Award No. 8051
Docket No. MW-8124

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Marion Beatty, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY

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

(1) Carrier violated the effective Agreement when, on February 2, 1955, it assigned junior B&B Carpenter, Mr. Earl Caplinger to position of B&B Foreman instead of the senior applicant and B&B Carpenter Mr. Elmer Rothgeb;

(2) Claimant Elmer Rothgeb be assigned to the aforesaid B&B Foreman's position and reimbursed for the difference between what he did receive and what he would have received had he properly been assigned to the foreman's position;

(3) The seniority roster maintained for B&B Foremen be adjusted so as to reflect the same information as would have been shown had the assignment here in dispute been properly made.

EMPLOYES' STATEMENT OF FACTS: Under date of January 7, 1955, File M-24166, the Carrier's Chief Engineer, Mr. F. J. Bishop, issued a bulletin advertising a position of B&B Foreman, Headquarters, Brittain, Ohio.

B&BCarpenter Elmer Rothgeb, seniority dating as of September 24, 1925, and B&B Carpenter Earl Caplinger, seniority dating as of May 6, 1926, made application for this B&B Foreman's position.

Under date of February 2, 1955, Chief Engineer Bishop issued a bulletin advising that the position of B&B Foreman, as advertised in his bulletin dated January 7, 1955, was assigned to Mr. Earl Caplinger.

The Carrier's selection of the junior B&B Carpenter, Mr. Earl Caplinger to fill this assignment was immediately protested, with a request that senior B&B Carpenter Elmer Rothgeb be assigned to the position of B&B Foreman with a seniority dating in such a class of February 2, 1955 over the junior employe assigned and that he be allowed the difference in rates of pay between that of a B&B Foreman and a B&B Carpenter from February 2, 1955, until such time as senior B&B Carpenter Elmer Rothgeb is assigned to the position.

repeated assertions in its submissions on the part of those preparing them that the statements therein contained are true. The Organization vigorously insists all proof submitted by the Carrier is in the form of opinion and conclusive evidence. Assuming without deciding it is right in that contention the fact still remains the findings was made that it must be overcome by the degree of proof required by the rule. The proof submitted by the Organization to accomplish that result is no better, if as good, as that submitted by the Carrier. * * *"

In Award No. 7015 your board said in part:

"This board has established a well fixed doctrine that it will not substitute its judgment for that of responsible carrier officers at local levels, in the matter of determining fitness and ability for a position. This is only proper because the local officers are in the best position to judge the fitness of employes for promotions to positions of greater responsibility."

Your board further said in the same Award:

"This board has also decided in a long series of awards that extra service in a position does not effectively qualify an employe for said position and that experience is not synonymous with ability; i.e.,"

In Award No. 6178 (Begley) in denying claim your board said in part:

"After a careful reading of the docket and the rules applicable, we find that under Article 13-1 the Carrier has the right to decide whether the applicant is competent to fill the bulletined position and, unless the employes can prove that the applicant was **competent** to perform the position involved or that the Carrier acted in a biased or prejudicial manner in evaluating the claimant's competency, the decision of the Carrier must be final. The employes have failed in their proof of competency or prejudice; therefore the claim must be denied —Awards 4040, 5966, 6054."

Carrier asserts its position based on competent evidence, that in the case of claimant, fitness and ability were not sufficient for the position on which he had submitted bid. The Petitioner has nowhere in its correspondence or discussions on the property contended in positive terms that the claimant actually had "sufficient" fitness and ability. All the Petitioner has said is that the claimant was the senior man and should have been assigned. But that in itself does not meet the qualifications of the rule.

Moreover, Carrier has shown that under principles enunciated by this labor tribunal, the Petitioner at all times retained the positive burden of showing by substantial and competent proof that the claimant actually had "sufficient" fitness and ability. It is palpably evident that the Petitioner has not at any time met, nor attempted to meet, the particular burden placed upon them.

Carrier further asserts it has not acted in a biased, arbitrary, capricious, unreasonable or prejudicial manner in denying the position to the claimant.

This claim is without merit and should be denied.

(Exhibits not reproduced).

OPINION OF BOARD: This case turns on the proper interpretation of Rule 15(b) of the agreement. It reads as follows:

"Promotion shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail."

In this case there were two bidders or applicants for the position of B&B Foremen. Both applicants were eligible to consideration under Rule 2. Both applicants received consideration.

Rothgeb had greater seniority than Caplinger.

Caplinger received the appointment, whereupon Rothgeb filed the protest out of which this case arises.

This case boils down to this one question, "Did the complainant, Rothgeb, have **sufficient** ability and merit? If so, he was entitled to the promotion.

Under the language of this Agreement the selection may not be based on **relative** ability and merit. The Carrier has bargained away its right to select its employes for promotion based solely on ability and merit, or based on relative ability and merit. It is bound by its Agreement (Rule 15(b)) to tap the senior employe for promotion and give him at least a trial period under Rule 18, if the senior employe has **sufficient** ability and merit.

The selection then depends on whether Rothgeb, the senior employe, had **sufficient ability** and **merit.**

The evidence in the record tends to show that both applicants had some ability and merit and both had some experience as acting foreman and some qualification for the promotion they sought. We can go even farther. We find that the evidence shows in the record that Caplinger, the man selected by the Carrier for promotion, had the greater ability and experience; he had an abundance of qualifications.

Four times in the Carrier's ex parte reply the **spokesman** for the Carrier (pp. 3, 8 and 10) expresses the conviction that Rothgeb, the unsuccessful applicant, did not possess sufficient ability and merit. This is the spokesman talking, presenting argument to this Board. His convictions and his words are not evidence. If management had made a bona fide determination that Rothgeb did not have sufficient qualifications, that determination should stand.

If management makes a bona fide determination that he has not sufficient ability and merit this Board is not inclined to substitute its judgment for that of management in matters of this kind, unless it is evident that management's decision was a gross mistake, was arbitrary, capricious, biased or without reasonable support.

The real evidence shows that the actual determination, the actual choice of the man for promotion, was made by Chief Engineer F. J. Bishop and that he did not determine it on the proper basis.

Bishop's letter to the Brotherhood (p 18) and his affidavit submitted as evidence in this case both clearly show on their faces that he used the wrong formula in selecting the employe for promotion and that he did not adhere to Rule 15(b).

In one case he based it on the high regard he had for Caplinger's ability (p 5) and how unjust it would be for such a capable man not to receive the promotion. In his affidavit (p 48) he based it on Caplinger's greater ability. In neither case did he put it on the basis that Rothgeb, the senior applicant, did not possess sufficient ability and merit. This latter is the formula he should have followed. It is the formula set forth in the Agreement.

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 for the reasons set forth in the Opinion the Carrier violated Rule 15(b) of the Agreement.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of August, 1957.