

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25550  
Docket Number MW-24934

George V. Boyle, Referee

(Brotherhood of Maintenance of Way **Employees**  
PARTIES TO DISPUTE: (  
(St. Louis Southwestern Railway **Company**

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

(1) The Carrier violated the **Agreement** **when** it failed and refused to award the position of **I&R** Foreman, as advertised by Bulletin No. 119 dated December 8, 1981, to **Mr.B. J. Collins** (System File **MW-82-3-CB/339-38-A**).

(2) Because of **the** aforesaid violation, the position of **I&R** Foreman shall be awarded to **Mr.B. J. Collins** with seniority as such dating from **December** 22, 1981 and he shall be allowed the difference between what **he** would **have** been paid at the **I&R** Foreman's rate and what he was paid at the track laborer's rate.

OPINION OF BOARD: In accordance with the current Agreement, the Carrier issued a vacancy bulletin on December 8, 1981, for a position of **I&R Foreman** on Gang 6094, headquartered at **Jonesboro**, Arkansas.

The Claimant, with a seniority date of September 3, 1974, submitted a proper bid. But the position was awarded to a junior **employee** with a seniority date of November 5, 1974.

The Organization claims that the position legitimately belongs to the Claimant on the basis of Articles 2 and 8 of the **Agreement**, which reads:

"**Article 2**, Seniority Rules. Section 1...(c) Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service as hereinafter provided.\*

"**Article 8**, Promotions and Filling of Vacancies. Section 1. Employees covered by these rules shall be considered for promotion. **Promotion** shall be based on seniority, fitness and ability. Ability and fitness being equal, seniority shall prevail, the **Management** to be the judge subject to appeal:

It is the Organization's contention that the Carrier failed to offer any probative evidence to justify its action, offering only gratuitous assertions regarding the Claimant's fitness and ability. Also **the** Organization alleges that, "The Carrier did not question the sufficiency of the Claimant's ability during the handling of this dispute on the property. **Hence**, the Carrier may not properly raise an issue with respect to the sufficiency of the Claimant's ability to perform the duties of an **I&R** Foreman, for the first time, **before** Board."

The Carrier asserts that the basis of its determination regarding the relative ability and fitness of the Claimant is founded on the Claimant's physical condition. Extreme obesity and hypertension caused the Claimant to be incapacitated for three protracted periods of time: November 1978 to October 1979, January 7, 1980 to October 1980, and April 1981 through November 1981. Moreover his return to work after the latest period was on a tentative basis, subject to continued medication and a severe weight **control** program. Thus the Carrier concluded that the junior **employee** was more fit and able to perform the work, that the two applicants were not equal in that regard and that the Claimant should not receive the promotion. It was awarded to the junior bidder based on the provision of "**Management** to be the judge."

Further the Carrier pointed out that this issue was raised at a conference on August 17, 1982, and in its letter of September 15, 1982, when it referred to the Claimant's medical history and record of absences attendant thereto.

The Board is in agreement with the Carrier's position. Moreover, the Carrier's decision must stand unless it can ~~be~~ shown that such decision was arbitrary, capricious, unreasonable or unwarranted. The prerogative of Management has been upheld by numerous prior Awards. The Organization was unable to demonstrate any basis for reversing this matter and thus it will remain undisturbed and the claim is 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 **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

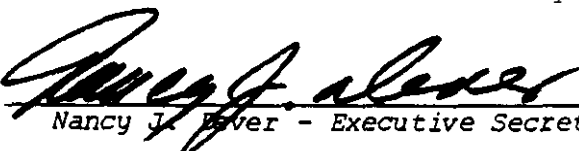
That the Agreement was not violated

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Lever - Executive Secretary



Dated at Chicago, Illinois, this 26th day of July 1985.