

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37431
Docket No. MW-36127
05-3-00-3-300**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier refused to allow Foreman T. M. Belle to exercise seniority in displacing junior Foreman M. D. Pruitt on Gang 3405 on January 13, 14, 15 and 18, 1999 (System File 4RM-9021T/1183642 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Foreman T. M. Belle shall now be compensated for thirty-two (32) hours' pay at his respective straight time rate of pay."**

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 Claimant in this case was working as a Flagging Foreman when his position was abolished on January 12, 1999. On January 13, 1999, the Claimant attempted to displace to a Track Foreman position on a different gang. He was advised that he could not make the displacement due to the fact that he was not hi-rail qualified and had not taken the necessary Rules examinations. The Claimant was held from the position for four work days before being permitted to displace a junior employee in accordance with Rule 13, which states:

"Employees whose positions have been abolished or who have been displaced will have the right to displace employees with less seniority providing they do so within fifteen (15) calendar days of the date their position was abolished or they were displaced."

The instant claim seeks payment for the four days between the time the Claimant attempted to displace and the time he was permitted to displace a junior employee who held the position. It is the Organization's contention that the Claimant should have been permitted to exercise his seniority and then become Rules qualified.

The Carrier responded to the claim by stating that a hi-rail qualification class had been given on November 10, 1998, but the Claimant failed to avail himself of that opportunity. The Carrier maintains that it has the right under Rule 17 to determine fitness and ability and to set reasonable requirements for a position. Here, the Carrier argues, there was no abuse of discretion when the Claimant was required to pass the Rules examination before being permitted to bump to the Track Foreman position.

The Board is not persuaded that the Carrier's defenses to the claim have merit. We find no evidence that the Claimant was advised of an opportunity to attend a hi-rail qualification class on November 10, 1998. On the contrary, it appears that the Claimant was furloughed at that time. The Carrier did not come forward with proof that there was a notification process advising furloughed employees of training opportunities.

Moreover, the record indicates that the Claimant returned to service as a Flagging Foreman on December 2, 1998 and remained in active service until the position was abolished on January 12, 1999. The Carrier did not identify any training opportunities offered during this time period. Accordingly, the Board

concludes that the Carrier was unpersuasive when it argued that the Claimant deliberately ignored opportunities to become qualified prior to attempting to displace to the position at issue.

Equally important, while we would agree that fitness and ability are factors in promotions under Rule 17, we are not convinced that these promotion requirements are applicable to the facts of this case. The Claimant was attempting to exercise seniority laterally from a Flagging Foreman position to a Track Foreman position; he was not seeking a promotion. In any event, we note that employees accepting a promotion assignment under Rule 17 are given 60 days to qualify on the position. Even accepting the Carrier's argument, the Claimant should have been permitted to displace to the position first and then given the opportunity to qualify, just as the Organization argued.

In light of the foregoing factors, this claim will be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of March, 2005.

**CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 37431 (DOCKET MW-36127)
(REFEREE KENIS)**

In reaching the decision to sustain the claim of the Organization that a Flagging Foreman was not allowed to displace a Track Foreman for lack of proper qualifications, the Referee provided the following reasoning:

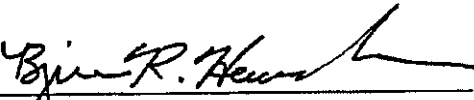
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This is a dangerous position the Board has taken, viz., that the Carrier cannot require an employee to be qualified before exercising seniority rights. Persons qualified as Flagging Foremen are not necessarily qualified as Track Foremen. The duties of the positions are as diverse as night and day.

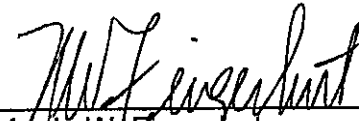
Absent specific language to the contrary, the parties and industry have historically applied Agreements to require employees to be qualified as a prerequisite to their assignment. See: Third Division Award 36760.

We view this Award as adding language to the Agreement, which the Board is not empowered to do. The above rationale therefore is clearly erroneous and should not be followed in the future.

For the foregoing reasons, we respectfully dissent.


Bjarne R. Henderson


John P. Lange


Martin W. Fingerhut


Michael C. Lesnik

April 12, 2005