

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37701
Docket No. MW-38171
06-3-04-3-88

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier improperly withheld Mr. D. Ingstrup from service on March 11, 2003 in connection with a 24-month lineman test that was in violation of Rule 2(b) (System File NEC-BMWE-SD-4272 AMT).
- (2) As a consequence of the violation referred to above, Claimant D. Ingstrup shall now be reinstated to service and allowed all lost wages, benefits and retirement credits beginning March 11, 2003 and continuing.”

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 protests the Carrier's enforcement of the terms of a conditional reinstatement agreement reverting the Claimant to dismissed status on the basis of his failure to pass the required qualification test, which the Organization asserts does not meet the requirements set forth in Rule 2, Qualifications for Positions, the pertinent parts of which are reprinted below:

- “(a) In making application for an advertised position or vacancy, or in the exercise of seniority, an employee will be permitted, on request, or may be required, to give a reasonable practical demonstration of his qualification to perform the duties of the position.**
- (b) In the event the employee requests, or is required, to give a reasonable and practical demonstration of his qualification for a position, the Company must give uniform job related tests based on reasonable job related criteria in order to ascertain initial qualifications for positions. The General Chairman or his designated representative shall have the right to inspect the tests and/or criteria and results of such tests to determine that the application of such tests and/or criteria are uniform to all employees.”**

In October 2002 the Claimant was dismissed for violations of rules and procedures governing work on the electrical system that resulted in an electrical explosion. This occurred shortly after a suspension for a similar violation. As a result of the Organization seeking another chance for the Claimant to prove he was capable of working safely as an Electrician, all parties agreed to a conditional reinstatement Agreement with provisions including the requirement that the Claimant take and pass the 24-month lineman test within 60 days. His failure to fulfill the conditions would result in the Claimant reverting to dismissed status.

The Claimant initially took and failed the test on January 9, 2003. As a result of the Organization's complaint that the test was a new and different test than the one the Claimant had taken when he initially qualified for the position, and its assertion that he had insufficient time to prepare for it, the Carrier agreed to discard the results and permit the Claimant to retake the test after receiving copies of all training materials and having sufficient time to review them. The Carrier noted that the test itself had been subject to an appropriate validation process. The Claimant again failed the same

test on February 12, 2003. The Organization intervened on the Claimant's behalf again and the parties entered into another written agreement whereby the Claimant was permitted to have one last opportunity to demonstrate his skill and knowledge, with his failure to pass the test to result in reversion to dismissed status and the Organization agreeing not to submit a claim for time lost as a result of this case. The Claimant again failed the retest on March 11, 2003, and he was reverted to dismissed status.

The Organization's claim is based upon its review of the test under Rule 2(b) on February 18 and March 12, 2003, and its assertion that some of the questions were ambiguous, subject to interpretation and could have more than one correct answer. The Carrier's responses to the claim point out that the test was developed and validated under the direction of the Ramsay Corporation using industry standards, that employees played a major role in its validation and constituted five of the seven members of the panel certifying the test as a valid measure of qualification, and there was only one correct answer to each question. The Carrier noted that Rule 2 does not apply because the Claimant was not making application for an advertised position or vacancy or exercising his seniority, and that the parties entered into two binding agreements which contained self-executing provisions reverting the Claimant to dismissed status for his failure to comply with the conditions of his reinstatement.

The Organization argues that the Carrier failed to comply with the provisions of Rule 2(b) in the development and implementation of the new 24 month Lineman test which contains interpretational questions that can easily make a difference between a passing and failing test score. The Organization asserts that it should have been provided an opportunity to inspect and review the disputed test prior to its certification and implementation. Because the application of this test was what caused the Claimant not to successfully complete the conditions to his reinstatement, the Organization requests that his dismissal be set aside.

The Carrier contends that Rule 2 does not apply to this situation, and that it complied with all aspects of the Rule in validating and certifying the 24 month Lineman test, which had been applicable for years and was not protested prior to the instant case. It notes that the Claimant was unable to pass the same test on three separate occasions with sufficient time and materials to prepare, failing to show that he was qualified for the position. The Carrier argues that the Board must give effect to the binding agreement of the parties, entered into a second time after the questions were inspected by the Organization, and that the self-executing provisions of that conditional

reinstatement agreement revert the Claimant to dismissed status, citing Third Division Awards 26029, 28075, 28361, 28537, 31787, 31911, 32427 and 36693.

A careful review of the record convinces the Board that the Organization failed to show that the Carrier violated Rule 2(b) in implementing the new 24 month Lineman test or that its application to the Claimant or its criteria were not uniform to all employees. The record supports the conclusion that the Carrier gave the Claimant every possible opportunity to demonstrate his skill and ability, which he was unable to do despite having three chances to pass the exact same test with sufficient time and materials to prepare for it. We agree with the Carrier that, under those circumstances, the self-executing provision in the conditional reinstatement agreement reverting the Claimant to dismissed status is binding on the parties and must be upheld by the Board. See Third Division Awards 26029 and 32427.

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 30th day of January 2006.