

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(Soo Line Railroad Company

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

(1) The Agreement was violated when the Carrier called junior employee R. Kasprowitz instead of Messrs. D. L. Nelson or R. F. Gibson to fill a vacancy on Crew 241 from June 30 through August 10, 1986 (System File R307 #1490N/800-46-B-270).

(2) As a consequence of the aforesaid violation, Claimant R. F. Gibson shall be allowed pay and all other benefits equal to those earned by R. Kasprowitz on July 9, 10, 11, 17 and 18, 1986 and Claimant D. L. Nelson shall be allowed pay and all other benefits equal to those earned by R. Kasprowitz for all other days beginning June 30 and continuing through August 10, 1986."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This Claim alleges that a violation of the Agreement occurred when Carrier improperly bypassed Claimant's seniority when it recalled a junior employee to a Utility Tractor Operator assignment.

The Organization says, in essence, the Claimants were senior, qualified and available for the assignment and, per the applicable January 1, 1985 Memorandum of Understanding, were entitled to be contacted and offered recall when the assignment became available. The Organization argues the Carrier had no proper justification for determining that Claimants were not fit, available or qualified for the assignment.

Carrier contends, first, that the Claim is invalid, ab initio, because it is vague, indefinite and lacking in specificity. Secondly, Carrier argues that it was justified in determining the Claimants to be unfit or unqualified for the assignment. Carrier says it has the right to make such determinations and that the Organization has not satisfied its burden to overcome Carrier's determination.

We have thoroughly reviewed the record concerning the issues raised by the parties on the property. That review prevents us from agreeing with Carrier's contention that the Claim is flawed with vagueness and a lack of requisite specificity. We find that the Claim contains more than sufficient information to allow Carrier to prepare its defense. The Claim gives the names of the Claimants and the junior employee, their respective seniority dates, the calendar dates which the Claim covers, a listing of rules allegedly violated, a description that it is based on an out-of-seniority recall, and a request for a make-whole remedy.

Regarding the merits, we note that numerous Awards of this Board recognize that Carrier has the right to judge employee fitness, ability and qualification for a job assignment and that Carrier's judgment will not be set aside unless it is shown to have been made unreasonably, arbitrarily or capriciously. The Organization has the burden to overcome Carrier's determination.

On this record, we find that the Organization sufficiently challenged Carrier's determination of Claimant's fitness and qualifications. As to one Claimant, the Organization denied certain statements attributed to the Claimant and it went on to produce evidence establishing, in our judgment, that the one Claimant had previously worked as the Tractor Operator. This shifted the burden of proof to the Carrier to support its determination. Carrier produced only a vague statement that the Claimant once said, under unspecified circumstances, that "...he didn't want the tractor or the truck." We do not find such evidence to be a sufficient basis for concluding that the one Claimant waived his recall rights and preferred continued furlough to working in the disputed assignment. This is especially so in view of the Claimant's denial that he made the statement.

As to the other Claimant, after the Organization described how the lack of a driver's license was not a valid basis for disqualification, Carrier did not attempt to refute the Organization's description. Moreover, it thereafter provided no support, whatsoever, for its initial determination.

In view of the foregoing reasons, the Claim must be allowed. Claimants should be made whole.

A W A R D

Claim sustained.

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Award No. 29218  
Docket No. MW-28305  
92-3-88-3-66

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 7th day of May 1992.