

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20569
Docket Number SG-20174

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(The Long Island Rail Road

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on The Long Island Rail Road that:

(a) Carrier violated the Signalmen's Agreement, particularly Rule 47(b), in allowing Signalman **Kearney** to work as a temporary Asst. Foreman instead of assigning a senior man, C. P. **Curto**, to the vacancy of said position from August 9, 1971, through August 20, 1971.

(b) Carrier now pay to Communication Tech. C. P. **Curto** the differential between Communication Tech. and Asst. Foreman's rate additional pay for 80 hours as a consequence of the violation.

OPINION OF BOARD: The dispute herein involves the contention that **Claimant**, a Signal man (Communications Technician), should have been assigned to an eleven day vacation vacancy as assistant **foreman**, which position was assigned to another Signalman who had less seniority. Rule 47 (b) is most directly involved; that rule provides:

"RULE 47 (b)

(b) **Employees** covered by this Agreement who possess the necessary qualifications to plan, direct, lead, regulate and coordinate the work of other employees will be given **consideration** for promotion to positions in the foreman **class**. When two or more employees do possess the necessary qualifications (referred to in the preceding sentence of this paragraph) the senior employee in the successive lower classes, specified in Rule 34 (c), shall be selected for promotion to the foreman class."

The issue **in** this dispute is primarily one of fitness and ability, which has been the subject of numerous Awards of this **Board**. Under these awards Carrier **has** the right to determine the fitness and ability of an employee for a position or promotion, which will not be disturbed by the **Board** unless it appears **that** the decision was **arbitrary** or capricious. Once an **employee's** lack of qualification **has** been determined by Carrier, Petitioner has the burden of establishing the employee's **qualifications** with probative evidence in order to demonstrate the arbitrariness and impropriety of Carrier's action (see for example Awards 5802, 15494 and 19129).

In this case, during the handling on the property, Petitioner asserted repeatedly that **Claimant** has been assigned to positions of assistant foreman previously and **was** qualified to handle the position in question. Carrier responded by stating, at the final conference on the property, that **Claimant** had **served 8s an assistant foreman** in cable **gangs** only and not **in** construction gangs, which is the position **in** dispute. Following the conference with Carrier's highest officer, the **Organization** submitted a letter in which it set forth certain dates, five **days** in 1968 and three **days** in 1969, during which periods it alleged that **Claimant** had served as assistant foreman in construction **gangs**. **Carrier** argued that the data presented came after the termination of the handling on the property and **was** inadmissible. Additionally, in its rebuttal statement, Carrier denied the statement made by Petitioner in the letter alluded to above, and insisted **anew that** Claimant has not had the experience attributed to him by Petitioner and was not qualified. We do not find that the belated letter from Petitioner contested by the **Carrier** constituted probative evidence establishing **Claimant's** qualification. No other data **was** submitted at any time during the handling of this dispute on the property. We must conclude that Petitioner has not met its burden of proof and we **may** not disturb the conclusion with respect to Claimant's fitness **and** ability determined by Carrier.

Eased on our conclusion with respect to the merits, **we** do not deem it necessary to deal with the other issues raised by Carrier.

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

That the parties **waived** or **81** hearing;

That the **Carrier and the Employees** involved in this dispute are respectively **Carrier and Employees** within the **meaning** of the **Railway Labor Act, 88 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**.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 30th day of December 1974.