Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 10513
SECOND DIVISION Docket No. 10103
2-CMSP&P-CM-'85

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employes:

1. That Carman Patrick Flayter was unjustly dealt with when he was denied the opportunity to displace a promoted Helper at Green Bay, Wisconsin when he was furloughed from his position as a Four-Year Carman at the Milwaukee Shops, Milwaukee, Wisconsin.

2. That accordingly, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to give Carman Patrick Flayter the position of Train Yard Carman at Green Bay, Wisconsin, for which he had made application on or about March 10, 1982.

3. That the Chicago, Milwaukee, St. Paul & Pacific Railroad Company be ordered to compensate Carman Patrick Flayter for each and every day that he was not permitted to work commencing with March 11, 1982 and continuing until he is placed in this train yard position at Green Bay, Wisconsin.

4. That the Chicago, Milwaukee, St. Paul & Pacific Railroad Company be ordered to make Carman Patrick Flayter whole for all rights and benefits accruing to an active employee, such as, but not limited to, medical, dental, welfare, holidays, all group insurance benefits, vacation qualifying days.

5. That the Chicago, Milwaukee, St. Paul & Pacific Railroad Company be ordered to pay Carman Patrick Flayter interest at the 12% rate per annum per year for any and all payment he may receive resulting from this claim.

Findings:

The Second 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 employes 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.

Claimant, Carman P. Flayter, was employed by the Carrier, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and had a regular position at the Carrier's Milwaukee Freight Shops. The Claimant's seniority date is January 2, 1981. Effective March 10, 1982, the Claimant was furloughed as a result of a reduction in force at the Milwaukee Shops.

On or about March 10, 1982, the Claimant unsuccessfully attempted to displace an advanced Carman helper at the Carrier's Green Bay, Wisconsin, Repair Track and Train Yard; the Carrier believed that the Claimant did not have the required welding skills. Effective June 21, 1982, the Claimant was recalled to work at the Milwaukee Shops, but again was furloughed on August 31, 1982. The Claimant thereafter successfully displaced a promoted Carman helper at the Carrier's Bensenville, Illinois, facility, effective September 8, 1982. While off due to illness, the Claimant was furloughed once more on December 1, 1982. On January 10, 1983, the Claimant resumed work at Bensenville, Illinois.

The Organization filed a claim on Claimant's behalf, charging that the Claimant was unjustly dealt with when he was denied the opportunity to displace the promoted Carman helper at the Green Bay facility; the Organization seeks to have the Claimant placed in a Carman's position at the Green Bay facility, and compensation for each day he was not permitted to work from March 11, 1982, through his positioning at Green Bay.

The Organization contends that the Claimant had the necessary skills to perform the welding duties of the promoted Carmen helper position, and should have been given the opportunity to qualify for the position if the Carrier doubted his ability. The Organization maintains that an employee's ability to perform a particular task can be determined only by a fair opportunity to demonstrate the required skills, but the Claimant was not given that opportunity. The Organization argues, therefore, that the Claimant was denied his right to the position.

The Organization further points out that none of the welders now working at the Green Bay facility ever took a welding test, nor was it necessary that the Claimant would have to weld in the disputed position. The Organization also asserts that the Claimant bid into a welder's position at the Bensenville facility and returned to that position after his sick leave; there was no question about the Claimant's welding skills.

Finally, the Organization contends that the claim should be sustained, the Claimant should be placed in a train yard Carman's position at the Green Bay facility, and the Claimant should be compensated for all days he was not permitted to work from March 11, 1982, through his placement in the desired position at Green Bay.

The Carrier contends that the claim presented to this Board is not the claim presented on the property; because it was not handled in the usual manner, this Board has no jurisdiction over the claim and should dismiss it.

The Carrier maintains that it is entitled to determine the fitness and ability of its employees as an exercise of its managerial judgment. The Carrier asserts that the Claimant did not possess the necessary qualifications to displace the promoted Carman helper at the Green Bay facility; further, the Organization did not prove that the Claimant possessed the required skills. The Carrier contends, therefore, that no contract violation occurred.

