

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35186  
Docket No. MW-32514  
00-3-95-3-415**

**The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.**

**PARTIES TO DISPUTE: (**  
**(Brotherhood of Maintenance of Way Employees**  
**(Duluth, Missabe and Iron Range Railway Company**

**STATEMENT OF CLAIM:**

***“Claim of the System Committee of the Brotherhood that:***

- (1) The Agreement was violated when the Carrier assigned Mr. Martichuski to fill a temporary foreman vacancy at the Duluth Docks on January 31, February 1, 14, March 1 and 3, 1994, instead of senior employee J. Rowe (Claim No. 12-94).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. J. Rowe shall be allowed the difference in pay between the wages he earned as a Lakehead Storage Facility Mechanic and that of a Lakehead Foreman for each day worked by the junior employee on the dates in question.”**

**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.***

**This claim involves the Carrier's assignment of a junior employee rather than the Claimant to fill a temporary Foreman vacancy on the five claim dates at the Lakehead Storage Facility at the Duluth Docks. Both the Claimant and the junior employee selected hold seniority as Mechanics at that facility; neither held Foreman seniority.**

**The Organization argues that the Carrier violated the Claimant's seniority rights under Rule 2 and the order for filling vacancies of less than 30 calendar days under Rule 4(c). It notes that the Claimant had temporarily performed the Foreman's position on six dates within the prior few months without incident showing his qualification for the job, and that the Carrier failed to provide reasons for its assertion that the Claimant did not possess the fitness and ability for the position, relying on Third Division Award 30452. It requests the pay differential he would have received had he been assigned the Foreman's position.**

**The Carrier contends that because neither the Claimant nor the employee selected were qualified Foremen and had no established Foreman seniority dates, Rule 2 and 4(c) do not apply. The Carrier asserts that it properly filled the Foreman vacancy under Rule 3(b), Promotions, and states that the Claimant did not have sufficient fitness and ability to be promoted to the Foreman position. The Carrier argues that, rather than establishing his fitness, the Claimant's prior performance showed that he lacked the requisite fitness and ability for the position, and this fact was discussed with him at a counseling session with his Supervisor.**

**The Carrier avers that it exercised its judgment of the Claimant's fitness and ability in accord with Rule 3(b), and that the Organization failed to meet its burden of proving such determination was arbitrary or that the Claimant did, in fact, possess the necessary skills for the job, citing Third Division Awards 20361, 21328, 21119. The Carrier notes that the Organization did not file a timely request for an Unjust Treatment Hearing under Rule 11 when it discovered that the Claimant had been found unfit, and should be precluding from raising that argument now.**

**On the property, the Carrier also referred to Agreement Supplement No. 15, Section 12(b), which provides, in pertinent part, that absences occasioned by a vacationing employee will not be considered "vacancies" under the Agreement, and that the Carrier will make every effort to observe the principle of seniority in filling such position.**

A careful review of the record convinces the Board of the merit of the Carrier's argument that the conditions required for filling a position under Rule 4(c) did not exist in this case, as neither the Claimant nor the employee selected was a qualified Foreman with Foreman seniority. There is little doubt that, under the language of Rule 3(b), the Carrier is the judge of determining an employee's fitness and ability for a promotion. The Board has repeatedly upheld the Carrier's prerogative in this regard and will not disturb such determination unless the Organization can show that it was arbitrary or that the Claimant does, in fact, possess sufficient fitness and ability for the job in issue. See Third Division Awards 20361, 21328, 21119.

The only evidence offered by the Organization in this regard is the assertion that the Claimant had performed in the Foreman position on six recent occasions "without incident." However, the Carrier specifically took issue with this statement, setting forth that the Claimant had been counseled by his Supervisor concerning his job performance. The Organization did not rebut this contention, and it stands as a fact on the record which supports the Carrier's assertion that the Claimant did not possess the fitness and ability to perform the job in issue. In such circumstances, we must conclude that the Organization failed to sustain its burden of proving that the Carrier's fitness and ability determination was arbitrary or capricious. Because the factor of seniority only comes into play under Rule 3(b) after fitness and ability have been established, the claim for additional compensation must fail.

**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 20th day of December, 2000.