

Award No. 16157
Docket No. MW-16205

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement when it failed and refused to assign the position of garage serviceman as advertised by Gary Division Bulletin No. 3391 to Track Laborer G. A. Arroyo and assigned the position to junior Track Laborer H. G. Crawford. (System Case No. SG-11-64 WM-14-64.)

(2) Claimant G. A. Arroyo be awarded the position of garage serviceman, with a seniority date in that class as of the date of Gary Division Bulletin No. 3391-A.

(3) Claimant G. A. Arroyo be allowed the difference between what he was paid at the track laborer's rate and what he would have received at the garage serviceman's rate had he properly been awarded the position referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant had established and held seniority as a section (track) laborer within the Track Sub-Department as of May 25, 1959. He has never established or held seniority in any other group or rank, but he has frequently been temporarily assigned to work as a welder helper, a grinder, a roadway machine operator, and a truck driver.

Mr. H. G. Crawford had established and held seniority as a section (track) laborer within the Track Sub-Department as of July 7, 1964. He did not hold any other seniority within the Maintenance of Way Department. He was never assigned and used—temporarily or otherwise—to perform the work of any other group or rank included therein.

Under date of July 7, 1964, the same date upon which Track Laborer H. G. Crawford entered its service, the Carrier issued a bulletin reading:

"No. 3391

Joliet, Illinois
July 7, 1964

November 8, 1939, between committees representing Shop Craft and Maintenance of Way Employees and the EJ&E Railway Company), in the Scales and Work Equipment Sub-department will be filled first by employees holding seniority in the group and rank in which the vacancy or new position occurs. If not so filled, they will be filled by qualified employees in succeeding lower ranks in that sub-department. In the event the vacancies or new positions are not so filled by employees in the Scale and Work Equipment Sub-department, they will be filled by qualified employees from Group 2 Track Sub-department desiring same or qualified employees desiring same from the Bridge and Building Sub-department and the Track Sub-department in that order before hiring a new employee. Employees so assigned will retain their seniority rights in the respective other groups and sub-departments from which taken.

* * * * *

"MAKING PROMOTIONS

Rule 8. Promotion shall be based on ability, merit, and seniority. Ability and merit being sufficient, seniority shall prevail, management to be the judge of ability and merit, subject to appeal."

"FAILURE TO QUALIFY

Rule 10. Employees awarded bulletined positions will be allowed sixty (60) calendar days in which to qualify for such position, and failing to do so will be so notified within seven (7) calendar days of the expiration of the sixty (60) day qualifying period at which time they will have the right to return to their former positions without loss of seniority.

* * * * *

(Exhibits not reproduced.)

OPINION OF BOARD: The principal question to be resolved in this case is whether Carrier was arbitrary, capricious and unreasonable in denying Claimant, a senior employe, the right to a bulletined position. There is no question that Claimant was entitled to consideration for the position in question; he held the requisite seniority, and under Rule 8 should have been assigned to the position in preference to his juniors, if in the judgment of Carrier, his ability and merit were sufficient.

Rule 8 reads as follows:

"MAKING PROMOTIONS

Rule 8. Promotion shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail, management to be the judge of ability and merit, subject to appeal."

It appears to us that the above cited language is clear and precise. In order for Claimant to succeed in this case, he must show by a preponderance of evidence that Carrier, in fulfilling its responsibility as the judge of ability and merit, grossly and blatantly abused its discretion.

The facts in this case would indicate otherwise. In making the determination that Claimant was not qualified, Carrier administered a test known as the "Wonderlic Mental Ability Test." He did not attain a sufficiently high score to warrant Carrier to assign him to the position. Carrier, however, did not base its judgment solely on the results of this test. It examined his work record very closely and gave him an opportunity on several occasions to work the very position to which he now aspires. It was a combination of these foregoing factors that enabled Carrier to arrive at the determination that he was not qualified.

Carrier's action in this case was reasonable, and its judgment, based on the evidence of record, was sound and in accord with the language of Rule 8. There was, in short, no abuse of discretion or managerial prerogatives. Those awards which have been given to us on behalf of the Petitioner have been analyzed very carefully, and are easily distinguishable from this case on a factual basis. We will deny this claim.

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 the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of March 1968.