

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37439
Docket No. SG-37940
05-3-03-3-352

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

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific (UP):

Claim on behalf of D. Razniewski, for the difference between his current rate of pay and the Assistant Signal Foreman’s rate of pay and loss of any overtime that may have occurred from the date of the assignments of Bulletin No. 6 (ASSIGN0602), and be allowed \$20.00 per calendar day for each day held off the position of Assistant Signal Foreman, account Carrier violated the current Signalmen’s Agreement, particularly Rules 53 and 55, when it failed to award the Assistant Signal Foreman’s position to the Claimant on March 22, 2002. This is a continuing claim until the Claimant is assigned to the Assistant Signal Foreman’s position. Carrier compounded the violation when it failed to deny the claim within the required time limits of Rule 69. Carrier’s File No. 1324886. General Chairman’s File No. N52 53-268. BRS File Case No. 12592-UP.”

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 dispute concerns itself with the issue of whether or not the Claimant had the fitness and ability to perform the duties of an Assistant Signal Maintenance Foreman.

It is noted in the Statement of Claim, *supra*, that the Organization raised an alleged time limits issue. The Board reviewed this allegation and found it to be without merit. That issue is therefore denied with prejudice.

The record shows that a position of Assistant Signal Maintenance Foreman was bulletined by the Carrier in March 2002. The Claimant was the only bidder for the position. At the end of the bulletin period, the Carrier posted a notice indicating that no qualified bids had been received. Following the posting of that notice, the Claimant requested a Hearing in accordance with the provisions of RULE 70 - UNJUST TREATMENT. A Hearing was held in April 2002, at which time the Claimant was present, properly represented and testified on his own behalf. Following completion of the Hearing, the Claimant was notified that, in the Carrier's opinion, he was not qualified to be assigned to an Assistant Signal Maintenance Foreman position. The record further shows that the Carrier did offer the Claimant the opportunity to take a qualifying test as provided for in RULE 1 - NOTE (a) of the Schedule Agreement. The Claimant declined to take such a test and there is no evidence in the case record that the Organization pursued the Carrier's offer relative to the NOTE (a) test. The claim, which is the subject of this case, was subsequently submitted on the Claimant's behalf.

The language of RULE 70 - UNJUST TREATMENT reads as follows:

"An employee who considers himself unjustly treated, other than covered by these rules, will have the same right of hearing and appeal as provided in Rule 68 B if written request is made to his immediate supervisor within ten (10) calendar days of cause of complaint. Failing to dispose of the complaint in such hearing, appeal may be taken in accordance with Rule 69.

Any complaint made by one employee against another will be made in writing."

RULE 1 - SENIORITY CLASS ONE consists of 16 job titles. In addition, and of particular concern to the Board in this case, is the NOTE which is the concluding portion of Rule 1. NOTES (a) and (b) read as follows:

"NOTE:

- (a) Positions of signal inspector, signal foreman, signal shop foreman, assistant signal foreman, assistant signal shop foreman, retarder yard maintainer and electronic technician will be bulletined and appointments made with due consideration for seniority, fitness and ability, the management to be the judge. In the event a senior applicant for a bulletined permanent position is not assigned, and the position is assigned to a junior employee, the senior applicant will, upon written request by the General Chairman to an officer designated by the Carrier within ten (10) calendar days of date of assignment notice, be given a standard practical, oral and written test conducted jointly by the Carrier and the General Chairman to determine if the individual can demonstrate fitness and ability to be assigned to the position. Such test will be given within ten (10) working days, unless extended by mutual agreement

after request is made therefor. If the senior applicant passes the test, the employee will be assigned to the position and the junior assigned employee will revert to the position formerly held.

- (b) Employees who are interested in working as Foremen will be permitted to take the Foreman test and pre-qualify for assignment as a Foreman. Employees who are interested in doing so may contact their supervisor to obtain the study material for the test. The Carrier will cooperate to the fullest extent in supplying the material and permitting employees maximum latitude to take the test. After an employee has pre-qualified by successfully taking the test, the qualification to work as Foreman will be considered valid for one year."

The Organization does not dispute that following the Carrier's rejection of the Claimant's bid, both he and the Organization on his behalf refused the Carrier's offer to give the Claimant a RULE 1 - NOTE (a) test. This action was taken at the Organization's and the Claimant's own peril.

The Board has repeatedly held that the Carrier has the sole right to be the final determiner of fitness and ability absent proof of arbitrary or capricious action by the Carrier. No such arbitrary or capricious action is found in this case. To the contrary, the Carrier not only accorded the Claimant an "unjust treatment" Hearing but also offered him the opportunity to take a RULE 1 - NOTE (a) test to demonstrate his fitness and ability. Both the Organization and the Claimant refused to avail themselves of this testing procedure.

The negotiated Rule clearly provides that "... the Management to be the judge" when giving "due consideration for seniority, fitness and ability."

The Organization presented no evidence or proof that the Claimant did in fact possess the fitness and ability to be assigned to an Assistant Signal Maintenance Foreman position. The conclusion reached in Third Division Award 21932, to wit:

"Once a Carrier determines that an employee does not possess sufficient fitness and ability, the employee assumes the burden of presenting evidence to support his contention to the contrary. See, for example, Award 21328.

We feel that Claimant received a fair and impartial hearing and, after thorough review of the entire record, we are unable to find that *Claimant met the burden of proof to establish that he was qualified to hold the position,*"

applies with equal force and effect in this case. The claim as presented is therefore denied.

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 22nd day of March, 2005.