

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23219
Docket Number MW-23299

George E. Larney, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ Union Pacific Railroad Company

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

(1) The Curler violated the Agreement when it assigned an employe with no seniority in Group 14 (R. F. Wetter) to the position of track welder as advertised by Bulletin 14-B dated April 4, 1978 instead of assigning a Group 14 employe thereto (Carrier's File 013-210-19).

(2) (a) The position of track welder be awarded to Mr. L. B. Davis .

(b) Claimant L. B. Davis shall be allowed the difference between what he earned as a welder helper and what he should have earned as track welder if he had been awarded the track welder's position beginning with the date Of Mr. Wetter's initial assignment thereto and to continue until the violation is terminated."

OPINION OF BOARD: On April 4, 1978, Carrier's Kansas Division General Roadmaster issued Bulletin No. 14-B advertising a vacancy of Track Welder-&c Weld Process, seniority class (b), Group 14 in the Track Subdepartment- Gang 3914 with headquarters at Hastings, Nebraska. The Carrier received three (3) bids; that from the Claimant, L. B. Davis, a Track Welder Helper in class (f) of Group 14 with seniority date of December 30, 1974; that from C. A. Fry, a Sectionman in class (a) of Group 17 in the Track Subdepartment; and from R. F. Wetter, also a Sectionman in class (a) of Group 17, Track Subdepartment with seniority date of July 1, 1974. No bids were received from employes already holding seniority in class (b) of Group 14 in the Track Subdepartment. On date of April 19, 1978, carrier issued Bulletin No. 14-C, awarding the position in question to R. F. Wetter instead of the Claimant.

The Organization alleges that in not awarding the advertised position to Claimant, Carrier violated several rules of the Controlling Agreement, effective January 1, 1973, but particularly and primarily Rule 19(b) which reads in whole as follows:

"(b) Positions of foremen and supervisors will be filled by promotion of available qualified employee. Positions of foremen or supervisors, or other positions that are not filled through bulletining to employees in seniority class, will be filled from available qualified employees in the other classes of the seniority group, and in the event not so filled will be filled from available qualified employees in the other groups of the subdepartment, and where ability and qualifications are sufficient, seniority shall prevail, the Management to be the judge with respect to positions covered by this section."

The Organization notes that It is an undisputed fact that of the three (3) employees who bld on the position in question, only the Claimant held seniority in Group 14, and therefore was the most senior of the bidders. The Organization argues that even though employee Wetter once held seniority in Group 14, he relinquished it at the time he assumed the position of Sectionman in class (a) of Group 17. Furthermore, the Organization submits, contrary to Carrier's contentions, Claimant was a qualified employee in that he possessed the ability and qualifications sufficient to perform the duties of Rack Welder-Arc Weld Process. In support of this latter contention, the Organization notes the following with regard to Claimant's qualifications:

- (1) In February 1977, Claimant attended and successfully completed the Carrier's Welder Training Program at Cheyenne, Wyoming in which he was instructed in the use of arc welding, Oxyacetylene Welding, Heat Treating, Grinding Procedures, etc.;
- (2) On June 7, 1977, Claimant was awarded two (2) certificates by Carrier, one specifying he had passed satisfactory examination on operating rules pertaining to the duties of Welder Helper and one specifying that upon examination, he had satisfactorily passed the required Rules and Regulations governing the safe handling and use of Oxygen, Acetylene and Oxweld Equipment;

- (3) That from 1972 until he was employed by the Carrier in 1974, he had worked as a welder;
- (4) That although Claimant supposedly failed to pass the first examination on the rules applicable to Track Welders in April, 1978, he did pass such test when reexamined in May of 1978. In any event, the Organization specifically notes that with regard to Claimant's supposed failure of the rules test in April, no copy of the original tests have ever been presented;

and

- (5) In August of 1978, Claimant successfully completed Carrier's course of instruction in Maintenance of Way welding. The Organization submits Carrier would not have enrolled Claimant in such a program if it felt that he did not have sufficient ability, qualifications and capacity for greater responsibility as a welder as contemplated by Rule 19(a) which reads in whole as follow:

"(a) Promotion shall be based on ability, qualifications, and capacity for greater responsibility and where these requirements are sufficient, seniority: shall prevail."

The Organization refutes Carrier's assertion employee Wetter was "the more qualified bidder to this position", contending the test of relative ability, qualifications, etc., is an inappropriate standard to be applied under Rule 19(b). The Organization argues the senior employee need not have ability greater than or equal to the junior employee, asserting his ability need only be sufficient for the purpose.

