



Award No. 15494
Docket No. CL-15625

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

**SOUTHERN PACIFIC COMPANY
(Pacific Lines)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The Southern Pacific Company violated the current Clerks' Agreement at its Sacramento General Stores when on January 19, 20 and 23, 1961, it failed to call unassigned employee Juan F. Vela to position of Crane Foreman but, instead, required regular assigned employee M. Tsutsumi to abandon his assignment to fill the position of Crane Foreman; and,

(b) The Southern Pacific Company shall now be required to allow employee Juan F. Vela eight (8) hours' additional compensation each date January 19, 20 and 23, 1961, at pro rata rate of Crane Foreman.

EMPLOYEES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including revisions, (hereinafter referred to as the Agreement) between Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the Employees) which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

On January 19, 20 and 23, 1961, a Crane Foreman was needed at the Rail Yard. In order to fill the position, Carrier required regularly assigned Helper M. Tsutsumi to leave his position on each of the above specified dates notwithstanding unassigned employee Juan F. Vela (hereinafter referred to as the Claimant) was a qualified crane foreman and available.

Claimant filed time card claim which was denied on March 1, 1961, by General Storekeeper D. A. Mount, his reasons therefor being:

"The work performed on the dates in question was our cropping operation at the Rail Yard, which requires that anyone working as a

consider that you were a qualified employe to work as Crane Foreman and your claim is therefore denied."

By letter dated March 16, 1961 (Carrier's Exhibit A), Petitioner's Division Chairman submitted the claim on behalf of claimant to Carrier's General Storekeeper, wherein it was alleged:

"Employe Vela states the following:

'I worked as a Crane Helper and Crane Foreman from 1950 to present date whenever opportunity arose. Unable to understand why management now contends that I am not a qualified employe'."

By letter dated April 26, 1961 (Carrier's Exhibit B), Carrier's General Storekeeper denied the claim, to which, by letter dated May 8, 1961 (Carrier's Exhibit C), Petitioner's Division Chairman gave notice that the claim would be appealed, asserting that claimant had prior experience.

By letter dated June 21, 1961 (Carrier's Exhibit D), Petitioner's General Chairman appealed the claim to Carrier's Manager of Stores and by letter dated August 18, 1961 (Carrier's Exhibit E), the latter denied the claim.

By letter dated October 4, 1961 (Carrier's Exhibit F), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel, and by letter dated August 21, 1962 (Carrier's Exhibit G), the latter denied the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: The primary question to be determined in this dispute is whether the Carrier, in refusing to assign Petitioner to the position of Crane Foreman, acted in an arbitrary and capricious manner.

While the answer to this question is to be decided by an examination of the facts, this Board is guided by certain precepts and rules so universal as to require no citation of authority.

Carrier has the exclusive right to determine the fitness and ability of an employe for a position; and such determination will be sustained unless it appears that the action was arbitrary or capricious.

Once Carrier has determined that Petitioner was not qualified to fill a position, Petitioner has the burden of coming forward with evidence of convincing probative value to support his contention as to qualification and the arbitrariness of carrier's action.

In the instant dispute, Petitioner contends that he was entitled to be assigned to the position of Crane Foreman, and Carrier violated the Agreement when it failed to do so.

In support of his contention that he was qualified (and hence that Carrier was arbitrary and capricious), Petitioner alleges: That he worked as Crane Helper and Crane Foreman "from 1950 to present date whenever opportunity arose." Petitioner's statement is supported by a letter written by the retired Chief of Scrap Operations who stated that "Several times between 1955 and January, 1962, it was necessary to use Vela [Petitioner] as a crane foreman."

Carrier asserts that Petitioner was not qualified because he had never been a Crane Foreman on Carrier's 25-ton locomotive crane operating in its Rail Yard; and had never performed as a Crane Foreman in a rail-cropping operation (which, Carrier submits, is "extremely hazardous").

The Carrier states: "Based on claimant's lack of experience, particularly in the light of his limited association with crane operations in handling rail and the lapse of time since he had performed service as Helper at Store No. 5, claimant was not considered qualified to hold down the temporary vacancy as Crane Foreman on January 19, 20 and 23, 1961; and as a consequence, claimant was not called therefore."

Petitioner's service record with the Carrier indicates that on June 17, 1960 while working as a Crane Helper he was "Cautioned about engaging in unsafe procedure while working with crane." (It is noted that while Petitioner did not deny the warning, he contended that he had no recollection of it.)

There is no evidence in the record to indicate that Petitioner had ever been a Crane Foreman on Carrier's 25-ton locomotive crane, and no evidence that he had ever been a Crane Foreman on any kind of crane during a rail-cropping operation.

The absence of such evidence, coupled with Petitioner's apparent safety procedures laxness, compels this Board to hold that Carrier was not arbitrary or capricious in its determination. Petitioner has failed to meet his burden.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April 1967.

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