Award No. 18943

Docket No. SG-18930

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William M. Edgett, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Company.

Claim No. 1

Protest in behalf of Mr. L. C. Sedlacek, Retarder Yard Maintainer at North Platte, Nebraska, account a junior employe was assigned to vacancy bulletin S-14.

Claim No. 2.

(a) That the Union Pacific Railroad Company violates the current Agreement between the Union Pacific Railroad Company and the Brotherhood of Railroad Signalmen effective April 1, 1962, when it fails and/or declines to apply Rules 36(a), 2(h) and the note following Rule 2, by arbitrarily assigning a junior employe to claimant Sedlacek to the position of Retarder Yard Maintainer with headquarters at the New Hump Yard at North Platte, Nebraska, and exercising prejudice by failing to honor Mr. Sedlacek's bid on this position.

(b) That Mr. L. C. Sedlacek be allowed four (4) hours and twenty-five (25) minutes for September 3, 1968, and four (4) hours for each of the following dates at the time and one-half rate of Retarder Yard Maintainer: September 3, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, and 30, 1968, October 1, 2, 3, 4, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, and 25, 1968, or a total of one hundred forty-four (144) hours and twenty-five (25) minutes. (Carrier's File: A-10425)

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties to this dispute bearing an effective date of April 1, 1962, which is by reference made a part of the record herein. Particularly pertinent to this dispute are the following provisions thereof:

"Rule 2. Classification of Work. * * *

(h) Retarder Yard Maintainer: An employe assigned to repairing and maintaining retarder yard equipped with radar or computor control of retarders, and requiring radio license. Maintainers of re-

The time claim was declined by Chief Engineer Brown to General Chairman Wollbrinck by letter dated July 29, 1969. Copy attached as Carrier's Exhibit H.

The General Chairman corresponded further with Chief Engineer Brown by letters dated September 11, 1969. Copies attached as Carrier's Exhibits I and J.

The matter was fully discussed in conferences held between the Carrier's Chief Engineer and the General Chairman of the Organization and the Carrier's position with respect to the merits of the dispute and the claim were fully outlined. During each of the aforementioned conferences the Carrier reviewed the history of the position since the classification was established under the auspices of the Memorandum Agreement with the Organization dated January 24, 1955, copy attached as Carrier's Exhibit K.

It likewise reviewed with the General Chairman the provisions of the note under Rule 2 of the Schedule Agreement, its intent and purpose and the fact that the Carrier had, on numerous occasions, exercised its judgment under the provisions of this rule to assign a qualified applicant to positions which are embraced therein.

While the Organization was fully aware of this fact, it was their position that seniority was controlling in making the assignment on the Retarder Yard Maintainer's position involved in the instant dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier established a position of Retarder Yard Maintainer at its "New Hump Yard," North Platte, Nebraska. Claimant applied for the position but it was awarded to an employe with less service.

The Agreement between the parties provides:

> "Rule 2 (h) Retarder Yard Maintainer: An employe assigned to repairing and maintaining retarder yard equipped with radar or computor control of retarders, and requiring radio license. Maintainers of retarder yards not covered by the first sentence of this section will be classified as interlocking repairmen."
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> * * * * *
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> "Note: Positions of signal inspector, signal foreman, assistant signal foreman, assistant signal shop foreman, general C.T.C. maintainer, and retarder yard maintainer will be bulletined and appointments made with due consideration for seniority, fitness, and ability —the management to be the judge subject to appeal under provisions of Rule 41."
>
> "Rule 36. Filling Vacancies and New Positions. (a) In filling vacancies and new positions, ability being sufficient, seniority will govern."

Claimant is recognized as a conscientious and loyal employe by Carrier. However, Carrier's supervisory personnel determined that he lacked the required technical knowledge to maintain the more sophisticated computer system which was installed at the new Retarder Yard.

This Board, in a number of decisions has held that Carrier's determination of fitness and ability will not be "interfered with unless carrier acted in an arbitrary and capricious manner" (Award No. 16321 Dugan, and cases cited therein).

This Board has also held:

> "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." (Award No. 15494 - Referee Zumas)

Claimant has failed to produce any evidence that he possesses the fitness and ability to perform the duties of the new position or that Carrier had abused the discretion given to it by the Agreement. Therefore, the claim must be denied.

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 Employes involved in this dispute are respectively Carrier and Employes 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: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of January 1972.

Dissent to Award 18943, Docket SG-18930

Award 18943 is in error.

The Referee in this dispute has observed that the Carrier's supervisory personnel determined that the Claimant did not have the required technical knowledge, and he holds that the Carrier's determination should not be interfered with unless it has acted in an arbitrary and capricious manner and that the burden of proving arbitrariness is the Petitioner's.

In the record the Petitioner has shown that the employe found to possess the required knowledge (an employe junior to the Claimant) had

been afforded pertinent training not afforded the Claimant. At that point the burden shifted and became the Carrier's to show that the training would not have given the Claimant the required knowledge; this it did not do.

Hence, the Petitioner met its burden; it was the Carrier that failed to meet its burden in the record, and the Referee in his erroneous award has *failed to give proper consideration to the pertinent facts of record.* Unfortunately, it is the Claimant who must suffer for the Referee's failure.

Award 18943 is in error; I dissent.

W. W. Altus, Jr.
W. W. Altus, Jr.
Labor Member

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