had resigned as section foreman on February 28, 1943, having been reemployed in the B. & B. Department of the San Antonio Division, and thereafter used as assistant foreman on a temporary vacancy, and that this extra gang was a large one doing the important work of laying new rail and resurfacing track.

Clearly the Management made an investigation of the qualifications of these individuals. There was no showing that it was arbitrary and this Division cannot properly substitute its judgment for that of the Carrier, by assigning to the position an employe whom it deems qualified but whom the Carrier does not.

**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 there was no violation of the rule.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson,  
Secretary

Dated at Chicago, Illinois, this 14th day of March, 1945.