

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Luther W. Youngdahl, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

GULF, MOBILE AND OHIO RAILROAD COMPANY

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

1. That the Carrier violated the provisions of Rule 19 of the current agreement in assigning a junior carpenter to the position of Assistant Bridge & Building Foreman on July 2, 1942, when H. E. Burroughs, a senior qualified carpenter, made application for and was available for such assignment;

2. That H. E. Burroughs be accorded seniority rights as Assistant Bridge & Building Foreman from July 2, 1942; and

3. That H. E. Burroughs be paid the difference between what he has received as a first class carpenter and that which he should have received as an Assistant Bridge & Building Foreman retroactive from July 2, 1942, and until this violation is corrected.

JOINT STATEMENT OF FACTS: On June 17, 1942 the position of Assistant B. & B. Foreman, Alabama and Tennessee Divisions, was bulletined. No bids were received from employes holding seniority rights as Assistant B. & B. Foreman. However, bids were submitted by H. E. Burroughs, B. & B. Carpenter, seniority date August 20, 1919, and by P. L. Ishee, B. & B. carpenter, seniority date August 5, 1920. P. L. Ishee, the junior B. & B. carpenter bidding, was assigned to the position of Assistant B. & B. Foreman.

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

POSITION OF EMPLOYES: Schedule Rule 19 (a) and (f) of Agreement in effect between the Carrier and the Brotherhood reads:

"(a) A promotion is an advancement from a lower to a higher rank. Promotions shall be based on ability, merit and seniority; ability and merit being sufficient seniority shall prevail. The management shall be the judge subject to appeal to the highest designated officer of the Company."

"(f) An employe accepting promotion will be allowed reasonable time in which to qualify, and failing to qualify will be returned to his former position without loss of seniority in the rank from which promoted."

Under date of June 17, 1942 Chief Engineer L. P. O. Exley issued Bulletin No. 141, advertising for bids for position of Assistant B. & B. Foreman in Gang No. 5 under Foreman J. M. Rawson. Under date of June 27, 1942 Chief Engineer Exley issued Bulletin No. 149 reading:

OPINION OF BOARD: Employee's claim that he was entitled to the promotion as Assistant B. & B. Foreman is based upon Rule 19 (a) and (f) of the Agreement which reads:

"(a) A promotion is an advancement from a lower to a higher rank. Promotions shall be based on ability, merit and seniority; ability and merit being sufficient seniority shall prevail. The management shall be the judge subject to appeal to the highest designated officer of the Company."

"(f) An employee accepting promotion will be allowed reasonable time in which to qualify, and failing to qualify will be returned to his former position without loss of seniority in the rank from which promoted."

Admittedly, Claimant Burroughs is senior to Ishee who was given the promotion. To justify the Carrier in disregarding Claimant's seniority it must appear that his ability and merit were not sufficient.

First, let it be said that we recognize the principle so often enunciated by this Division that the Carrier has the undoubted right to determine in the first instance, the sufficiency of the qualifications of applicants under a situation such as exists here. Awards 2427, 2638. Further, we do not overlook the principle that the conduct of the Carrier in dealing with the question under consideration is subject to review, not for the purpose of having this Board substitute its judgment for that of the carrier, but as a means of ascertaining whether there has been an abuse of discretion. Awards 2556, 2638. If however, seniority has been brushed aside by a misapplication of the rules and there is no reasonable basis in the record for the carrier's determination, the judgment of the carrier cannot stand even though there has been no showing of bad faith or bias.

Although the wording of 19 (a) and (f) herein is slightly different than Rules 5 and 12 of Railway and Steamship Clerks' Agreement, discussed in Award 2638, the rules are sufficiently similar so as to make applicable here the principles there set forth. Because the matter is there so exhaustively treated we need not unduly lengthen this opinion by reiteration of what is there said. References can quickly be made to that opinion by those who may be interested. It is sufficient to say, following the principles there enunciated, that employees claiming the right to an opportunity to qualify have the burden of proof of establishing that they possess reasonable merit and ability. The past record of an applicant may be sufficient to create a presumption that he is entitled to an opportunity to qualify. If the carrier makes the contention that the manner in which an applicant discharged the duties of a former position disqualifies him for another, the burden is on it to show that such past services were deemed unsatisfactory as of the time they were rendered and it may not raise that issue for the first time in passing upon the qualifications of the applicant for the new assignment. See also 2673.

With these principles in mind we look to the record to ascertain the facts. Carrier relies principally upon the following statement found in Carrier's submission:

"While serving as road carpenter, Mr. Burroughs had great difficulty in keeping his reports, time sheets, and correspondence, in shape, due to his lack of education more than any other reason. The fact that his reports were practically illegible, as his writing is so poor, really unfitted him for position as road carpenter. His lack of education, and his inability to readily understand written instructions was also a handicap to him, and would be more so if he were placed on a position of Assistant B. & B. Foreman on a gang where he would be called on to take over from time to time, and to assist the foreman in keeping records of time, material, etc."

Aside from the objection that this statement consists of mere conclusions, this claim of insufficient ability, so far as the record shows, was raised for the first time when Carrier was passing upon the qualifications of applicant for the new assignment. It does not appear that it was asserted during the several years when applicant was serving as a carpenter at which time Carrier now claims his records were inadequate. Under the rule enunciated in 2638 such proof therefore is insufficient.

