

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23541
Docket Number CL-23258

John J. Mikrut, Jr., Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and Steamship Clerks,
{ Freight Handlers, Express and Station Employees
{ The River Terminal Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8931) that:

1. Carrier violated the effective Clerks' Agreement when it failed to afford Mr. C. Scaggs a promotion to a Yardmaster position in preference to a junior employee.
2. Carrier shall now compensate Claimant C. Scaggs for eight (8) hours' pay at the pro rata rate of a Yardmaster position commencing on November 16, 1978, and continuing for each and every day thereafter that junior employee J. Carty is used as a Yardmaster.

OPINION OF BOARD: The issue which is central in this dispute is Organization's contention that Carrier's appointment of a junior employee to a vacant Yardmaster's position on or about November 16, 1978, was in violation of Supplement No. 5 of the parties' applicable Collective Bargaining Agreement. In support of its position Organization offers that Claimant's seniority date is September 6, 1957, whereas appointee's seniority date is March 8, 1962. Organization further contends that Claimant is qualified and can perform the duties required of said position and that Carrier's failure to appoint Claimant was simply because "he (Claimant) is an employee who demands that Carrier comply with the contract". Thus Organization summarizes that "... Carrier has clearly acted in an arbitrary and capricious manner ..." and that the instant claim should be sustained.

In addition to the above, Organization also argues that Carrier merely asserts that Claimant is unqualified to perform the duties of Yardmaster but thereafter offers no evidence whatsoever in support of this assertion; and further that the great majority of Carrier's arguments were not made when the case was presented "on the property", but instead were raised for the first time when the dispute was appealed to this Board.

Carrier's position, stated simply, is that Claimant was "... given the same fair and unprejudiced consideration" as was given to all other applicants and that Claimant "... failed to prove he possessed sufficient quali-

fications for the position of Yardmaster". Additionally, Carrier argues that "Supplement No. 5 gives management the explicit right to be the judge of the fitness and ability of the applicant" and further "(T)hat Claimant's work record and performance has demonstrated to management his inability to work harmoniously with supervision and fellow employees".

The Board has carefully read and studied the complete record in this dispute and is convinced that Organization's position herein is correct and, therefore, must be sustained.

From the outset it must be noted that, as per Organization's contention, a significant portion of Carrier's argumentation as contained in both its Submission and Rebuttal Brief was not offered when the issue was first presented on the property, and, for obvious reasons, such offerings will not now be entertained by this Board.

Turning next to the merits portion of this dispute, given the facts of record as presented herein, the Board is unable to conclude that Carrier's consideration of Claimant's qualifications was "fair and unprejudiced" as is required by Supplement No. 5 of the Agreement. While there can be no dispute that said Supplement does empower "(M)anagement to be the judge of the fitness and ability of the applicant", by the same token, such right may not be exercised "... in an arbitrary and capricious manner" (Second Division Award 7701). Regardless of the specific motivation which might have led to Carrier's decision not to promote Claimant to the position of Yardmaster, Carrier's allegations regarding Claimant's qualifications or lack thereof either are not supported in the record or indeed appear to be predicated upon the most trivial of incidents. Moreover, Claimant's twenty-two (22) years of service with Carrier, together with his numerous promotions and his apparently unblemished work record (particularly the latter) is sufficient to rebut Carrier's principal contention that Claimant "... has demonstrated his inability to work harmoniously with members of supervision and fellow employees" and that "(H)is argumentative attitude is unsuitable for the position of Yardmaster ..." (Third Division Awards 10424, 20702 and 21353).

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:



Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1982.