

Award No. 10345
Docket No. MW-9397

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(1) The Carrier violated the effective Agreement, when on October 5, 1955, it assigned junior laborer J. E. Reed to the position of Operator of Tractor Bulldozer S.P.O.-21, by Bulletin No. 10, instead of senior laborer Cyril Parker;

(2) Laborer Cyril Parker be awarded the position of Operator of Tractor Bulldozer S.P.O.-21, with a seniority date in that class of October 5, 1955;

(3) Laborer Cyril Parker be reimbursed for all monetary loss suffered account of the Carrier's improper action.

EMPLOYEES' STATEMENT OF FACTS: Under date of September 2, 1955, Division Engineer L. E. Lyon issued Bulletin No. 9, advertising position of Tractor Bulldozer Operator. No employe holding seniority rights in the class of Tractor Bulldozer Operator made application for this position. However, three (3) bids were submitted for this position, the applications reading as follows:

"Sept. 19, 1955

Dear Sir:

I wish to place my bid on Tractor-bulldozer, S.P.O. 21. Bulletin No. 9, Dated Sept. 2, 1955.

/s/ Jerald Edward Reed"

"Horn, Ariz.
Sept. 16, 1955

Mr. L. E. Lyons, Tucson, Ariz.
Mr. V. C. Foley, Yuma, Ariz.
Mr. S. J. Cox, Tucson, Ariz.

Accept this as my Bid for Tractor-Bulldozer S.P.O.-21.

Hassayampa during the period September 3 to October 5, 1955. In the judgment of the management Mr. Reed was best qualified on the basis of fitness and ability, and he was accordingly assigned to the position of operator on Bulldozer SPO-21.

In handling on the property, petitioner has cited Rule 2 of the current agreement in support of this claim, which reads:

"rights accruing to employees under their seniority shall entitle them to consideration for positions in accordance with their relative length of service with the Company, as provided in these rules."

That rule does not support the claim in this docket. In citing it, petitioner entirely ignores the fact that Rule 23, quoted supra, is a special rule providing the method to be followed in making promotions. It has been too well established by this Board to warrant citation that a special rule prevails over general rules, leaving the latter to operate in the field not covered by the former.

CONCLUSION

The Carrier asserts that it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support and requests that said claim be denied.

All data herein submitted have been presented to the duly authorized representative of the employees and are made a part of the particular question in dispute.

The Carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in submission which cannot be forecast by the Carrier at this time and have not been answered in this, the Carrier's initial submission.

(Exhibits not reproduced).

OPINION OF BOARD: This claim involved the right of junior laborer J. E. Reed to assignment of position of Operator of Tractor Bulldozers, instead of senior laborer Cyril Parker.

Due to annual flood conditions which usually commenced in July of each year Carrier had requested that additional bulldozers be shipped to the division here involved and one an RD-8, one of the largest bulldozers on the system arrived on the division from Salt Lake on August 22nd and was assigned on September 3, 1955 at Hassayampa, where an emergency existed.

On September 2, 1955, Carrier advertised for bids for Tractor Bulldozer operator. No employee holding seniority rights in the class of Tractor Bulldozer operator made application for the position.

Three bids were received as follows:

Jerald Edward Reed. Seniority date August 7, 1955.
Cyril Parker. Seniority date July 7, 1952.

(On this bid, appeared the following language. I am an experienced Bulldozer Operator)

Billy G. Duke. Seniority dated November 2, 1953.

This applicant had seniority rights as a laborer and also as a Crane Operator, as of September 7, 1954 s shown by Seniority Roster.

As herein set forth, Claimant in his bid for the position added the following, "I am an experienced Bulldozer Operator." No proof of that statement was submitted to Carrier relative thereto until Employes submitted two letters relative to the Claimant one dated November 29, 1955 and one dated December 28, 1955, both of which set forth that the writers thereof had seen Claimant Parker operating a bulldozer in 1951 and 1952, both of said letters being submitted by Organization February 20, 1956. There is no claim that Carrier had any such information at any time prior thereto.

It is the contention of the Carrier that Employee Reed, working at the time and prior to advertisement for bids, had experience in operating some large, on-track machines of the Carrier and, had, prior to becoming an employe of the Carrier, experience in operating a tractor as a tractor operator as shown by Carrier's records.

It is not disputed that Carrier sent Employee Reed to work with one Dan McKaskle on August 29, 1955 and that Mr. McKaskle in a letter stated that one Mr. Evans, employe of Carrier, had sent Reed out to work with him and that he, McKaskle, "was to instruct him how to operate a bulldozer."

