

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE DELAWARE & HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Delaware and Hudson Railroad that

(a) A. D. Wright, Signal Helper, should have been promoted to the position of Signal Mechanic in the signal gang on the A. & S. Division and that he be so compensated for the difference between the amount he earned and the amount he would have earned had he been properly assigned to such position on July 1, 1948.

(b) A. D. Wright, Signal Helper, be given a seniority date in the Signal Mechanic class as of July 1, 1948, the date he should have been promoted to such class.

EMPLOYEES' STATEMENT OF FACTS: On June 4, 1948, Bulletin No. 23.48 was issued by the Signal Supervisor advertising three Signal Mechanic positions.

Claimant A. D. Wright applied for a position of Signal Mechanic, as advertised in above mentioned bulletin, on June 8, 1948. Copies of his application were received by the Signal Supervisor, B. H. Richards, and Local Chairman A. L. Snyder.

On June 28, 1948 a letter from Signal Supervisor was issued in relation to Bulletin No. 23.48 in which he advised that one Signal Mechanic's position was awarded to Assistant Mechanic A. G. Frohrib, who had seniority date as Assistant Mechanic of February 26, 1948. One Signal Mechanic's position was abolished, and one Signal Mechanic's position was awarded to J. J. Tonnesson. The letter from the Signal Supervisor mentioned above stated that the position of Signal Mechanic was awarded to J. J. Tonnesson by appointment with a notation "no qualified bidders".

No application for the position of Signal Mechanic was received from J. J. Tonnesson, and he was Junior to the claimant in the Helper's class.

The application of the claimant was not considered for any of the positions advertised in Bulletin No. 23.48, even though he had seniority over J. J. Tonnesson and had applied for same in accordance with the rules of the agreement.

employees had bid from one position to another. However, service as such did not establish any seniority for Mr. Wright as the appointment was only temporary.

At the time that Signal Helper Tonnesson was appointed to position of signal mechanic, he was the only qualified employee available, he having established his ability in the mechanics' class during period of employment from November 1942 through September 1946 when he was permanently assigned to that type of work.

A qualified employee was available who could do the work properly and under such circumstances Rule 32 (c) does not provide for promoting assistant mechanics to mechanics. The work performed by Tonnesson had established him as a capable and satisfactory mechanic and he was therefore appointed because of this ability.

Carrier would call attention of the Board to part (a) of the Employees' claim. When this claim was progressed through channels it was officially denied on March 28, 1949 by Carrier's highest officer designated to handle same. On March 31, 1949 Employees requested that Carrier join with them in making a joint submission to the Adjustment Board. On April 1, 1949 Carrier advised Employees that it did not wish to join with the Organization in submitting this claim to the National Railroad Adjustment Board. Nothing more was heard from the Organization in connection with this claim until a copy of letter dated August 22, 1951, addressed to Mr. A. I. Tummon, Acting Secretary—Third Division, was received. It will be noted that the Employees have taken no action on this case from April 1, 1949 until August 22, 1951, yet this claim is for the amount he would have earned at the mechanic's rate from July 1, 1948. Carrier does not believe it should be presented with a retroactive claim whereon the employees have taken no action in over two years.

The only rule in the agreement having to do with promotion to position of signal mechanic before completing four (4) years as an assistant is Rule 32 (c), quoted on Page 4. It will be noted that Rule 32 (c) states "an employee **may** be promoted—if—he has qualified in less than 4 years to perform the work, provided a qualified and satisfactory signal mechanic—is not available—". (Emphasis added.)

Signal Helper Wright was not entitled to promotion for several reasons. A qualified and satisfactory Signal Mechanic was available. Signal Helper Wright had not completed 4 years' service as an assistant and was not qualified for signal mechanic's position. In fact, he had been in service less than a year and had been employed most of the time as a helper with a short period as temporary assistant mechanic and mechanic. He did not establish seniority as assistant mechanic until July 28, 1948 and was subsequently promoted to signal mechanic on November 8, 1950.

Under the existing facts, Signal Helper Wright was clearly not entitled to promotion under Rule 32 (c), the only rule in the agreement which has a bearing on this claim.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the Committee and made a part of the particular question in dispute.

OPINION OF BOARD: About the essential facts relevant to a determination of this dispute there appears to be no disagreement between the parties: (1) One June 4, 1948, the Carrier bulletined three signal mechanic positions. (2) As of this date among the signal mechanic helpers there were two employees, Claimant Wright and J. J. Tonnesson, the former being senior to the latter in that class. (3) Wright, holding seniority as a helper from August 25, 1947, has had the following work experience with the Carrier: employment for 14 days as a temporary assistant signal main-

tainer, beginning February 1, 1948; employment for about three months as a temporary assistant signal mechanic, beginning April 12, 1948; employment for nine days as a temporary signal mechanic, beginning June 21, 1948; promotion to a permanent assistant signal mechanic position July 28, 1948; and promotion to a permanent signal mechanic position November 8, 1950. (4) Tonnesson had been a signal mechanic from 1942 to 1946 but had resigned in September, 1946, to work elsewhere. Subsequently, on March 31, 1948, he was rehired by the Carrier as a signal mechanic helper and was in that position when the above-mentioned signal mechanic positions were bulletined. (5) Wright applied for one of these mechanic positions; Tonnesson did not. (6) The Carrier, without dispute, awarded one of these positions to A. G. Frohrib. A second of the positions was given to Tonnesson. The third was cancelled.

Two main issues separate the Parties: (1) which rule or rules of their effective agreement applies to and governs the resolution of the claim? The Organization stresses Rule 60 (a) of Article 5 on promotions and transfers, which states that in assigning positions other than foremanships the Carrier shall consider seniority and ability; and, ability being sufficient, seniority shall govern. The Carrier emphasizes Rule 32 (c) of Article 3 on assistant positions, which states that "an employe" (presumably in an assistant's position) may be promoted to a signal mechanic vacancy if he has qualified therefor in less than four years, provided a qualified, satisfactory signal mechanic is not available at the time. (2) If Rule 60 (a) is the chiefly applicable portion of the Agreement, was the Carrier's action proper thereunder?

In respect to the first issue, we think that Rule 60 (a) rather than Rule 32 (c) is controlling. Wright and Tonnesson were classified as helpers when the positions were bulletined. Rule 32 is part of an Article dealing with assistantships, not with helpers; and paragraph (c) must be interpreted as covering promotions from assistant to mechanic positions. Rule 60 (a), on the other hand, is part of an Article dealing with the general subject of promotions and must be presumed to cover all advancements of the sort at issue in the instant case.

The second question then becomes important. At basic issue is whether Claimant Wright's ability to perform the work of signal mechanic on July 1, 1948, was "sufficient". Here, as this Board has often held, the burden of proof rests on the Organization. The responsibility for determining sufficiency of ability lies with the Carrier's management, and the Organization is obligated to show that the Carrier's exercise of its responsibility was improper.

This, we believe, the Organization has succeeded in doing. It may well be that as of July 1, 1948, Tonnesson was a better qualified employe for the position of signal mechanic than was Wright. But under the rules of the Agreement the Carrier is not permitted to exercise its discretion by selecting the superior among two or more qualified persons. So long as the senior employe's ability is adequate, he must be chosen. The facts of Wright's temporary employment in higher-rated positions and his subsequent promotion to such positions strongly suggest sufficient competence and tend to substantiate the Organization's contention. We think the Carrier violated the applicable provisions of the agreement in promoting Tonnesson instead of Wright.

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 failed to adhere to the applicable provision of the Agreement.

AWARD

Claim (a) and (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of July, 1952.