

PUBLIC LAW BOARD NO. 2960

AWARD NO. 48

CASE NO. 42

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to assign Foreman G. A. Samson, the senior qualified foreman, to the Tie Gang Foreman's position on Bulletin No. 33. (Organization's File 8T-1854; Carrier's File 81-8-206.)

(2) The Carrier further violated the Agreement when Foreman G. A. Samson, upon abolishment of his position, was not allowed to displace the junior foreman assigned to the Tie Gang per bulletin 33.

(3) Assistant Vice President and Division Manager C. J. Burger failed to timely disallow the claim (appealed to him under date of April 25, 1981) as contractually stipulated in Rule 21 of the effective Agreement.

(4) As a consequence of either or all of parts 1, 2 and 3 Claimant G. A. Samson shall be allowed 'the difference in pay between his foreman's job at Janesville and that of tie gang foreman from April 2, 1981, until April 20, 1981, and the difference in pay between Assistant Foreman and tie gang foreman from April 20, 1981, until Mr. Samson is allowed to take the foreman's position on the tie gang. Mr. Samson is also to be compensated for all overtime worked by Mr. Auner during this claim period. Mr. Samson is also to be compensated for camp car allowance during this claim period.

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the employees and the Carrier involved in his dispute are respectively employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

Both the Organization and the Carrier make procedural arguments which must be considered at the outset. The Organization contends the initial claim was not denied within the time limits of Rule 21. The initial claim to Mr. Burger was sent April 25, 1981. On September 3, 1981, the Vice General Chairman sent the following letter to Burger:

"This letter is in regards to my claim of April 25, 1981, that was filed in behalf of Mr. G. A. Samson.

It is well over the 60 day time limit since this claim was filed. As of this date I have not received any response to said claim.

It is the claim of the Brotherhood that this claim must be allowed as presented due to your violation of Rule 21 (a) of the effective Agreement.

Please advise which pay period this claim will be allowed.

The Carrier claims that Burger did not violate the time limits as he answered the claim on May 5, 1981. Burger sent a copy of the May 5 letter to the Vice General Chairman on September 21, 1981. The Carrier further notes that the appeal of Burger's decision was not made until November 23, 1981. Thus, they argue the Union failed to appeal the May 5 denial within the time limits.

The Board has considered the competing procedural arguments and has concluded that neither party has violated the time limit rule. This is so because it must be accepted, under the circumstances, that although Burger initially mailed the response within the time limit,

the Union failed to receive it until September when a second copy was provided.

On the merits, the Union notes that the Claimant is senior to the employee assigned by the Carrier to the position in question. They also note that Rule 16 (h) requires that the Carrier will assign the senior qualified applicant to new positions when vacancies occur. Beyond this, the selection of the senior qualified applicant is clearly defined in Rule 17 and notes that assignments will be based on seniority, fitness and ability and that with fitness and ability being sufficient, seniority will prevail. The Organization argues that the sufficiency of the Claimant's ability to fill the foreman's position on the Tie Gang is not subject to question. It is pointed out by the Vice General Chairman, the Claimant "has been foreman on a Tie Gang in the past and is qualified." They also note that the Carrier has not denied or challenged the Vice General Chairman's statement and thus, under the principle that undenied statements must be accepted as fact, they assert this Board must also accept the sufficiency of the Claimant's ability. Therefore, the test of sufficiency was obviously met as the Claimant is qualified in that he has been a foreman on similar Tie Gangs and has not been disqualified. Rule 16 (h) and Rule 17 are quoted below:

Rule 16 (h):

Assignments to new or vacant positions will be as follows: By assigning the senior qualified applicant of the class in which the vacancy occurs, as defined in Rule 7. If no such applications are received, then by assigning the senior qualified applicant of the next lower class, successively, until vacancy is filled.

Rule 17:

Promotion is an advancement from a lower classification to

a higher classification within a Sub-Department.

4

Assignments and promotions will be based on seniority, fitness and ability. Fitness and ability being sufficient, seniority will prevail.

Employees are entitled to promotion to positions coming within the scope of this Agreement in the Seniority District and Sub-Department in which they hold seniority.

Employees declining promotion will not lose their seniority in the class in which employed or in lower class.

Employees accepting promotion and failing to qualify within sixty (60) calendar days, may return to their former positions.

The Union, in response to the Carrier's arguments on Article III, Section 3 of the March 12, 1980, Agreement submits that the relative ability of the two employees is immaterial. The senior employee need not have ability greater than or equal to a junior employee; his ability need only be sufficient for the purpose of the position.

The Carrier relies on Article III, Section 3 of the March 12, 1980, Agreement, which reads as follows:

"All positions of Foreman on gangs consisting of 18 or more employees will be bulletined to employees on the appropriate seniority district pursuant to the procedures of Rule 16, but such positions will be filled on the basis of qualification and seniority, qualification to be of first consideration."

The Carrier asserts that the effect of Section 3 is that seniority will govern only in the event that two or more applicants are equally qualified. Thus, seniority is of secondary consideration and not primary as asserted by the Union. The Carrier contends that Section 3 gives them the right to select only qualified applicants for bulletin positions. Furthermore, such choice need not be limited only to the most senior employee who meets the minimal qualification. The Carrier contends they are free under this rule to appoint the best qualified. In this case, the Claimant was not as qualified as Mr. Auner and it was

2960-48

not necessary to place him on the job.

5

The Board views Article III, Section 3 as an exception or modification to Rules 16 (h) and 17 to the extent that it only covers the assignment of foremen to gangs of 18 or more employees. If Article III, Section 3 were not somewhat of a modification of Rule 16 (h) or Rule 17, there would be no reason for it to be negotiated. It is the Board's opinion that Article III, Section 3 was intended to give the Carrier more discretion in appointing foremen to gangs of 18 or more employees than they had under the "sufficiency standard" of Rule 17. Under the facts and circumstances, it is concluded that the Carrier has not abused their discretion.

Therefore, the Claim is denied.

AWARD

The claim is ~~dismissed~~ denied *1/15/84*

*GIL VERNON*

Gil Vernon, Chairman

*H. G. Harper*

H. G. Harper, Employee Member

*J. B. Crawford*

J. B. Crawford, Carrier Member

Date:

*2/16/84*