

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former Seaboard System
(Railroad)

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

(1) The Agreement was violated when the Carrier assigned junior employee D. L. Watson instead of Mr. H. Euress to fill a Class 3 Machine Operator's position (backhoe) working with the Mulberry Extra Gang on October 23, 25, 26, 27, 28, 29, 30, November 2, 3, 4, 5, 6, 9, 10, 11, 12 and 13, 1987 [System File HE-87-124/12(88-231) SSY].

(2) As a consequence of the aforesaid violation, Mr. H. Euress shall be allowed the difference between what he was paid at the trackman's rate and what he should have been paid at the Class 3 Machine Operator's rate beginning October 23, 1987 and continuing through November 13, 1987."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant holds seniority as a Machine Operator. At the time this Claim arose, he was working as a Trackman and available for service. For the period cited in the Claim, two employees junior to the Claimant were temporarily assigned to operate a backhoe, a Class 3 machine, despite the provisions of Rule 8, Section 3, which reads as follows:

"Section 3

All temporary vacancies of more than seven (7) calendar days' and less than thirty-one (31) calendar days' duration will be filled as follows:

First, by using the senior employee of the rank and group on the district who has seniority in the rank in which the vacancy occurs, who may be out of work or working in a lower rank account reduction of forces.

Second, if no such employee is available, the vacancy will be filled through the general promotion rules."

In defense of the position that the Claimant has operated and is qualified to operate a backhoe, reference was made on the property by the Organization to a number of Foremen and Roadmasters who could attest to this. The Carrier contended that the Claimant was "not qualified," but offered no proof that the Claimant, as a Machine Operator, had been disqualified from such assignment. In the absence of such proof, the Carrier's failure to promote the Claimant to the temporary position is without support.

Pertinent to this situation is Third Division Award 19432, which states as follows:

"Most important though is that, standing alone, without adequate evidentiary support and explanation, the Carrier's initial reason for non-promotion is but a bare assertion which does not meet the controlling criteria of reasonableness. There is no doubt that a superior's opinions and judgments in a promotion case should be given great weight. But when such opinions are challenged, they must be supported with objective evidence or explanations in a degree of specificity sufficient to permit the underlying basis of the opinion to be tested by the rule of reasonableness. And since the record before us does not disclose a reasonable basis for the Carrier's decision, we must conclude that Carrier abused its discretion. To hold otherwise in the case at hand would be to condone an abridgement of the employee's seniority rights which are protected by the terms and spirit of the agreement.

We want to make it quite clear, however, that Article III, Section 2 of the applicable agreement gives the Carrier the unmistakable right to passover a senior employee, and to promote a junior employee, when the senior does not possess sufficient 'fitness and ability' for the position in question. In exercising its rights in this area the Carrier must necessarily have wide discretion to make determinations and such determinations will not be lightly altered or


set aside by this Board. The Carrier's right and discretion are not absolute, however, and the Carrier must be ever mindful that it may be called upon to demonstrate that its actions have a reasonable and fair basis."

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Defer - Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1991.