Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36898
Docket No. MW-36312
04-3-00-3-543

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 failed and refused to assign Mr. C. Austin to the foreman position advertised in Bulletin No. B-025-99 beginning on May 24, 1999 and continuing (Claim No. 27-99).

(2) As a consequence of the violation referred to in Part (1) above, Claimant C. Austin shall now be allowed the foreman assignment of Bulletin No. B-025-99 and he shall be compensated for the difference in pay between wages he earned as a mechanic and the foreman rate of pay for all hours of the foreman's position in question beginning May 24, 1999 and continuing until this matter is resolved."

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.

The Carrier issued Bulletin B-025-99 for the position of Foreman. The Claimant was the most senior applicant with 20 years of service as a B&B Mechanic. The Organization maintains that the Claimant was denied the position in violation of Rule 3 of the Agreement, which states:

> "(b) Promotion shall be based on fitness, ability, and seniority. Fitness and ability being sufficient seniority shall prevail. Carrier is to be the judge in determining fitness and ability, subject to appeal."

It is the position of the Organization that it must appeal this violation of the Rule, because the Claimant "was the senior qualified applicant for the position."

Rule 3(b) is well recognized to mean that the Carrier will determine the fitness and ability of any employee for a position. Unless it can be shown with substantive proof that the Carrier's determination was arbitrary, capricious, discriminatory or in some manner lacked proper judgment, the Board will uphold the Carrier's decision. In this instant case, the Carrier argued that it rejected the Claimant due to injury history, initiative, and work performance.

We studied the record to see if the Organization provided substantive evidence to prove that the Carrier's actions were improper or unreasonable. The Organization strongly argued that the Claimant has 25 years of experience with 20 of those years as a mechanic. The Organization contends that this is sufficient evidence of his qualifications to serve as a Foreman. It further argues that the majority of the Claimant's injuries were minor, sometimes caused by other employees, and that the Claimant's conscientious reporting of scrapes, bruises, or sore muscles should not disqualify the Claimant. Further, any Carrier argument about 'initiative in taking training' is off the mark. The successful junior applicant was available to take the roadway worker protection training while the Claimant worked the midnight shift that made the training unavailable. Lastly, the Organization argues that the errors made in work performance are selected by the

Carrier to justify its decision, and not proof that the Claimant is incapable of performing successfully in the position of Foreman. Quite the contrary, the Organization forcefully argues that the Claimant as mechanic-in-charge worked to completely build the gull wing hopper car with a crew assigned to him. It argues that the Carrier violated the Agreement by selecting a junior employee when the Claimant was a qualified senior employee.

There is in the on-property record a clearly stated position from the Carrier that it carefully considered its decision on the necessary qualifications for the Foreman's position. The Carrier states that considering injury history, initiative and work performance the Claimant lacked fitness and ability given the responsibilities of the Foreman's position. The Carrier stated that the Claimant had 30 injuries in 30 years, and in one counseling session the Claimant "stated that in working alone he was less likely to be involved in an accident." It noted that "At least 15 of his injuries were serious enough to be reportable to the FRA." The Carrier also argued that when both the Claimant and the successful junior applicant worked together, the Claimant failed to take the initiative to request roadway worker protection training, while the junior applicant did so. Further, the Carrier pointed out that the Claimant failed on two instances to properly line up work to correctly perform the fabrication of hopper liners and the fabrication of gate openings. Such errors were the result of poor communication which the Carrier concluded demonstrated that the Claimant lacked sufficient fitness and ability for the Foreman's position.

It is the Organization that bears the burden of proof. Once the Carrier denied that the injuries were minor, but pointed out that 15 were serious, it was up to the Organization to rebut. There is nothing in this record to show that the Claimant's injury record was normal to others, equal to the junior employee or lacked the seriousness suggested. Nor is there any evidence that these injuries were not applicable to a decision to select a qualified employee for Foreman. The Carrier maintained they were important to selection. There is no proof that they were not. Further, the Carrier maintained that the Claimant lacked initiative to get training. While the Organization argued that the Claimant worked the midnight shift, there is no argument in this record from the Claimant or the Organization that he desired and was prevented from training. The issue of work performance errors are not denied.

The determination of fitness and ability has been appealed by the Organization as Rule 3(b) permits. The record indicates that we have a difference in views over what appears to be a long term and excellent employee. However, a difference in views is not probative evidence that the Carrier violated the Agreement. There is no showing that the Carrier's fitness and ability determination was arbitrary or capricious. Quite the contrary, the Carrier provided proof that its evaluation was seriously conducted, considered, and compliant with the Rule. Lacking requisite proof, the claim 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 25th day of February 2004.