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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36888
Docket No. SG-37434
04-3-02-3-410

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Amtrak (NRPC):

Claim on behalf of E. H. Robertson, for time and one-half for each day the Claimant is denied the Inspector's position, account Carrier violated the current Signalmen's Agreement, particularly Rules 11(b) and 56(b), when it denied the Claimant a displacement to the position of Inspector C&S on January 16, 2001. Carrier's File No. NEC-BRS(S)-SD-930. General Chairman's File No. JY 321074-180017. BRS File Case No. 12056-NRPC(S)."

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 results from the Claimant's unsuccessful attempt at displacing a less senior Communications Inspector from the Claimant's position of Inspector, C&S on January 16, 2001. The Carrier's reason for denying the Claimant displacement rights was that he did not possess the qualifications of a Communication Foreman, asserting without contradiction that the Signal Foreman and the Communication Foreman are two distinctive jobs with separate responsibilities and qualifications. The record reflects that the Claimant was offered an opportunity to take the Communication Inspector/Foreman examination on the date of his request but refused to do so. The record also indicates that, on the property, the Organization pointed out that the Carrier's response to its appeal was untimely under Rule 56(b). While disputing the merits of the claim, the Carrier paid the Claimant the difference between the straight time and overtime rate for the six workdays in which the time limits were exceeded.

The Organization initially argues that the claim should be sustained based upon the admitted violation of the time limits contained in Rule 56(b) citing Third Division Awards 14496, 19695, 30876, 33604; Second Division Award 12346. Next the Organization contends that the Claimant's placement on the seniority list for the Inspector/Foreman classification indicates that he is qualified to perform the Foreman position which he sought to displace onto, and that Rule 11(b) requires that seniority governs when more than one employee possesses the necessary qualifications for the job, relying on Third Division Awards 13991 and 20120 for the importance of the principle of seniority. Because the Claimant was senior to the employee he sought to displace, the Organization asserts that denying him his displacement rights in this case violated the Agreement. The Organization posits that the Carrier created a position and qualifications outside the boundaries of the Agreement in order to selectively assign an employee to a position of its creating, thereby impermissibly unilaterally altering the classifications listed in the Agreement, citing Third Division Awards 20383 and 32418.

The Carrier argues that it is well established that it has the right to determine an employee's fitness and ability for a position prior to a displacement, citing Third Division Awards 25681 and 28995. Because there was no record of the Claimant ever having performed communications work, the Carrier contends that it was entitled to ask the Claimant to demonstrate his qualifications for the position he sought to displace onto, and that it did so by offering him an opportunity to take the

Communications Foreman examination. The Carrier asserts that the Claimant's refusal to take the exam and the absence of other evidence establishing his fitness and ability for the position constitutes a valid basis for denying his request to displace. It notes that its right to use a test to demonstrate fitness and ability has been upheld by the Board in Third Division Award 35754. Finally, the Carrier argues that the response from its Chief Engineer substantially complied with the time limits and permitted full processing of the claim without prejudice to the Claimant's rights, that the minor delay was rectified by additional compensation to the Claimant, and should not be used to resurrect a flawed and meritless claim, relying on Third Division Awards 22829 and 23311 as elucidating the purpose of time limits in an Agreement. The Carrier requests that the claim be denied on its merits.

With respect to the procedural time limit issue, it appears to have been resolved on the property by the Claimant being made whole for any possible loss associated with the six day delay in responding to the Organization's appeal. Thus, we find no basis for sustaining the claim on procedural grounds. On the merits, a careful review of the record convinces the Board that the Organization failed to meet its burden of proving a violation of the Agreement in this case. The Carrier has the right to establish qualifications for a job and to utilize testing as a means of demonstrating an employee's fitness and ability to perform a job. Third Division Award 35754. In this case the Carrier asserted without contradiction that there is a significant difference between a Foreman position in the Signal Department, which the Claimant held and was qualified for, and a Foreman position in the Communications Department, which the Claimant never performed. Because it is clear that the Carrier provided the Claimant with the opportunity to demonstrate his fitness and ability to perform the position that he wished to displace onto, and the Claimant refused to take the examination for such position, the Organization is unable to establish that the Claimant was qualified for the Communications Foreman job or that the Carrier's rejection of his request to displace to such assignment violated Rule 11(b) or any other provision of the Agreement.

AWARD

Claim denied.

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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 25th day of February 2004.