

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30753
Docket No. MW-30233
95-3-91-3-682

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
(
(Union Pacific Railroad Company (former
(Oklahoma, Kansas & Texas Railroad)

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

(1) The Carrier violated the Agreement when it assigned junior employe P. G. Smith, instead of Foreman A. S. Bell, III, to the advertised foreman position on Extra Gang 8739 at Duncan, Oklahoma effective October 22, 1990 (System File MW-91-2-OKT/910066 OKT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant A. S. Bell, III shall be allowed compensation for all overtime, nineteen and one-half (19-1/2) hours' travel time, 1,082 miles at .24 cents per mile and OKT district foreman seniority rights commencing October 22, 1990 on a continuing basis until such time as he is awarded and placed in the foreman position on Extra Gang 8739 at Duncan, Oklahoma."

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 employee 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.

This dispute concerns the Carrier's selection of an employee junior to the Claimant for a position as Foreman, which had been bulletined October 11, 1990. The applicable Rule in such selection is Article 5, which states in Rule 1 thereof as follows:

"Promotions shall be based on ability and seniority; ability being sufficient seniority shall govern."

The Claimant, while serving as a Foreman, was dismissed on January 27, 1989, for "starting a fire on the right-of-way and striking a fellow employe with a handful of track spikes causing a personal injury". He was reinstated thereafter on a leniency basis with the understanding that he "forfeits all seniority in the Track Foreman classification".

In February 1990, the Claimant successfully applied for and was assigned to a System Foreman position on Gang 8900. On August 15, 1990, the Claimant was again dismissed from service for "making threats to physically injure an employee of the Union Pacific Railroad and possession of a deadly weapon". Following "therapeutic counseling," the Claimant was again returned to service on October 12, 1990, in his capacity as a System Foreman. Immediately upon his return, he bid upon the bulletined position of Foreman, which was a so-called "District" Foreman position. It was this position for which the Carrier found the Claimant without the necessary "ability" and thus awarded the position to a junior employee.

The Organization points to the Claimant's status as a Foreman at the time of his bid and contends that, on this basis, the Carrier can hardly contend that his ability is not "sufficient." The Carrier, on the other hand, rests on its prerogative to assess ability and contends that the offenses for which the Claimant was twice dismissed from service are sufficient to hold that he could not adequately meet the responsibility as a Foreman who, in contrast to the position he currently held, would be required to function under largely unsupervised conditions.

The Board holds that the Carrier's action was clearly not arbitrary or in any way contradictory to its previous judgment of the Claimant. After the first dismissal, the Claimant was permitted to return to service and, in due course, to Foreman status. The second dismissal followed, and his second return to duty was based on professional medical advice as to his psychological condition. It is certainly not surprising that the Carrier found no basis to permit the Claimant, immediately upon his return, to undertake a new supervisory position. Such judgment was well within the Carrier's authority.

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AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 1995.