

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21284
Docket Number MW-21301

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Baltimore and Ohio Railroad Company

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

(1) The Carrier violated the Agreement when it failed to assign Mr. J. W. McKenney to the position of extra gang foreman on Bulletin No. 36, dated March 25, 1974 but assigned Mr. A. Cummings thereto (System File B-E-100/2-MG-1356).

(2) Mr. J. W. McKenney be allowed the difference in what he received as trackman and what he should receive as extra gang foreman from April 1, 1974 until such time as he is assigned to the aforementioned position.

(3) Mr. J. W. McKenney be accorded a seniority date as extra gang foreman as of April 1, 1974.

OPINION OF BOARD: Claimant J. W. McKenney is a Trackman with seniority dating from April 3, 1972 on Sub-Division No. 4 of Carrier's Baltimore West End Division. He bid on a job of Extra Gang Foreman which was advertised by Bulletin No. 19 on March 11, 1974. The job was awarded to another Trackman on the same Sub-Division who had seniority dating from August 23, 1972. Claimant herein alleges that in awarding the position to the junior man Carrier violated his rights under Rule 3, the general Seniority Rule, as well as Rules 34 and 38. The latter two cited rules read as follows:

"RULE 34

BASIS OF PROMOTION

A promotion is an advancement from a lower rank to a higher rank. Promotions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail."

* * *

"RULE 38

FAILING TO QUALIFY

Employees accepting promotion and failing to qualify within thirty (30) calendar days may return to their former positions without loss of seniority. Employees demoted will have the right to displace other employees junior in service in lower ranks."

There is no disputing that Claimant holds greater seniority than the employee who was successful in bidding to the promotion. Under the clear language of Rule 34, therefore, Claimant must prevail if he has "sufficient" ability and merit. As in most such cases, the initial determination of sufficiency must be made by management subject to challenge and review through the arbitral process. There is no evidence of an arbitrary or bad faith exercise of that managerial discretion herein, but the parties do have sharply differing views both of the facts and of the meaning of Rule 34.

Relative to the interpretation of Rule 34, we find Carrier's assertions on the property that a "more qualified" junior man can prevail over a "qualified" senior man to be without merit. As we read the rule, so long as the senior man has "sufficient" ability and merit he is entitled to the job. Thus, the sufficiency of these qualities must be measured absolutely in terms of adequacy to meet the job requirements, not relatively in terms of competing applicants.

The foregoing principles are of cold comfort to the Claimant in this case, however. As the moving party, Claimant has the burden of proving that he possessed sufficient ability and merit to qualify for the higher rank job. Concededly, Rule 38 affords the promotee a 30-day trial period, but the latter rule is a condition subsequent which does not arise unless the senior applicant fulfills the condition precedent of sufficiency of ability and merit. The record before us does not contain any evidence, but for bare assertions from Claimant, to support his claim to the job. Carrier has put the sufficiency and adequacy of his ability and merit in issue by evidence of poor attendance and lack of experience in track work. Claimant has not met his burden of proof in rebutting this evidence or offering positive evidence of the merit of his claim. See Awards 16471, 17948, 18353, et al. The claim must be dismissed.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee 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.

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Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 12th day of November 1976.