

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Francis J. Robertson, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**ABILENE AND SOUTHERN RAILWAY COMPANY**

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

(1) That the Carrier violated the effective agreement when they assigned an individual holding no seniority on the Abilene & Southern Railway Company to perform section foreman's duties during the first period of July, 1950 instead of assigning this work to Relief Foreman A. C. Cox;

(2) That A. C. Cox be paid the difference between what he did receive at the Section Laborer's rate of pay and what he should have received at the Section Foreman's rate of pay during the period of time that A. O. Hatcher was assigned to serve as Relief Foreman at Ballinger during the first half of July, 1950.

**EMPLOYEES' STATEMENT OF FACTS:** A. C. Cox is employed as a Section Laborer on the Abilene and Southern Railroad at Winters, Texas.

In the calendar year 1939, the Carrier first appointed Mr. Cox to fill a Relief Section Foreman's position.

On many occasions subsequent to 1939, Mr. Cox was required by the Carrier, to render service in the capacity of Relief Section Foreman, and was so paid.

During the first period in July, 1950, the Carrier assigned A. O. Hatcher, employed by the Texas and Pacific Railroad, to a Relief Section Foreman's position at Ballinger, Texas on the Abilene and Southern Railroad.

Mr. Hatcher holds no seniority on the Abilene and Southern Railroad. During this period Mr. Cox was employed in the capacity of Section Laborer.

Claim was filed in behalf of A. C. Cox for the difference in what he received as Section Laborer and what he should have received as Section Foreman for the first period of July, 1950.

Claim was declined.

The agreement in effect between the two parties to this dispute dated

that he would stand first in line for a regular position should a permanent vacancy occur. Mr. Cox failed to show an ability to perform the position of section foreman.

Surely, it cannot be said that this Carrier had not properly **considered** the claimant for promotion. He was given every opportunity to show the Management his qualification as a section foreman but his trial periods disclosed that he lacked the qualifications necessary to perform satisfactory section foreman work.

**Article 10 (a) of the Current Agreement Is Controlling in the Instant Case and States That in Matters of Promotion the Chief Engineer's Decision Shall be Final.**

It is the Carrier's position that Article 10 (b) was not violated, but on the other hand, Article 10 (a) is controlling, and that rule specifically provides that the Company is to be the judge in the selection of applicant for promotion. Rule 10 (a) reads as follows:

"Promotions shall be based on ability, merit and seniority. Ability and merit being satisfactory, seniority shall prevail, the Company to be the sole judge subject to appeal to the Chief Engineer whose decision shall be final."

The Organization progressed an appeal on the instant claim and the Chief Engineer rendered a decision denying the temporary promotion of Cox. Chief Engineer Gammie's letter of December 5, 1950, is attached as Exhibit "D". The Chief Engineer in rendering his **final decision** was not acting arbitrarily and capricious, but denied the appeal of this case because he felt that Cox had failed to disclose sufficient ability and merit to warrant his being used as a section foreman.

Although the claimant was used as relief section foreman in emergency at various times, he did not and could not under Article 2, Paragraph (a) of the Agreement establish seniority as a section foreman as he was not assigned by bulletin while performing such emergency relief service.

Article 2, Paragraph (a) reads:

"Seniority begins at the time the employee's pay starts on the position to which assigned following bulletining of the vacancy as provided in Article 11."

In conclusion, we hold that a decision in this case turns upon the application of Article 10 (a) covering Promotions. This rule provides that promotions shall be based on ability, merit and seniority. Ability and merit being satisfactory, seniority shall prevail, the company to be the sole judge subject to appeal to the Chief Engineer, whose decision shall be final.

We hold that the discretion as to necessary fitness and ability rests with the Company and we have shown that the claimant's ability and merit when used on previous assignments as relief foreman were not satisfactory; also, that the case has been appealed up to and including the Chief Engineer "whose decision shall be final".

The Chief Engineer rendered a decision denying the claim, and we hold that his decision is final and respectfully request the Board to deny the claim.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Claimant, a regularly assigned track laborer, applied for assignment to a temporary vacancy as Section Foreman at Ballinger, Texas, for the two-week period in July, 1950, when the regularly assigned occupant of that position went on vacation. The Carrier refused the assignment to Claimant and assigned one Hatcher, an employe of the Texas and Pacific Railroad to the vacancy. Employees filed claim as indicated.

The rule pertinent to a disposition of this claim is Article 10 Sections (a) and (b) of the Agreement between the parties, which reads as follows:

**"ARTICLE 10.**

**Promotion**

(a) Promotions shall be based on ability, merit and seniority. Ability and merit being satisfactory, seniority shall prevail, the Company to be the sole judge subject to appeal to the Chief Engineer whose decision shall be final.

(b) Employees entitled to promotion shall be given consideration before hiring new men."

It will be noted that the above quoted rule provides that the Company is the sole judge of satisfactory ability and merit subject to appeal to the Chief Engineer whose decision shall be final. Under such a rule, the determination of the qualifications of an employee for promotion is a matter for Carrier's exclusive discretion subject to the qualification that that discretion be not partially, arbitrarily or capriciously exercised. If the Carrier's determination is challenged before this Board, the burden of establishing the satisfactoriness of Claimant's ability and merit for the position to which he aspires rests with the Employees.

The record reveals that Carrier has assigned the Claimant at various times to vacancies as a relief foreman. Carrier asserts that although he has had many years of experience in track work it was found that Claimant did not have the ability and apparently did not realize the responsibilities required of a section foreman while performing relief section foreman's service. That general statement is supported by citations of specific instances of dereliction of duty while Claimant was acting as a relief foreman prior to July 1, 1950, and by statements of supervisors who had requested Claimant's foreman to speak to Claimant about his seeming lack of interest in the work. Nowhere in this record are these statements of the Carrier effectively refuted by the Employees. Apparently, the Employees rely on the fact that Carrier had seen fit to permit Claimant to act as a temporary foreman on previous occasions as establishing his satisfactoriness and ability for promotion in July of 1950. Any inferences or presumptions as to qualification of Claimant which might arise from that fact, however, are dispelled by Carrier's contention to the effect that he had been tried and found wanting which contention is supported by substantial unrefuted evidence. It is apparent, therefore, that the Employees have not sustained the burden of establishing Claimant's ability and merit and that this claim must be denied.

**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 did not violate the Agreement.

**AWARD**

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of Third Division

**ATTEST:** (Sgd.) A. Ivan Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 14th day of January, 1952.