

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23886
Docket Number MS-23468

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: { Earl Johnson
{ Union Pacific Railroad Company

STATEMENT OF CLAIM: "Prior to June of 1978, Mr. Earl Johnson had been an employee of Union Pacific Railroad for almost 20 years. At that time, he bid on the foreman's job for the signal shop located in Pocatello, Idaho. He was the highest qualified bidder, but initially, his bid was rejected for that of another. Mr. Johnson then filed a grievance with respect to his rejection as foreman and subsequently was installed as foreman of the signal shops in the Pocatello area.

On the 45th day of his employment as foreman, which was also the last day of the grace period for the Railroad to terminate him, he was in fact terminated from the job for unjustified reasons."

OPINION OF BOARD: The present parties to this dispute are in essential agreement regarding the Claimant's service time and his experience background; but they are not in agreement regarding his qualification to fill the position of Signal Shop Foreman at the Carrier's Consolidated Signal Shop at Pocatello, Idaho.

Disputes involving an employee's qualifications which require that we decide if a Carrier has violated the controlling labor agreement are not new to this Board. Precedent to the basis upon which we must decide these disputes are Awards which hold that:

Third Division Award No. 17040:

"OPINION OF BOARD: . . . Nevertheless, the awards are legion that it is the Carrier's prerogative to determine the fitness and ability of an employee for a particular position. See Awards 16871, 15780, 15494, 14976 and 13876. Unless it be shown that Carrier's determination is arbitrary and capricious, its action will not be disturbed. The burden is on the Claimant to make such a showing. See Awards 16546, 16309 and 15494, among others."

Third Division Award No. 17141:

"... numerous awards of this Division have established the principle that the determination as to whether an employee has sufficient fitness and ability to fill a position is a prerogative of management, and that once the fitness and ability of an employee have been found by the Carrier to be lacking, the burden rests upon the Claimant to over-

~~come~~ that decision by substantial and competent proof. See Awards ~~5417~~, 6829, 11231, 12394, 14040, among others. ~~The~~ Petitioner has not met the burden of proof required of it. The **claim** will, therefore, be denied."

Third Division Award No. ~~11941~~:

"... Under the above rule the determination as to 'fitness and ability' to fill the relief position was within the judgment of Carrier. It found Claimant wanting.

Only if Petitioner proved by a preponderance of the evidence that Carrier exercised its judgment in an **un-reasonable, arbitrary, capricious or discriminatory manner** could we consider whether the Agreement was violated. The burden of proof was Petitioner's. It did not meet it. We will dismiss the **claim**."

~~The~~ Claimant cites 3 points in an attempt to support his position:

1. He has **over 30** years service **time**;
2. He has worked in the field, the **Omaha** Signal Shop and (for about 20 years) as a Relay Repairman in the Pocatello area; and
3. It is the opinion of three of the Claimant's fellow employees that he is qualified.

As we review these points, we must agree that each is an important factor to be considered in determining if a Claimant has met his burden of proof, because each certainly adds to an **employee's** worth. But, our problem arises from the absence **in** each instance of any showing of an inherent property which would establish that **Claimant** possesses the leadership and judgment qualities which are inseparable frw a Foreman's position - especially in a field which affects public as well as employer and **employee** safety. Even the opinions of his fellow **employees**, as valuable as such opinions otherwise are, cannot be accepted to justify the **overturn** of the employer's judgment. It has not been shown that their judgment is superior to Carrier's; nor does two years' experience as an Assistant Foreman (**approximately** twenty-five years earlier) show that he is automatically qualified for the position in question.

Finally, the Claimant complains that the Carrier gave him little or no reason for the disqualification. We are not unsympathetic to that plea. It would have been far better for all concerned had a written, explanatory statement been given to the **Claimant**, and it is quite possible that such an action might have **eliminated** the necessity of this claim. However, this Board is not permitted to dispense equity, and even though the Carrier's judgment is no longer **immune** from challenge, the challenger still has the burden of proving the claim. We hold that Claimant has not met his burden, and we must deny his claim.

Since we have found Claimant's position to be without merit, there is no need to examine the Carrier's other defenses.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

Claimdenied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, **Illinois**, this 13th day of May, 1982.