

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34011
Docket No. MW-34308
00-3-97-3-911**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway Company
((former Burlington Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Agreement was violated when the Carrier failed to assign Mr. L. J. Andersen to the welder position on Gang W719 which he bid on and which was not assigned because of alleged ‘no bidder’ under Award Bulletin DR-08A (System File C-95-A080-10/MWA 950901AC BNR).**
- 2. As a consequence of the violation referred to in Part (1) above, the Claimant shall ‘ . . . be given a Welders date of April 30, 1995 and paid all straight time and overtime worked by this gang from May 8, 1995 which would have been the report date, and continuing until such time as the Claimant is awarded this position and begins working it.’”**

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 were given due notice of hearing thereon.

In April 1995 the Carrier issued a bulletin advertising two Welder positions on Welding Gang W719. No employees from the Welding Subdepartment submitted a bid and the Claimant, who possessed the requisite Department of Transportation qualifications, was the most senior bidder from any other subdepartment. However, he was not awarded the position and this claim was then filed.

The Organization contends that the Carrier violated Rules 2 and 22, which together provide that employees will be considered for positions in relation to their seniority and that if there are no bidders from within the seniority roster from which the position in question is to be filled, the position must be awarded to a senior qualified applicant in the next lower rank. Thus, when there were no bidders for the two welding positions from the Welding Subdepartment, one of the positions should have been awarded to the Claimant as the most senior qualified bidder from the next lower rank.

The Carrier, on the other hand, contends that although the Claimant was the next most senior bidder he was not qualified, because under the Federal Railroad Administration Safety Standards the position in question required that the incumbent possess at least one year of supervisory experience in railroad track maintenance or a combination of that experience and training from a course in track maintenance or from a college level education program related to track maintenance. Thus, because the Claimant did not meet these standards it properly did not award one of the positions to him.

In reply the Organization asserts that the Carrier did not raise this argument on the property and is, therefore, barred from doing so before the Board. In the alternative, it argues that this defense is specious because the size of the welding gang was such that the Claimant would have been working closely with several other employees who met this standard.

We disagree with the Organization on both points. First, it is clear from the on-property correspondence that the Carrier raised this defense during the handling of the dispute on the property. Although it is true that it did not cite to the express provision

as it does before the Board, it asserted the substance of the FRA requirement and labeled it as such. Therefore, absent any showing that the manner in which the Carrier raised the defense somehow prejudiced the handling of this matter we find that the issue is properly before the Board. On the second point, the Carrier contends, admittedly without citation to facts in the record, that although the welding gang in question did not consist simply of a Foreman and Head Welder, the fact is that the gang had three different vehicles and, therefore, it could easily be assumed that the vehicles would work at different cites. Therefore, the need for the prior experience was substantial and the Claimant could not meet that need by working with those who possessed the requisite experience. We agree that this is a reasonable inference that can be drawn from the facts in the record before the Board. To the extent that any such inference is not reasonable, we alternatively find that this assertion, when juxtaposed against the assertion of the Organization that the Claimant would in fact be working with others who met the experience requirements of the FRA leads to an irreconcilable conflict in the facts that the Board is not in a position to resolve.

The Organization's final argument is that the Claimant should have been awarded one of the two positions and then given, as provided in Rule 23A, a period to meet the qualifications for the position in question. Without deciding whether there was any such obligation on the Carrier to act in this fashion, it is sufficient to point out that the time period provided for in Rule 23A is 30 days and that even after the 30-day period, the Claimant would still not possess the requisite one year of experience.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 19th day of April, 2000.

LABOR MEMBER'S DISSENT
TO
AWARD 34011, DOCKET MW-34308
(Referee Perkovich)

The Majority's decision to deny this claim requires dissent. This dispute involved the Carrier's failure to assign an employee to an ordinary welder position on the basis that he allegedly failed to possess the necessary minimum qualifications. During the handling on the property the Carrier asserted that the Claimant was not minimally qualified because of some unidentified Federal Railroad Administration (FRA) requirement. The Organization challenged the Carrier's assertion during the handling on the property. The record establishes that the Carrier never specifically identified any FRA provision that could support its position. The Carrier merely asserted that such a requirement existed. The problem here is that the burden of proof was on the Carrier to provide evidence to support its affirmative defense. Since the Carrier failed to even cite a specific FRA provision during the handling on the property, the Carrier's sole defense collapses and the Employees' claim should have been sustained. The Carrier never clarified its position concerning a specific FRA provision which allegedly prohibited assigning the Claimant to the position until it filed its submission at the Board. Hence, the Majority's inane finding of an "irreconcilable conflict in facts" is pure bunk. Again, the burden was on the Carrier to prove its affirmative defense, on the property, not in its submission to the Board. Hence, it is crystal clear that the Majority improperly relied upon a *new* argument from the Carrier's submission and erroneously stretched that *new* argument into an imaginary "conflict in facts". For the Majority's edification, the Rules of the Board, codified in Circular No. 1, prohibit consideration of *new* argument. Awards holding to this effect are truly legion in number. In any event, the FRA

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requirement that the Carrier eventually identified within its submission to the Board clearly pertains to foremen, not to welders. For all the foregoing reasons, the Majority's decision to blindly accept the Carrier's unsupported assertion that the welder position required the applicant to satisfy an FRA requirement is palpably erroneous and can have no precedential value. Therefore, I dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is written in a cursive, flowing style with a large initial "R".

Roy C. Robinson
Labor Member