The other evidence in support of the Carrier's claim of lack of ability, it seems to us, has to do with the comparative ability of Burroughs and Ishee rather than the insufficiency of ability of Burroughs, with the exception of the conclusion of Superior W. M. Johnson, who stated during the investigation, "Mr. Burroughs is a good worker but is not capable of handling labor." This claim also was made for the first time when the promotion was being considered and therefore is not proper proof under the principle hereinbefore stated.

To indicate that Carrier was placing emphasis upon the superior ability of Ishee rather than the insufficiency of ability of Burroughs, we quote from Carrier's submission as follows:

"Another supervisor said 'I am sorry to say that I don't think either of them are very bright stars,' and concluded his expression of opinion by saying '* * * I think Ishee's selection over Rube is a wise choice.' Without exception, each of the supervisory officers who knew both men, expressed the opinion that Ishee was superior to Burroughs in these qualities that are required in an Assistant B. & B. Foreman." As the Board stated in 2638,

"The Carrier is required to give the position to the senior applicant if his qualifications are sufficient and it may not insist upon the right to make the assignment to the applicant who is best qualified. (Emphasis supplied.)

The long record of applicant in the instant case created a presumption that he was entitled to an opportunity to qualify. His seniority date is August 20, 1919. Besides working several years as carpenter and gang leader, he served for at least ten months as Assistant B. & B. Foreman on the Jackson and Eastern Railroad. The Chief Engineer states of him: "He is a loyal hard worker and would willingly do anything asked of him so far as his ability to do so would allow." His own foreman, J. M. Rawson, under whose immediate supervision he worked for fifteen years had this to say:

"H. E. Burroughs has been working with and for me for the past 15 years. He is well qualified for general B. & B. work, can operate motor car. He is a good worker. Can handle and work with other men. He can measure and cut off bridges and frame bridge timber.

"His qualifications to do bridge work are equal to that of P. L. Ishee. The educations of both men are, in my opinion, about the same. Burroughs was gang leader in my gang for the past three years, prior to Ishee's promotion. Ishee never handled any men prior to this promotion to Assistant Foreman. He is new on the job of handling men. He does better work in the gang himself than he is able to get out of the other men. In my opinion, the qualifications of both men, taking it all the way around, are practically the same. In my opinion, the position of Road Carpenter is more important and difficult to handle than that of Assistant B. & B. Foreman."

Applying the principles herein expressed to the facts disclosed by the record, we reach the conclusion that Carrier has failed in its proof to overcome the presumption of merit and ability that arises in applicant's favor by virtue of his record.

We do not express an opinion as to Claimant's qualifications to ultimately fill the position claimed. We simply say there is no reasonable basis in the record for failing to give him an opportunity to qualify. If, after accepting the promotion under 19 (f) pursuant to the award herein, he fails to qualify within a reasonable time this Opinion is without prejudice to Carrier to take such steps as it deems best to protect itself under the rules.

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 Carrier violated the Agreement.

AWARD

Claim sustained pursuant to Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of March, 1945

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION No. 1 TO AWARD No. 2864

DOCKET MW-2856

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employees.

NAME OF CARRIER: Gulf, Mobile and Ohio Railroad Company.

Upon application of the representatives of the employees involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

In the above Award the Board found that Carrier had violated the Agreement by assigning P. L. Ishee, a junior carpenter, to the position of Assistant Bridge and Building Foreman on July 2, 1942, when H. E. Burroughs, a senior qualified carpenter, made application and was available for such assignment.

The System Committee made three contentions under its claim:

- (1) That there was a violation of the Agreement as above found;
- (2) That by reason thereof Burroughs was entitled to seniority rights as an Assistant Bridge and Building Foreman as of July 2, 1942; and
- (3) That Burroughs was entitled to the pay of an Assistant Bridge and Building Foreman retroactive to July 2, 1942.

The Board having found that the Carrier violated the Agreement in not promoting Burroughs to the new position as of July 2, 1942, it follows that he is entitled to the seniority rights and retroactive pay of the position as of that date. The latter two phases of the claim go with the first as the fruit goes with the tree.

When in the closing paragraph of the Opinion the Board stated:

"We do not express an opinion as to Claimant's qualifications to ultimately fill the position claimed. We simply say there is no reasonable basis in the record for failing to give him an opportunity to qualify. If, after accepting the promotion under 19 (f) pursuant to the award herein, he fails to qualify within a reasonable time this Opinion is without prejudice to Carrier to take such steps as it deems best to protect itself under the rules."

it did not qualify its opinion with respect to the right of Burroughs to seniority and the retroactive pay of the new position. It was merely setting out the pattern as to the rights of the parties in the future pursuant to the provisions of the Agreement. The fact that Burroughs may not permanently qualify for the new position does not mean that he can rightfully be denied the emoluments of that position during the time he endeavors to qualify. Once employee accepts the promotion, he is entitled to the seniority rights and the pay connected with it, as of the date when the promotion should have been made, which in the instant case, is July 2, 1942.

In the event that Burroughs does not qualify to hold the new position within a reasonable time, Carrier then has the right under the Agreement to return him to his former position with the seniority rights and pay thereof. Until then Burroughs is entitled to the seniority rights and pay of the position of Assistant Bridge and Building Foreman as of July 2, 1942.

Referee Luther W. Youngdahl, who sat with the Division as a Member when Award No. 2864 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

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