

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29935
Docket No. MW-29543
93-3-90-3-487

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
(Southern Pacific Transportation Company
(Eastern Lines)

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

- (1) The Agreement was violated when, effective June 26, 1989, the Carrier assigned junior employee S. W. Amos instead of Mr. D. D. Dry to the B&B assistant foreman position on Gang HB2 as advertised on Bulletin No. 6-89 dated May 30, 1989 (System File MW-89-99/485-66-A SPE).
- (2) Mr. D. D. Dry shall be allowed a B&B assistant foreman seniority date of June 26, 1989 and he shall be compensated for the difference between what he was paid as a carpenter and what he would have earned as a B&B assistant foreman for all straight time and overtime hours beginning June 26, 1989 and continuing until the violation is corrected."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

Under Article 49, Unjust Treatment, the Claimant sought and obtained a hearing concerning the Carrier's decision to promote a junior employee to an Assistant Foreman position, which had been bulletined and for which the Claimant had indicated his interest.

When the unjust treatment conference did not satisfy the Claimant, the matter was brought to the Board for resolution.

In defending the Claimant's seniority and previous experience as an Assistant Foreman, the Organization relies on Article 8, Section 1, which reads as follows:

"Employees covered by these rules shall be considered for promotion. Promotion shall be based on seniority, fitness and ability. Ability and fitness being equal, seniority shall prevail, the Management to be the judge, subject to appeal."

As the Carrier points out, however, this Rule is not applicable to Assistant Foreman positions, which are covered by Article 41, Section 1, reading as follows:

"Assistant B&B Foreman shall be considered as employees in training for position of B&B Foreman and shall be promoted from the ranks of B&B Mechanics, Class A or B, without regard to seniority; ability, merit and fitness to apply...."

The Rule makes it clear that seniority is not a factor requiring consideration. As to the other factors, the Carrier's right to judge relative "ability, merit and fitness" is well established.

The Organization notes that the "position was not a training position for a B&B assistant foreman, but a bulletined position which required the applicant to perform the work as a B&B assistant foreman at the beginning of the assignment." This argument, apparently, is a misreading of Article 41, which states only that Assistant Foremen are considered "in training" for Foreman positions; there is no reference to "training" for an Assistant Foreman position.

There is no restriction on the Carrier's right, based on its own judgment, to select an Assistant Foreman. Absent a finding of arbitrary or capricious action, there is no basis for the Board to disturb the Carrier's decision.

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: *Catherine Loughrin*
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 2nd day of December 1993.