Finally, the Organization asserts that even assuming arguendo that sufficiency of Claimant's ability was subject to dispute, he would have been entitled to a qualifying period under Rule 20(h) which reads in whole as follows:

"RULE 20. BULLETINING POSITIONS

* * *

- (h) An employee assigned to a bulletined position, or who makes 8 displacement and fails within thirty (30) days to demonstrate his fitness and ability, shall vacate the position on which disqualified, and may displace only the junior regularly assigned employee of the class from which promoted. Employees will be given full cooperation and assistance of department heads and others in their efforts to qualify.*

Carrier argues that as a result of not having received 84 bids from employees previously qualified and assigned as Track Welder in either Class (b) or (c) of Group 14, the next alternative, as provided for under Rule 19(b), was to attempt to fill the position with a qualified employee from among the other classes in Group 14. Carrier notes Claimant was the only employee from among the other classes in Group 14 to submit a bid and that in its review of Claimant's overall credentials it determined that he did not possess the fitness and ability sufficient to perform the duties of Track Welder-Arc Weld Process namely, to operate arc welding equipment to repair and buildup damaged, battered, chipped and worn rails, frogs and switches. Carrier submits that in making the determination as to which of the three (3) applicants were qualified for the position, it not only weighed their welding skills or lack thereof, but also considered their prior work experience which encompassed their welding background and knowledge of operating and safety rules. In considering these factors with regard to the Claimant, Carrier notes he failed to pass the April, 1978, examination on the rules applicable to Track Welders and based on Claimant's work record it was determined he lacked the responsibility and safety awareness deemed necessary for the position in question. Such lack of responsibility and safety awareness is supported, Carrier contends, by Claimant's record which reflects that: on numerous occasions he has been observed merely sitting on the rail instead of protecting for train movement while the Welder was engaging in welding despite having been previously cautioned; he had been cautioned several times for failure to lock Company vehicles when left unattended; he had been involved in an accident with a Company vehicle; and he was deemed to have been jointly responsible for the loss of a

grinder from the rear of 8 truck which occurred as 8 result of the machine not having been properly tied down. As to the sufficiency of Claimant's welding Skills, it is held by Carrier that he did not possess such skills at the time he bid on the position in question and that it was only subsequent to his bid that he attained the necessary skills upon successfully completing eighty (80) hours of welding instruction as of August 30, 1978.

Carrier argues that in finding Claimant deficient in the various aforementioned qualification areas, it is well within its contractual grant of authority under Rule 19(b), in fact so specified, to next consider the Other two (2) applicants, Fry and Wetter, both of whom were from 8 group in the TrackSubdepartment other than Group 14. Of these two (2) applicants, Wetter was found to be the qualified employe for the position.

AS to the Organization's contention Claimant was entitled to a thirty (30) day qualifying period pursuant to Rule 20(h), Carrier takes the two-pronged position that this is new argument and therefore not one to be considered by the Board in its deliberations and second that in any event, such 8 contractual requirement obtains only after an employe has been assigned to a vacancy and here, the Claimant was not so entitled because he was not awarded the position.

In sum, Carrier concludes the Organization has not carried its burden of proof by showing Claimant was, in fact, qualified for the position in question at the time he bid on it and asserts It properly exercised its contractual management's rights when it promoted employs Wetter over the Claimant.

In our review of all the argument and facts of record, we find substantial conflict in the parties respective positions 8s to whether or not Claimant possessed the necessary and sufficient welding skills to qualify for the position in question, that of Track Welder - Arc Weld Process. We find such conflict to be irreconcilable based on the evidence before us. But even if we were able to resolve these differences in favor of the Claimant, in our judgment, Rule 19(a) still reserves to Carrier the right to consider more than an employe's ability and qualifications; the Rule also calls for consideration of an employe's capacity for greater responsibility when making determinations 8s to promotions. In the instant case, Carrier argued and the Organization nowhere refuted, that Claimant was deficient in his capacity to assume greater responsibility 8s so reflected by his past work record. Thus, with Claimant's welding skills in question as to the actual level of sufficiency coupled with a demonstrated deficiency in his capacity to assume greater responsibility, the Board is

left with no other alternative than to uphold Carrier's original decision to promote the junior employe from outside of Group 14 in the Track Subdepartment for the Class (b) Track Welder position,

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Paulsen*
Executive Secretary

Dated at Chicago, Illinois, this 16th day of March 1981.