

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **23185**  
Docket Number M-23179

George **S. Roukis**, Referee

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way **Employees**  
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(St. his-San Francisco Railway Company

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

(1) The Agreement **was** violated when the position of welder helper as advertised by Bulletin No. 53 dated June 27, 1978 was awarded to an applicant junior to **Trackman D. L. Shaw** (System File **B-1089/D-9720**).

(2) (a) Bulletin No. 53 be cancelled and rescinded;

(b) The position of welder helper be awarded to Mr. D. L. **Shaw**;

(c) **Claimant Shaw** shall be allowed the difference between what he earned as a section laborer **and** what he should have earned as a welder helper if he **had** been awarded the welder helper's position beginning with the date of Mr. Simon's initial **assignment** thereto and to **continue** until the violation **is** terminated."

**OPINION OF BOARD:** In this dispute Claimant submitted a timely bid for the position of Welder **Helper** which was subsequently awarded to **Trackman L. W. Simon** by Bulletin No. **53-A** on July 26, 1978. This selection elicited the instant claim.

In defense of **his** position, **Claimant** contends that Carrier did not consider his ability, merit and seniority as it was required to under Rule 33, but instead promoted the less senior employe, who, although more qualified in this speciality, was improperly selected. He asserts that he had all the qualifications implicitly required in **Rule 19** and **thus** should have been selected.

**Carrier contends that Claimant did not possess** sufficient ability and merit to be **assigned** to this position, but that Mr. Simon, who passed the Welders examination and was qualified as a welder on June 29, 1978, did possess the requisite technical competencies. It **asserts** that Rule 33 permits Carrier officials to determine ability and merit standards. Claimant's seniority **in** Seniority District 2 is listed as December **15**, 1969, **while Trackman Simon's** seniority is **listed** as May **13**, 1974. They both held seniority in the Track **Sub-Department**.

In our review of this case, the pivotal question before this Board is whether Claimant was sufficiently qualified to assume the Welder Helper's position. We will not consider the applicability of **Rule 32** since it was not raised on the property during the claim's handling, but **argumentatively** developed for the first time in Carrier's submission. We will consider the significance and applicability of **Rules 19** and **33**.

It **is undisputed** that **Trackman** Simon was **the most qualified** bidder, when a comparative assessment of qualifications is considered. But there is no tangible or persuasive indication that Claimant was unqualified. To the contrary, **the record** shows that he filled temporary positions of Welder Helper in the past and served as a Welder Helper **immediately** prior to Mr. Simon's selection. Admittedly, we concur with Carrier's basic position that **Rule 33** vests its **officials with** the authority to determine employment **fitness** credentials, but this contractual prerogative does not presuppose that only the **most** qualified applicant will be considered. There are no limitations in the Welder Helper's bid specifications that restrict selection only to those employees who passed the Welder's test. If this were so, the Welder Helper's position would be a misnomer. It is by definition a Helper's position. If **Claimant** were unqualified, it would be a moot issue, but he did adequately perform this work on **numerous** occasions. In fact, the Division Engineer stated at the February **12**, 1979 investigation that Claimant performed satisfactory work, but defensively noted that Paragraph 5 of **Rule 19** required Welder Helpers to qualify as Welders at any time during the training period. By itself, this would appear to be a limiting factor, but it is not a selection criterion. It simply means that once a person is selected for this position, he is expected to qualify for the Welder's position. Careful analysis of the record does not **reveal** that Claimant was unqualified for this position. It indicates that he was not as technically astute as Mr. Simon. But superlative fitness is not the determinative standard. The test under **Rule 33** **is** whether he possessed sufficient ability and merit for seniority to be considered. Claimant successfully **performed** the Welder Helper's duties **in** the past and his overall performance record comports with the manifest intent and purpose of **Rule 33**. We believe he **met** the **litmus** test. In Third Division Award 8051, we pointedly held in pertinent part that:

"Under the language of this Agreement the selection **may** not be based on relative ability and **merit**. The Carrier has bargained away its right to select its employees for promotion based solely on ability and merit, or based on relative ability and merit. **It is** bound by its Agreement (**Rule 15(b)**) to **tap** the senior employee for promotion and give him at least a trial period under **Rule 18**, if the senior employee has sufficient ability and merit."

We have consistently applied this interpretative Standard in analogous **type** cases. It is foursquare on point with the facts herein. We will sustain the claim.

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 violated.

A W A R D

Claim sustained.

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

ATTEST:   
Executive Secretary

Dated at Chicago, Illinois, this **18th** day of **February 1981**.