

PUBLIC LAW BOARD NO. 76

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Roy R. Ray, Referee

STATEMENT OF CLAIM:

1. The Carrier violated Rule 1 of Article 4, when an employe holding no seniority as either a Section Laborer, Assistant Track Foreman, Relief Foreman, Extra Gang Foreman, or Track Foreman was assigned to the position of Extra Gang Foreman on Seniority District No. 2.

2. Claimant, A. M. Lahey be allowed the difference in Section Laborer's rate of pay, and Extra Gang Foreman's rate of pay beginning July 19, 1968, and continuing until violation referred to in Part 1 of this Claim is corrected.

OPINION OF BOARD: THE FACTS

On July 1, 1968 the position of Foreman on Extra Gang No. 239, located near Chanute, Kansas was bulletined. R. A. Woods, Jr. and Claimant A. M. Lahey placed bids for the job. When the bids closed on July 11 no bids had been received from any employee with seniority as foreman. Claimant Lahey held seniority as Section Laborer with a hire date of July 11, 1963. Woods, who had worked as a foreman for Carrier during previous employment, had been rehired by Carrier on May 17, 1968 and assigned as Relief Foreman on Extra Gang No. 239 when Foreman Lawrence Shaffer became ill. On July 19, 1968 Carrier assigned Woods to the job. The Organization filed the present claim on July 29, 1968 alleging that the assignment violated Claimant's rights under Article 4, Rule 1.

Claimant Lahey had gone through the period of training provided for in Article 4, Rule 1 and on various occasions had performed service as Relief Foreman. He was listed as No. 14 on the Division Engineer's list. Carrier asserts that when Foreman Shaffer became ill on or about May 17, 1968 Roadmaster Jacquinet requested

Claimant Lahey to relieve on Extra Gang No. 239 at Chanute and that Lahey refused to go to Chanute as Relief Foreman. The Organization denies that any such request was made of Lahey at the time Shaffer became ill or later when he retired. Foremen are listed on separate seniority rosters from track laborers. Neither Lahey nor Woods held seniority as a Foreman. Lahey was listed on the Roster for Laborers, Seniority District 4-5 (combined), with a hire date of July 11, 1963. At the time of his assignment to the job in question Woods was not listed on any seniority roster.

CONTENTIONS OF THE PARTIES

The Organization contends that Claimant Lahey was clearly qualified for the job, as demonstrated by his previous service as Relief Foreman and Relief Assistant Foreman under the procedure specified in Article 4, Rule 1, on various occasions and that Carrier has never questioned Lahey's ability to perform the work. It asserts, therefore, that by virtue of the provisions of Article 4, Rule 1 Claimant Lahey was entitled to be promoted to the position of Foreman of Extra Gang No. 239. The Organization argues that the issue here is one of promotion in the Track Department. It also points out that Article 5, Rule 1 states that "Promotions shall be based on ability and seniority; ability being sufficient seniority shall govern." It contends that since Lahey had sufficient ability, and clearly had more seniority than Woods the Carrier was required to promote him to the job. It says that the "seniority" referred to in Article 5, Rule 1 is not restricted to "seniority" in the higher class to which the employee seeks promotion but refers to his seniority compared to other bidders.

Carrier does not question the qualifications of Claimant Lahey to perform the work of Foreman, but explains its failure to offer the Foreman's job to him by stating that it had offered Lahey similar jobs in the past and he had refused them because he did not want to be away from his home in Parsons. It also points to the

fact that neither Lahey nor Woods held seniority as Track Foreman. Under these circumstances it contends that no rule of the Agreement required it to give Lahey preference for the job. Carrier says that Article 4, Rule 1 sets up the procedure to be followed when a Track Laborer is to be trained for promotion to Foreman; but places no limitation on Carrier's right to hire an experienced foreman if one is available. It says that the words used are "shall be eligible for promotion" and argues that this means "qualified" rather than "shall be promoted." Carrier contends that Article 5, Rule 1 is not applicable to the present case since neither Claimant nor Woods held any seniority in the Track Foreman classification. In this connection Carrier relies upon Award 11587 of the Third Division, which involved an interpretation of the same seniority rules involved here.

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE 3 - SENIORITY

Rule 1. Seniority begins at the time pay starts in the respective branch or class of service in which employed, transferred or promoted and when regularly assigned. Employees are entitled to consideration for positions in accordance with their seniority as provided in these rules.

ARTICLE 4 - PROMOTIONS AND BULLETINS

Rule 1. The Division Engineer will select from Track Laborer's Roster not to exceed four men on each seniority district to be used as relief assistant track foremen and/or track foremen on their respective seniority districts. The Track Laborers so selected will be advised in writing, a copy of such advice will be sent to General Chairman and to Local Chairman. The men so selected shall be those the Division Engineer regards as most likely material for promotion to assistant track foreman and/or track foreman. These men shall be used for relief assistant track foreman and/or track foreman's work on their seniority district, and if their work as relief foreman or assistant foreman during the period of twelve consecutive months following their selection for relief work is satisfactory and they pass satisfactory examinations, they shall be eligible in the order of their written designation as relief foreman for promotion to assistant track foremanship and/or track foremanship on their seniority district. Where conditions make necessary men may be promoted in less than twelve months.

Rule 2. New positions and vacancies shall be bulletined within

ten (10) days previous to or following the date such vacancies occur and the right to bid on such vacancies or new positions will be accorded foremen, assistant and/or relief foremen in the order named.

