

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25985
Docket Number MW-25359

John E. Cloney, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Burlington Northern Railroad Company
(Former St. Louis-San Francisco 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 track foreman's position, as advertised by Bulletin ED-99 dated March 26, 1982, to Mr. R. Johnson (System File B1673/MWC 82-10-5).

(2) Because of the aforesaid violation, Mr. R. Johnson shall be awarded the above-mentioned position with seniority as track foreman dating from April 27, 1982 and he shall be allowed the difference between what he would have been paid at the track foreman's rate and what he was paid in a lower-rated position."

OPINION OF BOARD: Claimant with Trackman seniority of March, 1974 was the least senior of four employees to bid on an advertised position of Track Foreman in March, 1982. The Bulletin was cancelled as the Carrier contended there were no qualified applicants. Claimant was judged to be "lacking in ability and merit". In handling on the property Carrier pointed to Claimant's "Excessive amount of absences" as establishing lack of at least one requirement of supervision. The Carrier also contended completion of the Apprentice Foreman Training Program (described below) was "irrelevant" calling attention to Paragraph (a)(16) of Rule 20. The position was rebulletined. Claimant did not rebid and the position was assigned to an employee with Foreman seniority.

On May 17, 1982, the Organization contested cancellation of the original Bulletin requesting that "the foreman position be assigned to the senior applicant who had complied with Rule 37 as of April 27, 1982," After the Carrier responded there had been no qualified applicants the Organization on July 21, 1982, argued Claimant was qualified.

Various Rules, which need not be quoted in their entirety, are relied upon by the Organization. Those Rules deal with consideration for promotion (Rule 31), factors governing promotion (Rule 33), bulletining of vacancies (Rule 36), and assignments to new positions (Rule 38).

Rule 20 of the Agreement established an Apprentice Foreman Training Program. The Rule provides for pre-testing of applicants who will undergo a program which will not exceed eighteen months and "An apprentice foreman will be qualified as a foreman within the training period, or released from the ... program" (Rule 20(a)(6).) The Rule also provides for release from the program of those who in Carrier's opinion "do not show satisfactory aptitude."

Claimant participated in this program and completed it in 1979. The Organization argues the Rules noted required bulletining of the position, required Claimant be considered for it, spelled out the factors to be considered and required assignment and notification of a qualified applicant. It concedes Management is to be the judge of qualifications as provided by Rule 33 but contends Claimant's qualifications had been established by completion of the Apprentice Program. It points out there is no evidence that Claimant's absences were not fully justified or that he was ever disciplined for attendance problems.

This Board does not believe the claim is procedurally defective as the Carrier insists. The original claim referred to the senior applicant who had complied with Rule 37. While Claimant was not the senior applicant to respond to the March Bulletin in the Organization's July 21, 1982, letter he was asserted to be the senior qualified applicant. In that same letter the Organization stated reasons for its position regarding qualifications. Since that time there has been no ambiguity regarding the identity of Claimant. The Claim has been handled with Johnson alone as its subject. We see merit to the Organization's position that the initial claim must be understood to refer to the senior "qualified" applicant. We cannot conclude the Organization has "switched claimants" nor do we find evidence of surprise or prejudice.

It is clear the Carrier is to be the judge of qualifications and this Board agrees with the Carrier that the "Organization has the burden of showing that claimant ... had sufficient ability and fitness ... (and) that the Carrier acted arbitrarily" Contrary to the Carrier this Board does not believe completion of the Apprentice Foreman Training Program is irrelevant and we conclude it must be accorded much more weight than Carrier was prepared to give it. It might in fact be considered to establish fitness and ability in the absence of other evidence. Nevertheless attendance is a legitimate and important concern in the evaluation of fitness for the Foreman's position. Admittedly there is no evidence regarding reasons for Claimant's unsatisfactory attendance but this is not a discipline case and the causes are perhaps less significant. Therefore this Board does not conclude Claimant was a qualified applicant who was not selected due to arbitrary or capricious reasons.

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.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deger - Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1986.