

The Second Division consisted of the regular members and in addition Referee John Phillip Linn when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen and Oilers
(St. Louis-San Francisco Railway Company

Dispute: Claim of Employees:

1. That the Carrier violated the effective Firemen and Oilers Agreement when on December 5, 1979, it refused to award Position, "Vacation relief Stationary engineer and lube oil pumper, Symbol No. 930," to senior bidder, Timothy G. Shelton thereby depriving him of (1) his seniority rights, (2) the right of a fifteen days trial as a lube oil pumper and, (3) the right to demonstrate his ability for that position;
2. That accordingly, the Carrier be ordered to compensate Mr. Timothy G. Shelton for the difference between the rate of pay of his position, Laborer, and the rate of pay of Position (Vacation relief Stationary engineer and lube oil pumper Symbol No. 930), commencing on December 5, 1979, and continuing for each and every day thereafter until the violation is corrected.

Findings:

The Second 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 waived right of appearance at hearing thereon.

Claimant Timothy G. Shelton, was employed by the Carrier at its Diesel Shop, Springfield, Missouri, with seniority date of May 15, 1974, when by Bulletin No. 478 (dated November 26, 1979) the Carrier advertised a relief position, Job Symbol No. 930.

The posted Bulletin No. 478 indicated that the position was permanent and "When not used in relief at power house, will work lube pumper and any other duties in the laborer craft. Applicant must be qualified at the Power House."

Claimant made application for the position but was not assigned thereto for the reason that he lacked sufficient ability to immediately perform one of the three-fold duties of the position. Claimant had previously been qualified to work at the power house and was qualified to perform ordinary laborer duties. However, Claimant had never performed nor broken in on the oil pumper work.

At the time Bulletin No. 478 was advertised, Claimant was occupying his position on the 4:00 p.m. - 12:00 midnight shift. The oil pumper duties are performed on the 8:00 a.m. - 4:00 p.m. shift. It is the general practice of the Carrier to require applicants on positions who have not previously been qualified to break in on their own time, and the Carrier encourages employees to break in on as many positions as possible so that they will be able to protect the day-to-day vacancies which may occur on such positions as well as establish their qualifications for bidding purposes.

On November 30, 1979, the expiration date of the bulletin advertising the subject vacancy, the Carrier contacted Claimant (who was the most senior applicant) at which time Claimant acknowledged that he had not broken in on the oil pumper duties. Carrier did not make an immediate assignment of the position to the next most senior applicant, who was a qualified bidder, but waited for a five-day period during which time Claimant had ample opportunity to break in on the oil pumper duties. However, Claimant made no request or indication that he desired to break in on the oil pumper duties.

The vacancy in Job Symbol No. 930 was assigned to A. L. Wester (seniority date of May 26, 1977), whose qualifications are not disputed, on December 5, 1979.

On or about January 15, 1980 the subject time claim and grievance were filed on behalf of Claimant. After the dispute had been handled with all officers of the Carrier designated to handle such matters, including the highest designated officer of the Carrier, without resolution, the Employee's claim was processed to this Board.

It is the position of the Employees that the Carrier violated Rule 17(a) and (b) of the controlling Agreement when it refused to award Position Symbol No. 930 to Claimant, the senior bidder.

Rule 17, Promotions, reads:

"(a) Group B and C employees will be given preference for promotion to higher Groups, except Subdivision 2 employees in Groups A and B will be given preference for a promotion to Higher Subdivision within their Group. Ability being sufficient, seniority shall govern. Determination of ability shall be made jointly by the local officer and local committee.

(b) Employees will be considered for promotions in accordance with this rule. Employees failing to qualify by trial, fifteen days to be considered sufficient trial, may return to their former positions without loss of seniority but will not establish seniority in the higher Group or Subdivision."

The Employees contend that Rule 17(a) and (b) required the Carrier to assign the subject position to Claimant because his seniority was greater than that of any other applicant; because Claimant was to be given preference for promotion to the higher Subdivision within his Group because; Claimant's ability was sufficient; and because Rule 17(a) and (b), when read in harmony, does not mean

that an employee's ability must be such that he can fully and completely perform all duties of the position immediately upon assuming the position. It is argued that the contract language contemplates that the senior applicant must be given fifteen days in which to qualify by trial, unless the employee obviously lacks fitness and ability so that it is apparent he cannot qualify within the fifteen-day period.

The Organization emphasizes that Claimant had already demonstrated his ability by having passed the Stationary Engineer test and by having worked at the Pump House on numerous occasions. Additionally, it is stressed that Bulletin No. 478 referenced qualifications only in the sentence reading "Applicant must be qualified at the Power House."

The Organization believes that it has been shown that Claimant had the ability to perform the work of the subject position; that Claimant was the most senior applicant for the position; and that Claimant had a contractual right to receive proper instruction and supervision in the work of oil pumper for a fifteen-day trial period. Consequently, the Organization seeks the remedy set forth in the Claim of Employees, supra.

Further, the Organization asserts that the Carrier acted arbitrarily, capriciously and discriminatorily in this case, which conduct violated the Agreement between the parties and should not be ignored by this Board.

The Carrier contends that the Organization is attempting to force the Carrier to assign applicants to vacancies based on seniority alone irrespective of their qualifications. If the Organization's interpretation of the contract were adopted, the Carrier would be left to blindly assign the most senior applicant to a job vacancy for a fifteen-day trial period before any determination could be made with regard to that individual's abilities and qualifications. That is an improper interpretation of Rule 17.