In the letter from Mr. McKaskle, he further stated, "Mr. Reed had apparently never operated a bulldozer before and I taught him as much as I could the week that he was working with my bulldozer."

Carrier states that Employee Reed, with a seniority date of August 17, 1954, qualified as large on-track machine operator S.P.O.-2 December 1, 1954, and continued in that position until machine was transferred off division June 7, 1955. That in view of Reed's understanding of large machines and his ability to operate the multiple tamper S.P.O.-2 as well as his statement of having had experience of operating a tractor on a ranch at Geronimo, Arizona, Mr. Evans states he selected Reed in accordance with Rule 23 of the current agreement.

Carrier further states that there had been heavy storm damage on this particular Division, that it had requested further bulldozers and on August 22, 1955 bulldozer No. S.P.O.-21 (Caterpillar type R.D.) arrived on Carrier's Tucson Division, and due to heavy storm damage at various points on the Division, it was necessary that said bulldozer be placed in service as quickly as possible. Due to the fact that all available employes holding seniority as tractor-bulldozer operators were engaged in combatting the storm damage, a check was made to determine whether any employes of the Track Sub-department were qualified to operate No. S.P.O.-21. That such check disclosed the information herein set forth relative to employee Reed and Reed was instructed to report to Hayden Junction (Mr. McKaskle) to work with McKaskle to familiarize himself with the operation of an R.D.-8 bulldozer, awaiting arrival of bulldozer No. S.P.O.-21.

Due to the emergency, bulldozer No. S.P.O.-21 was diverted to Hassayampa, at which point it was unloaded September 3, 1955. Reed was also sent to Hassayampa and he commenced operating said bulldozer September 3, 1955, and continued to operate that machine until March 9, 1956.

The particular Rules concerning promotions which are involved in this dispute are:

"RULE 2

Rights accruing to employees under their seniority shall entitle them to consideration for positions in accordance with their relative length of service with the Company, as provided in these rules."

"RULE 23

Promotions shall be based on ability, fitness, and seniority. Ability and fitness being equal, seniority shall prevail, the management to be the judge."

"RULE 25

An employee accepting promotion and failing to qualify within ninety (90) days may exercise his seniority in the seniority class from which promoted, or return to his former position in said class providing the position is still in existence and has not been assigned to an employee his senior."

It is the contention of the Organization that Employee Parker was entitled to this promotion and that he should be entitled to a qualifying period under Rule 25.

Carrier contends that Rule 23 governs; that the rule provides that promotions shall be based on ability, fitness and seniority. Ability and fitness being equal, seniority shall prevail, the management to be the judge. That in the judgment of the management, employee Reed was the best qualified on the basis of fitness and ability for the particular job involved.

Repeated decisions of this Division of the Board have established the rule that once fitness and ability of an employee have been found by the Carrier to be lacking, the burden rests upon the Claimant to overcome that decision by substantial and competent proof. (Award 5417)

The responsibility for the selection of employees and their promotion is the Carriers: and we should not substitute our judgment based on paper for the Carrier's first hand judgment, except upon a showing of abuse of discretion (Award 5292) bad faith, capriciousness, bias or partiality: the burden rests upon Claimant to overcome that decision by substantial and competent proof.

Except for employee Parker's own statement on his bid, that he was an experienced bulldozer operator, no further information relative thereto was submitted on his behalf, until some time after the assignment of Reed.

Relative to Mr. McKaskle's statement regarding employee Reed being with him for training from August 29, 1955, it is obvious that Reed either had experience operating heavy machinery as Carrier claims or McKaskle was an outstanding teacher as the record shows Reed commenced operating bulldozer S.P.O.-21 on September 3, 1955 and continued as such operator until March 9, 1956.

It is difficult to conclude on the record that the Carrier was unreasonable, partial, arbitrary or capricious in determining, under all the circumstances that Claimant was not sufficiently qualified. The Carrier is under no obligation to undergo the hazard and expense of the qualifying period provided in Rule 25,

unless the Senior has something else to offer than potentiality. (Award 5292). In the final analysis, Management was the judge of ability and fitness and only if they were equal, seniority would prevail. We cannot make such a finding that they were equal, upon the record as it stands as of the date of the selection of employe Reed.

We find there is not a sufficient showing here to upset the Carrier's determination.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of the THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of February, 1962.