

Award No. 11279

Docket No. MW-10711

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Martin I. Rose, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
SEABOARD AIR LINE RAILROAD COMPANY**

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

(1) The Carrier violated the effective Agreement when it assigned Carpenter Helper O. F. Grier instead of Carpenter Helper J. E. Culberson to the position of Carpenter on May 8, 1957;

(2) Mr. J. E. Culberson, the senior applicant, be assigned to the above referred to position and reimbursed for the difference between what he received as a Carpenter Helper and what he should have received as Carpenter from May 8, 1957, until such time that he is assigned to the position.

EMPLOYES' STATEMENT OF FACTS: On April 24, 1957, the Carrier issued Bulletin No. 45, advertising two (2) positions of Carpenter on Carpenter Gang No. 2 on the Virginia Division. Applications therefor were made within the time limits stipulated in the Agreement rules by the following employees:

NAME	CARPENTER HELPER SENIORITY DATE
A. A. Ayscue	April 24, 1954
J. E. Culberson	October 13, 1954
O. F. Grier	April 22, 1957

On May 8, 1957, the Carrier issued Circular No. 66, assigning one of the positions of Carpenter to Mr. A. A. Ayscue and the other to Mr. O. F. Grier.

Consequently, a claim was filed in behalf of Claimant Culberson, who is senior to Mr. Grier, requesting that he be assigned to the above referred to position of carpenter and reimbursed for the difference between what he received as a Carpenter Helper and what he should have received as a Carpenter from May 8, 1957, until such time as he is assigned to the position.

as to demonstrate his ability as a carpenter, which claimant did not satisfactorily do, although this is not a difficult job for a carpenter. This did not discriminate against claimant and simply confirmed the decision previously made as to his lack of ability and merit. This drove home to him the fact that he was not then qualified to fill position of Carpenter and apparently woke him up, since he then acquired tools customarily provided by carpenters and worked to qualify himself as a carpenter, which he did subsequently.

There is no question as to the qualifications of Mr. O. F. Grier to fill the position of Carpenter. He worked as Carpenter Helper on another railroad from September 1952 through February 1957, had supplied himself with the customary tools and fully demonstrated his ability to perform carpenter's work.

There was no violation of the agreement in this case and no discrimination against the claimant, Mr. Culberson. The Carrier's position is supported by Third Division Award 5802 and many other awards of that Division.

Carrier affirmatively states that all data contained herein has been made known to or discussed with Organization representatives.

OPINION OF BOARD: Claimant and O. F. Grier established and hold seniority as Carpenter Helpers as of October 13, 1954 and April 22, 1957, respectively. On April 24, 1957, Carrier bulletined two permanent positions of Carpenter. Claimant, Grier and another employe bid for the positions. On May 8, 1957, the positions were awarded to Grier and the other employe; thereafter, claim was filed by the Claimant.

The Employes contend that the failure of the Carrier to award the Carpenter position to Claimant rather than Grier Violated Rule 2 (b) of the applicable Agreement which provides, with respect to appointments to new positions or to fill vacancies, as follows:

" . . . Ability and merit being sufficient, seniority shall prevail in the appointment."

Carrier contends that Claimant's seniority did not prevail under the Rule because his ability and merit were not sufficient.

Upon review of this kind of a dispute, this Division will not disturb the Carrier's judgment of ability and merit unless it can be shown that the Carrier was arbitrary or capricious in reaching its decision, and, as to this, the Employes have the burden of proof. See Awards 7171, 8196, 10000, 10345. It is also clear that rules like Rule 2 (b) quoted above have been construed to mean that the senior employe is entitled to the promotion if he has sufficient ability and merit, and that his ability and merit "need not be greater than or even equal to, that of junior applicants." See Awards 8181, 8051.

There is no doubt but that the job of Carpenter Helper is in the direct line of job progression to the position of Carpenter. The past record of the Claimant in the job of Carpenter Helper creates a presumption that he has sufficient ability and merit for promotion to Carpenter. See Awards 2638, 2864. Although the burden of proof in the sense of establishing the claim does not shift, this presumption is rebuttable and requires Carrier to come forward with evidence which supports its judgment of Claimant under the Rule when

he bid for the promotion and was denied it. The record shows that Carrier relies on assertions of the Master Carpenter and assertions attributed to the Foreman, a test given the Claimant, and failure of Claimant to acquire tools customarily furnished by skilled workmen.

The assertions of the Master Carpenter and the Foreman that Claimant lacked sufficient ability and merit for the promotion were made without reference to any factual basis for them. No evidence with respect to Claimant's past service was offered or set forth in the record as a bases for, or to justify, these assertion or opinions. Even opinions of experts must have demonstrable factual or evidentiary foundations to entitle them to probative value. But bare assertions or opinions unsupported and unexplained by evidence, as offered by the Carrier here, cannot be regarded as sufficient.

After the claim was filed, the Master Carpenter asked Claimant to demonstrate his ability as a carpenter by laying out and cutting a pair of steps. The records disclose that the parties are in sharp conflict as to whether Claimant successfully completed this test. Furthermore, Carrier's judgment that Claimant lacked sufficient ability and merit for the promotion was reached before this test was given and was not influenced by it.

While the acquisition of tools customarily furnished by skilled workmen may be desirable and suggest an interest in advancement, the failure to acquire them does not in itself establish lack of sufficient ability and merit for promotion. Such failure may be due to reasons unrelated to the work, and ability and merit may be sufficient nevertheless.

For these reasons, review of the record shows that the presumption which supports Claimant's claim was not rebutted by evidence which justifies the Carrier's position. See Award 10424. Accordingly, the claim must be sustained.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1963.