

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13184
Docket No. 13029
97-2-95-2-54**

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

**(Brotherhood Railway Carmen, Division of
(Transportation Communications International Union**
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

- 1. That Carman R. F. Augustyniak was unjustly dealt with when he was denied the position of Intermodal Freight Carman advertised with Bulletin No. 11-A and a less senior and less qualified carman was awarded this position.**
- 2. That the Soo Line Railroad did violate the provisions of Side Letter No. 4, dated February 25, 1992, Paragraph (1) which governs the selection of Intermodal Carmen.**
- 3. That accordingly, the Soo Line Railroad shall now be ordered to award R. L. Augustyniak the position of Intermodal Carmen.**
- 4. That the Soo Line Railroad shall also be ordered to award Carman R. F. Augustyniak all overtime pay, from May 10, 1994 until he is placed in this position, which he would have earned had he not been unjustly and capriciously denied this position to which his experience, seniority and bidding rights entitled him."**

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 were given due notice of hearing thereon.

This claim arises from Carrier's award of the position of Intermodal Freight Carman at the Schiller Park Intermodal Facility pursuant to Bulletin No. 11 dated April 29, 1994 to J. L. Nimmer, a person less senior than Claimant. There is no dispute that Claimant bid on the position and had performed the duties of this position for seven months in 1987 with no complaint from Carrier.

The Organization contends that Carrier's action violates Side Letter No. 4, which reads, in pertinent part:

"Due to the highly competitive nature of the Intermodal traffic, in recognition of the nature of Intermodal work, and in consideration for the increase in Intermodal Carmen rates as provided in Side Letter No. 6 of this Agreement, it is hereby agreed the following work rule changes will apply to carmen working on Intermodal positions effective with the date of this Agreement.

(1) (a) Exercise of seniority, either through displacement or bidding on bulletins for new positions or vacancies, will be permitted based on seniority and qualifications, qualifications being equal, seniority shall govern."

The Organization argues that Claimant met the qualification requirement since he had performed the position to the satisfaction of Carrier in the past, and was qualified for it by the Terminal Manager at the Schiller Park Facility at the time. It avers that Carrier cannot disqualify an employee without just cause, relying upon Second Division Award 8449, and states that it failed to provide any justification for its decision in this case. The Organization asserted on the property that Carrier should have given Claimant a test to compare his qualification to those of employee Nimmer prior to

awarding the job to a less senior employee. The Organization requests that Claimant be placed in this position and be compensated for any losses incurred as a result of Carrier's arbitrary action.

Carrier argues that the Manager at the Schiller Part Intermodal Facility properly exercised his right to award the position based upon qualifications under Side Letter No. 4. It contends that this Letter gives management the right to select the most qualified employee for an intermodal position, and that it did so in this case. Carrier asserts that it is the Organization's evidentiary burden to provide substantial evidence that Claimant's skills and ability are equal to those of the employee selected by management, citing Fourth Division Award 4939, a burden which it contends has not been met.

This Board reaffirms the principle set forth in Fourth Division Award 4939 that Carrier has the fundamental right to select the most qualified applicant for a position in the absence of any contractual rules limiting this prerogative. Side Letter No. 4 does not limit Carrier's right in that regard, and, in fact, specifically grants Carrier the right to consider comparative qualifications for Intermodal Carmen positions due to the nature of the work. Further, we are in agreement with Carrier that in a claim of this sort, it is the Organization's burden to prove that Claimant's qualifications are at least equivalent to those of the successful bidder.

A careful review of the record in this case convinces the Board that, while the Organization relies only upon Claimant's seniority and prior performance of the position to establish his qualifications, it was unable to address the issue of comparative qualifications since Carrier never informed Claimant or the Organization of the reason(s) for its determination that Nimmer was better qualified than Claimant. This is true despite the Organization's specific requests for this information on the property. Carrier's attempt to give reasons for its Manager's determination for the first time in its Submission to this Board must fail as untimely. In the absence of any stated reason for Carrier's determination that the successful bidder was more qualified than Claimant, the Organization was precluded from taking issue with management's decision, except by way of this claim. As noted in Second Division Award 8449, the absence of such information is a fatal flaw to Carrier's case.

We conclude that, while Carrier has the right to make a comparative qualification determination in this case, it must give the Organization an opportunity to contest such

determination by stating the basis for its conclusion. It has not done so. Accordingly, the case is remanded to the parties with the direction that Carrier set forth, in writing, the basis for its determination that Nimmer was better qualified than Claimant for the Intermodal Carman vacancy announced in Bulletin No. 11. Thereafter, the Organization is to be provided an opportunity to contest such determination by providing to Carrier within 30 days of receipt of its letter evidence that the Manager relied upon qualifications unrelated to the job, inaccurate information, or that its determination was unreasonable or arbitrary.

AWARD

Claim remanded in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 23rd day of December 1997.