Finally, the Carrier argues that the monetary portion of the claim primarily represents a penalty that is unsupported by the Agreement; a claimant should be able to recover only what he has lost.

For these reasons, the Carrier contends that the claim should be denied.

This Board has reviewed all of the evidence in this case, and it finds that it is properly before this Board for decision.

It is clear that the Claimant attempted to displace the promoted Carman helper pursuant to the provisions of Article III of the Agreement dated June 1, 1953, which states: "...They will not be retained in service as carmen when four-year carmen as described above become available," and the provisions of the March 16, 1942, Memorandum of Agreement, covering the advancement of Carman helpers to mechanics. The 1942 Agreement states in paragraph 8:

> "When qualified mechanics are available for hire, they will be employed, displacing first, advanced helpers and then advanced apprentices, such displacement to be made in reverse order of temporary advancement to mechanic class. The local supervisor and the general chairman or local committee of the craft involved will approve the men to be displaced."

We find that the key language in the two above Agreements is the word "qualified." Although it does not appear directly in the language of the 1953 Agreement, it is still clear that in order for an individual to take advantage of his rights pursuant to those Agreements, a displaced employee must demonstrate, to the satisfaction of the Carrier, that he possesses the necessary qualifications to displace the promoted Carman helper. Without being able to show that he has the necessary skills, an individual does not have the right to the job.

As the Third Division has stated in Award 396:

> "...While seniority is thus to be given controlling recognition where the necessary qualifications are present, it is clear that the right of seniority is not established as an absolute right--that faithful discharge of duties, capacity for increased responsibility, and sufficiency of ability are also relevant considerations."

In the case at hand, there is no evidence in the record that the Claimant had the necessary welding skills to make him qualified for the position that he wanted. The Carrier's welding instructor stated that the Claimant had never been certified as a welder. Claimant's Foreman stated that he had never seen the Claimant do any welding work while he worked under the Foreman. And, finally, there is evidence in the record that the Claimant himself admitted to the Car Foreman that he was not a qualified welder and did not hold the appropriate qualifications for the new job.

In response to the above facts brought out by the Carrier, the Organization really does not reply with any evidence in rebuttal, except to contend that he should have been given a test or a trial period on the job so that the Carrier would be able to judge his welding ability.

However, as we have stated on many occasions in the past, the determination of whether an employee is qualified is a matter of judgment by Management. As long as Management uses a fair and reasonable method in making its determination of qualifications, we will not substitute our judgment for that of Management. (See Second Division Award 2469.) It is well established by the Awards of this Board that the Carrier has the prerogative to determine fitness and ability; and when such a determination has been made, this Board will not disturb it unless it appears that the Carrier was arbitrary or capricious in its determination. When, as here, a Carrier determines that the claimant lacks sufficient fitness and ability, the burden is then upon the claimant to establish the Carrier's error by substantive evidence.

In the case at hand, the Claimant offers no evidence whatsoever that he had the necessary welding skills. He merely argues that he should have been given a trial period. And there is that admission that he did not even have the sufficient skills.

Although a trial period may be appropriate on occasions when the Agreement calls for one, or where the claimant has shown sufficient abilities in the past for the job at issue (see Awards 4214 and 6946) in a situation where a claimant has admitted his lack of ability and the Carrier has no evidence whatsoever of sufficient welding experience on the part of the claimant, it is not unreasonable for the Carrier not to extend to a claimant a trial period or an on-the-job test.

The employer must be the judge of fitness and ability of an employee, and to hold otherwise would be to destroy the basic attributes of Management. As long as the Carrier's decision is made within the limits of honesty and good faith and with a reasonable basis, this Board will not overturn it.

The Claimant has not provided sufficient evidence for this Board to overturn the decision of the Carrier.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of September 1985.