

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39887
Docket No. MW-39038
09-3-NRAB-00003-050462
(05-3-462)**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to assign Mr. R. Dosch to the B&B Crew 623 assistant foreman position on Bulletin No. 181A dated July 1, 2004 (System File C-04-090-043/8-00219-123).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Dosch shall now be assigned to the aforesaid bulletin position effective July 1, 2004 and he shall ‘. . . be reimbursed for any and all hours the position worked at the pro rata rate of pay and have all overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.’”**

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 were given due notice of hearing thereon.

The Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it failed to assign the Claimant to the B&B Assistant Foreman position advertised by Bulletin No. 181.

The Organization initially contends that the Carrier failed to comply with the clear terms of the Agreement when it decided not to assign the Claimant to the B&B Assistant Foreman position at issue. The Carrier refused to so assign the Claimant, despite the fact that he was the most senior applicant for the position. Addressing the Carrier's position that it did not assign the Claimant to this position because he never worked in the B&B Department and has no experience constructing bridges under train traffic, the Organization argues that the Carrier simply failed to recognize that the Claimant, by virtue of his seniority and demonstrated propensity to qualify for challenging positions, was entitled to be assigned to the B&B Assistant Foreman position and given the necessary training and 30 working days to obtain any necessary certification.

The Organization points to the Agreement Rules providing that promotions shall be based upon ability and seniority. Moreover, the Agreement Rules allow an employee 30 days within which to qualify for a position, and the promotion Rule does not require that an individual be qualified before being promoted. The Organization maintains that this provision is designed to afford the employee time to obtain the necessary assistance and training to demonstrate ability to perform the duties of a particular position.

The Organization emphasizes that in the instant case, the Carrier flatly denied the Claimant his right to obtain training for the B&B Assistant Foreman

position. The Organization points out that although the Claimant was the senior applicant for this bulletined position, the Carrier failed to assign him to the position.

Addressing the Carrier's position that the Claimant was refused assignment to this position because he was not qualified, the Organization submits that the obvious problem with this argument is that Rule 8(b) does not stipulate that promotion will be based on an employee being immediately qualified. Moreover, Rule 8(b) expressly provides that employees must be given the opportunity to qualify for positions, with the Carrier's full assistance.

Citing Third Division Award 30452 as controlling precedent, the Organization emphasizes that the Carrier previously demonstrated his desire, ability, and capability to secure positions of higher responsibility with the Carrier. The Organization argues that to flatly deny the Claimant an opportunity to qualify for the B&B Assistant Foreman position clearly was in violation of the Agreement.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization admits that the Claimant never worked in the B&B Department in any capacity whatsoever. The Carrier asserts that the Agreement does not require it to promote the Claimant to a supervisory position within a Department the Claimant never has worked. The Carrier argues that an Assistant Foreman is expected to supervise the daily activities of a B&B crew, but the Claimant has no experience constructing bridges under train traffic. The Carrier emphasizes that B&B Department activities require specialized construction skills and experience.

The Carrier points out that the Claimant had established seniority in the Track Sub-Department prior to being promoted to Assistant Foreman, meaning that he had experience in that Department. The Carrier asserts that the Claimant has no such experience in the B&B Sub-Department.

The Carrier emphasizes that in the parties' Agreement, Rule 8 precedes Rule 9, which suggests that Rule 9 does not come into play until the employee is deemed

to possess sufficient ability under Rule 8 to be considered for a demonstration of such abilities under Rule 9.

The Carrier submits that under Rule 8(c) the Claimant is entitled only to “consideration,” nothing more. The Carrier insists that the Claimant was considered, but management determined that he did not possess sufficient ability or minimal requirements to be considered for advancement to the position of Assistant B&B Foreman. The Carrier argues that the burden of proof is on the Organization to prove otherwise. The Organization has not provided any support for its assertion that the Claimant possessed sufficient ability or minimal requirements. The Carrier insists that the Organization failed to meet its burden of proving that the Claimant possessed sufficient ability for the position, contrary to management’s determination.

The Carrier contends that the Rules do not require it to award a promotional position based strictly on seniority. The Carrier argues that absent such a requirement, the Carrier retains the managerial right to make a determination and award a position to an applicant with sufficient ability prior to being required to provide 30 days for the employee to demonstrate the ability to perform the work. The Carrier emphasizes its obligation to provide efficient and quality service. The Carrier asserts that a number of Awards support its position.

The Carrier asserts that the Organization has not cited any Rule that specifically restricts the Carrier’s right to determine sufficient ability and that restricts the Carrier in the manner that the Organization suggests. The Organization has not cited any Rule that requires the Carrier to award a promotional position, or any position, based strictly on seniority.

The Carrier insists that, as Awards have indicated, it has the right to assign work to qualified personnel. As for the Organization’s argument that the Claimant should have been given a 30-day period in which to prove his ability, the Carrier points out that the Organization has not cited any Agreement language that obligates the Carrier to do so. The Carrier further emphasizes that it is clear that the Claimant did not have the most basic qualifications necessary to fill the position. The Carrier contends that it has no obligation to provide a training or

demonstration period unless management determines that the Claimant meets the requirements of Rules 8(b) and (c).

The Carrier then argues that it has the right to determine minimum or sufficient qualifications prior to being required to provide a 30-day demonstration period. Moreover, the Carrier submits that although the Organization alleged that the Claimant possessed sufficient ability, it provided no evidence of this. Pointing to a number of Awards, the Carrier asserts that mere statements by the Organization do not meet its burden of proof.

The Carrier further asserts that because the Claimant was not qualified for the position and has no dating within the B&B Department, he suffered no loss in connection with this matter, and the Claimant is not entitled to payment for a position for which he does not possess sufficient ability. The Claimant was fully employed throughout the claim period.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it refused to assign the Claimant to an Assistant Foreman position. Therefore, the claim must be denied.

The record reveals that the Carrier has the right to make the determination as to who is to fill positions based on the Claimant's qualifications as well as the Claimant's seniority. The record reveals that the Claimant in this case had never worked in the B&B Department and had no experience constructing bridges under train traffic. The Carrier determined that the Claimant did not possess the skill or ability to supervise the construction, repair, maintenance, or dismantling of bridges or other structures, including concrete work and the other work involved in that particular job.

Although the Organization claims that the Carrier had an obligation to afford the Claimant a 30-day trial period to learn the position, there is no record

that the Claimant had any B&B knowledge or experience in addition to leadership skills. The Carrier was not required to give this unqualified individual an opportunity to learn the job.

It is fundamental that the Organization bears the burden of proof in cases of this kind. In this case, the Organization failed to meet that burden. Therefore, the claim is denied.

AWARD

Claim denied.

ORDER

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 31st day of July 2009.