

SPECIAL BOARD OF ADJUSTMENT NO. 280

Award No. 122
Case No. 201

PARTIES TO DISPUTE:

St. Louis - Southwestern Railway

and

Brotherhood of Maintenance of Way Employes

STATEMENT OF CLAIM:

- "I. Carrier violated the Maintenance of Way Agreement, especially but not limited to Rule 2-Seniority, and Rule 5-Promotions and Transfers, when it assigned position of Assistant Foreman on Extra Gang No. 32, Malden, Missouri, under advertisement No. 41-N to Junior employee.
- "II. Track laborer L. D. Nelson be allowed difference in pay of Assistant Track Foreman, \$4,7963 per hour, and laborers' rate of pay of \$4,4267 per hour, beginning August 26, 1974 and continuing to date of assignment as Assistant Foreman."

FINDINGS:

A position of Assistant Foreman was advertised under Bulletin 41-N. Since no applications were received from any employe holding seniority as Assistant Foreman, laborer applicants were considered. The position was awarded to an employe with a seniority date of January 21, 1972. Claimant, with a seniority date of October 27, 1971, contends that he should have been awarded the position.

The question, therefore, is whether Carrier was arbitrary and capricious in awarding the position to a junior employe under the circumstances.

Rule 5-1 (a) provides:

Promotions shall be based on ability, merit, and seniority. Ability and merit being sufficient, seniority shall prevail, the Carrier to be the judge, subject to appeal.

Carrier defends its action because the junior employe had experience as Assistant Track Inspector and had worked as Assistant Foreman in an extra or relief capacity. Claimant had experience only as a laborer.

The Organization contends that Carrier failed to show that Claimant did not have sufficient ability to perform the duties of Assistant Foreman. The Organization further argues that Carrier recognized that Claimant had sufficient ability when it promoted Claimant to Assistant Foreman in December, 1974, some three months later.

On the basis of the record as presented, it is clear that the reason Carrier did not award Claimant the position was because the junior employe had experience as a Track Inspector and had worked as an Assistant Foreman in an extra or relief capacity. Carrier did not deny Claimant the promotion because of any objective determination that he, the Claimant, had insufficient ability; rather, that the junior employe had some experience and was therefore better qualified by comparison.

Under the language of Rule 5-1(a) Carrier is required to show that Claimant has insufficient ability to perform the work as measured by the Claimant's own ability and not by comparing his ability (or experience) with that of the junior employe. It must be kept in mind that this type of

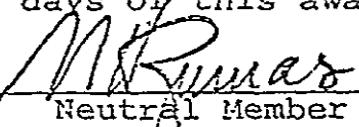
modified seniority clause, viz. "sufficient ability", gives the senior employe preference if he possesses sufficient ability to perform the work. Under such clauses, minimum qualifications are generally sufficient, and it is necessary to determine only if the senior employe can in fact do the job. Under such clauses, moreover, comparisons between applicants are unnecessary and improper; and the position must be awarded to the senior bidder if he is competent no matter how much better qualified or more competent the junior bidder might be.

A different type of Modified seniority clause is generally known as a "relative ability" clause that makes comparisons between employes bidding for jobs necessary and proper, and seniority becomes a factor only if other qualifications (e.g. ability and merit) are equal.

Given the nature of the Rule 5-1(a), and the fact that Carrier has failed to meet its burden of showing that Claimant's ability was not sufficient to perform the work of Assistant Foreman, this claim must be sustained.

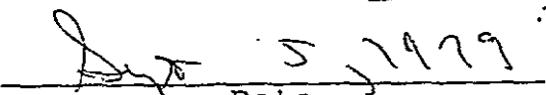
AWARD

Claim sustained. Carrier is required to compensate Claimant within 30 days of this award.


M. Rivas
Neutral Member


C. B. Doyne
Carrier Member


M. A. Chiriboga
Organization Member


Date

Sept 5, 1979