The Carrier notes that Rule 23, Bulletining and Filling New Positions and Vacancies, is applicable to the dispute, and makes it abundantly clear that the Carrier is not required to place employees on vacancies if they are not qualified. Rule 23 reads, in part:

"(a) All permanent vacancies or new positions shall be bulletined. Bulletins shall be posted for five days before vacancies are filled permanently. Senior employees in point of service will, if qualified, be given preference in filling such new positions or any vacancies that may be desirable to them, but the Carrier will not be required to place employees on vacancies or new positions if they are not qualified ...

(b) An employee exercising his seniority rights under this rule will do so without expense to the Carrier; he will lose his right to the position he left, and if after trial he fails to qualify for the new position, he will have to take whatever position may be open."

The Carrier points to facts showing the exacting nature of the duties of an oil pumper and the immense damage and catastrophic results of improper performance of such duties. It notes that diesel engine lubricating oil is received by the Carrier in tank car lots and is unloaded in storage tanks. From there it is dispensed to various locations throughout servicing tracks located within the shop and to the service track facility located nearby the shop. Used or drained diesel lubricating oil is collected at the various points and pumped into a storage tank. From there, the used or contaminated oil is pumped into tank cars and shipped to an oil reclaiming plant for recycling. The turn of a wrong valve could result in contaminated oil being pumped into the crank cases of hundreds of diesel locomotive engines before the error might be discovered.

Further, the Carrier notes the description of the oil pumper duties as set forth in the Chief Mechanical Officer's letter in this case, reading in part as follows:

"The position responsible for pumping oil, both new and drained, requires an incumbent thoroughly familiar with loading and unloading oil from railroad tank cars, oil sampling techniques, and the valve and pump arrangement necessary to unload oil, pump to or from storage tanks, the shop ramps, and the service tracks; and to pump drained oil into storage from the shop ramps and into tank cars for removal. It is extremely important that the proper oil be pumped to or from the various stations and not be contaminated. It is equally important that oil in any of the above processes not be spilled because of the expense and pollutant potential."

The Carrier denies violation of the controlling Agreement, and also denies acting in arbitrary, capricious or discriminatory manner. It asks this Board to take note of the fact that Mr. Wester, who was assigned to the subject vacant position, qualified for the Stationary Engineer and Lube Oil Pumper Position on his own time, during his vacation and on other shifts, except on two occasions when he was working during the day shift and was given permission to break in for two or three hours on each occasion on the work in question.

The Carrier asks this Board to deny the claim in its entirety.

It is a rudimentary rule of interpretation that contractual provisions should be considered as a whole in determining rights and duties arising therefrom. Here, both Rule 17 and Rule 23 appear to have application to the dispute under the facts presented.

Unfortunately, the provisions of Rules 17 and 23 cannot be harmonized. Indeed, while those rules appear to compliment each other in part, they also appear inconsistent in part. The only reasonable conclusion to be drawn is that the two rules, considered collectively or independently, fail as a model of clarity.

Nevertheless, it is the determination of this Board that it is clear that

the Carrier is not required to place any employee in a vacancy or new position who is not qualified to perform the duties thereof. That explicit language in Rule 23 appears without exception.

Further, it is crystal clear that employees need not be given preference in filling permanent vacancies based on seniority alone. Rule 23 is quite explicit in this regard because it provides that senior employees in point of service will, "if qualified", be given preference in filling permanent vacancies. Similarly, Rule 17 states plainly that seniority shall govern, but only where ability is sufficient in cases of promotion.

The contractual references to a trial period are not framed in language overcoming the provisions for ability and qualification requirements as an initial consideration in filling a position. Thus, it is reasonable to conclude that an applicant in the position of Claimant had no contractual right to a trial period based on seniority alone; and no employee has a right to fill a permanent vacancy who lacks qualifications to perform the duties of the position without training.

If the Carrier chooses to place an unqualified applicant in a new position or a permanent vacancy, then the trial period provided for is operative. Here, the Carrier had a qualified applicant and, consequently, Claimant's greater seniority did not govern in the assignment of job Symbol No. 930.

The Carrier is not found to have violated the express terms of the applicable Agreement between the parties or the implied term of good faith and fair dealing. The Carrier acted upon serious and valid considerations concerning an express part of the duties of the posted position. Its conduct was neither arbitrary nor capricious.

Further, the Carrier is not found to have acted in a discriminatory manner. Although Mr. Wester had been given authorization on two occasions to spend some time qualifying for the oil pumper duties during his scheduled shifts, this fact does not establish that the Carrier authorized the break in activity to discriminate in favor of Mr. Wester or against Claimant. It appears that for the most part Wester was required to qualify on his own time consistent with the Carrier's general practice. Claimant had the same opportunity and, additionally, the Carrier offered that opportunity to Claimant at that point in time when Claimant knew that unless he became qualified on the oil pumper duties, the less senior, but qualified, Mr. Wester was to be assigned the position in question. Claimant elected to remain unqualified for the posted vacancy. Consequently, neither Claimant nor the Organization is found by this Board to be able to persuasively argue that the Carrier discriminated against Claimant.

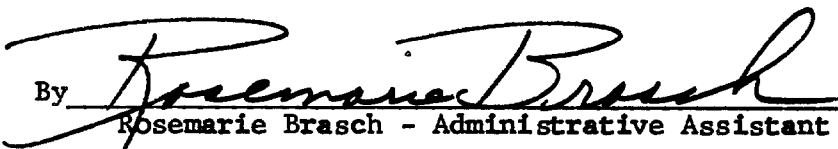
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of March, 1983.