

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37666
Docket No. MW-36615
05-3-01-3-141**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when, effective February 4, 2000, it assigned junior Assistant Foreman D. O’Quain instead of Mr. M. B. Landry to fill the material foreman position on Gang 2555 advertised by Bulletin No. 2273 (System File MW-00-81/1223421 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. B. Landry shall now be compensated for the difference in pay between the assistant foreman and the material foreman’s straight time rate of pay for eight (8) hours each day beginning February 4, 2000 and continuing and he shall be awarded the material foreman position on Gang 2555 as advertised by Bulletin No. 2273.”**

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.

On March 5, 1999, the Claimant established seniority as an Assistant Foreman on the Dequincy Division. During the period of January 21 through January 31, 2000, per Bulletin GDEQ02273, a position of Material Foreman headquartered at Lake Charles, Louisiana, was advertised for the seniority preference of employees holding Track Foreman's seniority on the Dequincy Division. Because the Material Foreman position would be responsible for entering the gang members' time roll information into the payroll system, for tracking and assuring delivery of track material and for tracking the status of budgets on various assigned track projects, one of the requirements of the Material Foreman position required that the applicants must be timekeeping qualified.

Although the Carrier did not receive any applications from employees holding Track Foreman's seniority on the Dequincy Division, it did receive applications from D. J. O'Quain, Claimant M. B. Landry and W. G. Reed whose service dates were, November 5, 1997, December 10, 1997 and June 16, 1998, respectively.

After assessing the candidates' respective qualifications, D. J. O'Quain, as the senior applicant, was assigned to the position effective February 4, 2000 and established Track Foreman's seniority as of that date pending qualification under the provision of Rule 10, Section (a) of the current Agreement.

Pursuant to this action, the Organization submitted a claim contending that the Carrier violated the Agreement when it did not select the Claimant for the position of Material Foreman. According to the Organization, the Claimant had expressed an interest in learning the timekeeper skills and this request had been unfairly denied. Further, the Claimant did have Assistant Foreman seniority. As a result of this alleged violation, the Organization requests that the Claimant be

elevated to the position of Material Foreman and that he receive compensation as a Material Foreman beginning on or about February 4, 2000.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that pursuant to Rule 10(a) the Carrier has the discretion to select the most senior employee, assuming that ability and merit are sufficient. According to the Carrier, in the instant case, the employee selected for the Material Foreman position, O'Quain, was not only the most senior, but also the most qualified. In addition, the fact that the Claimant was a senior Assistant Foreman does not dictate that he obtain the position of Material Foreman.

Rule 10(a) provides:

"Promotions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail, the management to be the judge subject to appeal."

In the instant case, the Board finds that the Organization has not been able to meet its burden of proof to show that the Claimant should have been awarded the Material Foreman position. The Carrier has shown not only that the successful bidder was the most senior, but also that he was sufficiently qualified for the position. The Organization's affirmative defenses do not change the result. First, as to the Organization's position that the Claimant possessed seniority as an Assistant Foreman, we agree with the Carrier that this is not determinative for the position of Material Foreman. As the Board held in Third Division Award 36976, an Award relating to the same Claimant:

"The Rule [10(a)] does not explicitly provide for a preference based on seniority in the next lower classification when there are no bidders with seniority in the classification. Moreover, the Organization did not establish a proper interpretation of Rule 10(a) by past practice or negotiating history that undercut the Carrier's contention that seniority within the craft controlled."

Furthermore, there is insufficient evidence to prove the Organization's contention that the Carrier purposely did not train the Claimant on the timekeeping system.

Thus, after a review of all the evidence, there has been no showing that the Carrier erred when it did not select the Claimant for the position of Material Foreman.

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 21st day of December 2005.