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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 38095
Docket No. SG-37571
07-3-02-3-645**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(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 K. M. Cline, for the differential between the Assistant Signalman’s rate of pay and the Signal Shop Technician’s rate of pay starting on September 7, 2001, and continuing until this dispute is resolved, account Carrier violated the current Signalmen’s Agreement, particularly Rules 38 and 80, when it failed to assign the Claimant to the position of Signal Shop Technician that he bid on August 31, 2001. Carrier’s File No. 1285899. General Chairman’s File No. S-38,80-197. BRS File Case No. 12285-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.

As is noted in the above claim, this matter arose when the Claimant bid into a Signal Shop Technician's position that had been advertised in Bulletin No. BLTN1701. The Carrier awarded another employee the position. On September 13, 2001, the Organization filed a claim on the Claimant's behalf in which it alleged that the Carrier had erroneously assigned another employee in place of the Claimant. In particular, the Organization maintained that the Carrier had violated Rule 38 of the Agreement, as well as the parties' "Training Agreement," at Sections 5(a) and (b) of Appendix S to that Agreement.

The Carrier denied the claim on November 1, 2001. In that letter it noted that Appendix S, Section 5 (a) provides that:

"Should the requirements of service necessitate more employees in Class 1 than are available, the Assistant Signalmen who have passed the greatest number of examinations will be considered for promotion to fill the vacancy, fitness and ability being sufficient. . . ."

The Carrier stated that while it had considered the Claimant, it found his lack of sufficient training to preclude him from appointment to the position.

In its appeal, the Organization conceded that the Claimant needed additional training, but argued that the Carrier had no way of judging what his actual abilities were with respect to the position at issue until it gave him the opportunity to qualify for the position. In its denial of that appeal the Carrier reiterated that it had, in fact, considered the Claimant for the position at issue, but had determined that his fitness and ability were not sufficient to justify his placement therein.

It is clear from the language of Appendix S, Section 5(a) of the Training Agreement that the Carrier retains considerable latitude – within the restrictions elsewhere in the parties' Agreement – in selecting Assistant Signalmen to fill Class 1 positions. The Carrier's rights in this regard are not without limits (see, for example Third Division Award 34147). It must treat candidates fairly in assessing fitness and ability; such determination may not be arbitrary or discriminatory. In

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the matter presently before the Board there is no indication in the record that the Carrier's determination was not made in good faith. As noted in Third Division Award 34175 – involving these same parties – in the absence of a showing of malfeasance, the Board has been historically reluctant to superimpose its own judgment regarding employee fitness and ability for that of the Carrier.

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 February 2007.