

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30452
Docket No. MW-30015
94-3-91-3-441

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Co.

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

- (1) The Agreement was violated when the Carrier assigned Mr. J. Hermes to the temporary position of Soni Rail Operator, advertised by Bulletin No. 15, instead of assigning senior applicant Mr. R. L. Egeberg (System File R631/8-0007).
- (2) Claimant R. L. Egeberg shall be allowed pay for all lost wages, including all overtime, vacation, fringe benefits and other rights restored which were denied him, beginning March 20, 1990 and continuing until such time the assignment is corrected."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Claimant holds seniority in the Carrier's Roadway Equipment Subdepartment as a Group 4 operator. In that capacity, Claimant is qualified to operate roadway equipment and has been assigned to operate self-propelled machines including a tamper which is equipped with an electronic sensing device used in track surfacing.

By bulletin dated March 2, 1990, the Carrier advertised a temporary new Group 6 Machine Operator position for a Soni Rail Detector in Northern Division Crew 790 (approximately 10 months duration). The Soni Rail Detector is a hand held unit which requires the operator to manually move a sensing head over the rail end and to visually watch a gauge reading of the sensor. Sixteen applicants including Claimant bid on the position. None of the applicants was from Group 6 Rank A.

By bulletin dated March 20, 1990, the Carrier appointed an employee junior to Claimant to the Soni Rail Operator position. He had been working the position on a temporary basis pending assignment. The junior employee had not bid on the position.

This claim asserts that Claimant was entitled to the position on the basis of Claimant's greater seniority.

The relevant Rules state as follows:

"RULE 4
SENIORITY

* * *

- (f) Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service as hereinafter provided.

* * *

RULE 8
PROMOTIONS

- (a) A promotion is an advancement from a lower rank to a higher rank.

Note: The principle of promotion also applies to transfer of employees to a bulletined position between groups in a sub-department, between positions within a rank or between sub-department.

- (b) Promotions shall be based on ability and seniority; ability being sufficient, seniority shall prevail, the Management to be the judge, subject to appeal.

- (c) Employees are entitled to promotion in the sub-department over which their seniority rights prevail; however, employees will be given consideration for assignment to positions in a sub-department in which they do not hold seniority in accordance with their relative length of service.

* * *

RULE 9
QUALIFYING FOR PROMOTION

- (a) An employee accepting promotion will be allowed thirty (30) working days in which to qualify, and failing shall retain all previously established seniority rights. Upon evidence of employee's inability to qualify, he may be removed from the position at any time before the expiration of thirty (30) working days. Employees shall be given full consideration of supervising officer in their efforts to qualify.

* * *

RULE 11
ASSIGNMENT PROCEDURE

- (a) Except as otherwise provided in this rule, vacancies or new positions will be filled by employees holding seniority in the rank in which the vacancy or new position occurs.

In the event they are not filled as provided above, then they will be filled by the senior, qualified applicant in the next succeeding lower rank(s) in that seniority group. If the vacancy or new position is not so filled by an employee in the seniority group in which the vacancy occurs, the senior, qualified applicant holding seniority in the same sub-department in which the vacancy or new position occurs will be given consideration based on the earliest date in that sub-department.

* * *

RULE 14

* * *

- (d) Employees who fill a vacancy pending assignment by bulletin must express their desire for the position by making application therefore, or a junior employee may be assigned thereto. In the event no applications are received, the senior furloughed employee in the applicable group, rank, and subdepartment in the applicable zone will be notified of his assignment to the bulletined position and must return to service within seven (7) days after so notified in writing of his obligation to report or failing to give satisfactory reason for not doing so, will forfeit all seniority rights in that group."

In this case, the junior employee who was working the Group 6 Soni Rail Detector position on a temporary basis pending assignment was assigned the position when it was bulletined over the more senior Claimant (a Group 4 operator) even though the junior employee did not bid on the position. We find that assignment to be inconsistent with the above stated Rules.

Rules 4(f), 8(a)-(c) and 9 clearly contemplate seniority, ability and the opportunity to qualify as factors for promotions which, as here, include transfers between groups in sub-departments. Under the facts of this case, those provisions were not allowed to operate. Although filling the Soni Rail Detector vacancy pending assignment by bulletin, the junior employee did not choose to apply for the position when it was bulletined. Under Rule 14(d), the Carrier could assign the position (here, to the junior employee, even though he did not apply for the position), but only "[i]n the event no applications are received" But, applications were received - 16 of them including Claimant's. Rule 14(d) does not state that those applications must be from "qualified" applicants. That Rule only permits the kind of assignment made by the Carrier to the junior employee in the event "no applications are received." The Carrier's interpretation that it could assign the position to a junior employee who did not make application for the position notwithstanding the fact that 16 employees did apply for it, for all purposes, reads the seniority, ability and the opportunity to qualify provisions out of the Agreement.

Throughout, the Carrier asserted that Claimant was not qualified for the position. But, aside from making the assertion, the Carrier has not factually shown why Claimant, who as a Group 4 operator working with similar but more sophisticated equipment than the Soni Rail Detector, would have been incapable of qualifying for the Soni Rail Detector position. Although under Rule 8(b) the Carrier is "to be the judge" for ability determinations, without more of a factual demonstration by the Carrier, we cannot say that the Carrier has shown why Claimant should not have at least been given the opportunity to qualify for the position under Rule 9 as his seniority otherwise entitled him.

Third Division Award 29219 does not change the result. In that award, "no contractual right to the vacancy in question" was found. Here, however, the above discussion shows that Claimant had a contractual right by virtue of his seniority to at least be given the opportunity to qualify for the position in question. Further, we cannot say that Claimant was not damaged in this case. Had Claimant been given the opportunity to qualify for the position, successful qualification by him may well have affected Claimant's wages (depending on the amount of work that position performed in the time the position existed) as well as future job bidding opportunities.

The claim will therefore be sustained. To make Claimant whole, Claimant shall be entitled to the differential in wages, if any, between those wages received by the junior employee during the time he held the Soni Rail Detector position as bulletined and those wages received by Claimant for that same period.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of September 1994.