ARTICLE 5 - BULLETINS AND ASSIGNMENTS

Rule 1. All positions except those of Track Laborers will be bulletined. Promotions shall be based on ability and seniority; ability being sufficient seniority shall govern.

DECISION

It is quite clear from the record that Carrier never intended to promote Claimant Lahey to Foreman of Extra Gang No. 239. When Shaffer became ill Carrier hired Woods and placed him in the Relief Assignment at Chanute. At this point Carrier had in mind the assignment of Woods to the job permanently if and when it became vacant. Although Carrier considered Lahey qualified for the position it states that he was not offered the job because in the past he had refused positions requiring him to be away from home overnight. Carrier frankly states that it elected to give preference to Woods who was as well qualified by training as Lahey (having gone through the same training program during a previous period of employment), had more experience and would accept an assignment requiring him to be away from home. Although Lahey in the past had declined jobs as Relief Foreman which would take him away from home he had never declined a permanent assignment outside of Parsons, and here he specifically requested the permanent job at Chanute. Since Lahey was not offered the job Carrier was not justified in assuming that he would refuse it. Thus Carrier's action cannot be supported on this ground.

The issue to be resolved, therefore, is whether Carrier was required to offer the job to Lahey because he was qualified and held seniority as Track Laborer. A careful study of the Agreement and review of the submissions leads us to the incapable conclusion that nothing in the Contract required Carrier to promote Lahey. Article 4, Rule 1, relied upon by the Organization, states that the Track Laborers,

selected by the Division Engineer, who have satisfactorily performed relief foreman work shall be eligible in the order of their written designation for promotion to foreman. It does not say they shall be promoted. "Eligible" according to Webster's Dictionary as well as normal usage means "qualified." If the Company chooses to promote from the Division Engineer's list it must take the men in the order of their designation. But the language as it now stands does not require the Carrier to pick a foreman from this group. We agree that in the normal course the best way to obtain qualified foremen is through a program of training such as is set forth in Article 4, Rule 1; and we are satisfied that employe morale will be enhanced by promoting those who have demonstrated their qualifications through training and experience. But the present Article 4, Rule 1 does not require this and no matter how desirable such a procedure may be this Board does not have the authority to read such a requirement into the Contract. If such a compulsory requirement is as important to the Brotherhood as it seems to be it will have to obtain this at the bargaining table in the form of some such clause as "When the position of Track Foreman becomes vacant it will be filled by promotion from the Division Engineer's list."

In its written submission the Organization also contended that Lahey was entitled to the job because of his seniority. Reliance was placed upon the language of Article 5, Rule 1, "Promotions shall be based on ability and seniority; ability being sufficient seniority shall govern." Here the Organization argued that Lahey had the necessary seniority since he held seniority as Track Laborer whereas Woods had no seniority. The question then arises as to what is meant by "seniority." Carrier argues that "seniority" refers to the particular classification to which the employe is assigned and says that seniority in the Track Laborer Classification does not give the employe a right to a higher position. This argument finds support in Article 3, Rules 1 and 2. Rule 1 says "employees are entitled to consideration for promotion in accordance with their seniority ranking as provided in these rules."

Rule 2 then restricts this by stating "seniority rights of employees in system gangs will extend over the entire system and be confined to their respective classifications." In interpreting these rules Referee Dorsey in Award 11587 of the Third Division held that an employee holding seniority in one of several other groups in the Bridge and Building Department had no contractual right because of that seniority to be assigned to a permanent position as Steel Bridge Foreman. This Award, involving the present parties, is clearly in point here since Lahey had seniority only as a Track Laborer and neither he nor Woods had seniority as foreman.

At the hearing the Organization apparently abandoned its reliance upon Article 5, Rule 1. It admitted that Article 4, Rule 1 was a deviation from Article 5, Rule 1, and said that since Track Foremen were involved, the Carrier must follow Article 4, Rule 1. In this connection it should be noted that Article 4, Rule 1 has no requirement of seniority. It specifically states that Track Laborers on the Division Engineer's list shall be eligible for promotion in the order of their designation. In other words if a promotion is to be made from that list seniority is not only not controlling, but is not even a factor to be considered.

The Organization has argued that since 1942 the only way Carrier has been assigning Foremen is through the procedure set forth in Article 4, Rule 1, and that this has been the practice since the rule was adopted. Carrier says there are five men on the Foremen's Roster who have established seniority as foreman with no seniority as laborer. The Organization explains by stating that these men entered the service as apprentice foremen. As we have indicated we think the use of the promotion procedure is commendable. But we cannot rule that merely because Carrier has used that procedure for a long period it cannot use other methods where as here its rights in this respect are not restricted by the Agreement.

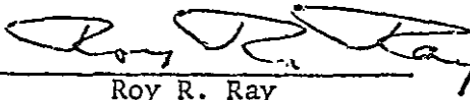
The equities here are on the side of Claimant but we are unable to find

any contractual basis upon which to found a decision in his favor. Reluctantly, therefore, we rule that Carrier was within its rights in placing Woods in the Foreman's position.

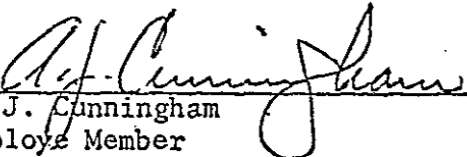
AWARD

The claim is denied.


Public Law Board No. 76



Roy R. Ray
Neutral Member and Chairman



A. J. Cunningham
Employee Member



Fred R. Carroll
Carrier Member

Dallas, Texas
October 31, 1969