

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36289
Docket No. MW-35653
02-3-99-3-569**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to promote and assign Mr. T. L. Tatten, Jr. to the Group 7 Eastern District Track Inspector position advertised in Bulletin EDT01309 on April 30, 1998 and instead assigned junior employee H. J. Swanson (System File R-9819-101-/1143540).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. L. Tatten, Jr. ‘ . . . must be allowed pay for all wages lost attributed to this incorrect assignment of the Track Inspector position. As further indicated, this claim is filed with the understanding the claim period commenced April 30, 1998, the date of the assignment, and would continue until such time Claimant Tatten is allowed to fill the referred to assignment and/or given a Group 8 Eastern District Track Inspector seniority date and ranking senior to Mr. Swanson.’”**

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.

A Track Inspector opening, Eastern District, was posted in April 1998. That position is in Seniority Group 7 of the Track Subdepartment. Bids were received from a number of employees. None of the bidders held seniority as Track Inspector. And there was no one on the applicable roster who was available and qualified to move to the Track Inspector opening.

Tatten was one of the bidders. He held seniority as a Track Laborer which is in Group 18 of the Track Subdepartment. He also held seniority as a Truck Driver and was working as a Truck Driver in April 1998. As such, he was involved with track maintenance and he claims he was qualified to restore and rework track as well, although he had never filled the Track Inspector job. Swanson was also one of the bidders. He was then serving as a Sectionman and held seniority in that position, Group 17 of the Track Subdepartment. He also held seniority, effective August 1997, as a Track Foreman and Assistant Foreman.

The Carrier awarded the Track Inspector opening to Swanson even though he had less seniority than Tatten. The Organization insists this was a violation of Tatten's seniority rights under Rules 19 and 20 which read in part:

"Rule 19 - (a) Promotion shall be based on ability, qualifications, and capacity for greater responsibility and where those requirements are sufficient, seniority shall prevail. (b) Positions of foremen and supervisors will be filled by promotion of available qualified employees. Positions of foremen or supervisors . . . that are not filled through bulletining to employees in seniority class, will be filled from available qualified employees in the other classes of the seniority group, and in the event not so filled will be filled from available qualified employees in the other groups of the subdepartment, and where ability and qualifications are sufficient, seniority shall prevail, the Management to be the judge with respect to positions covered by this section. . . .

Rule 20 - (e) . . . In the event there are no qualified employees furloughed or regularly assigned in a lower class, the vacancy or new position may be filled in accordance with the provisions of Rule 19(b). . . ." (Emphasis added)

If seniority alone were the controlling consideration here, Tatten would obviously prevail. However, when the parties agreed to establish a Track Inspector position in their December 28, 1959 Letter Agreement, they also agreed on a number of principles to be followed in dealing with Track Inspector openings. One of those principles, found in paragraph 4 of the Letter Agreement reads in part:

"Track Inspector positions will be filled from employees, selected by Management, who hold seniority in . . . Seniority Group . . . covering Section and Extra Gang Foremen, Assistant Section and Extra Gang Foremen, Rock Patrol Foremen, and Fire Patrol Foremen. . . ."
(Emphasis added)

Because Swanson held seniority as a Track Foreman and an Assistant Foreman before the Track Inspector opening was posted in April 1998, the Carrier plainly had a right to prefer Swanson over others who did not fit this paragraph 4 condition. The Track Inspector opening "will be filled . . ." by the Carrier from among those who hold seniority as Foremen. That principle was not overridden by Rules 19 and 20. The specific language of paragraph 4 of the Letter Agreement trumps the general language of Rules 19 and 20.

Hence, the Carrier was within its rights in selecting Swanson, a junior employee, rather than Tatten to fill the Track Inspector opening. Indeed, Rule 19 states that the Carrier "[shall] be the judge . . ." regarding the "qualifications" of those who bid for a Foreman opening. There has been no violation of the Rules.

AWARD

Claim denied.

Form 1
Page 4

Award No. 36289
Docket No. MW-35653
02-3-99-3-569

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 28th day of October 2002.