

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39024
Docket No. SG-38407
08-3-NRAB-00003-040344
(04-3-344)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 Railroad Company:

Claim on behalf of W. B. Miller for the difference in pay between an assistant foreman and signalman for every hour the Claimant works; travel time for trips to and from his home, to Gang 2138 starting point; overtime for every Saturday and Sunday the Claimant was forced to work while on Gang 2138, and straight time for every day the Claimant was off but should have worked had he been allowed to report to Gang 3967 Assistant Foreman, account Carrier violated the current Signalman's Agreement, particularly Rule 58, when the Claimant was not allowed to place himself on the Assistant Foreman's position on Gang 3967 at Highland Park. This claim is continuing until the Claimant is allowed to go to his rightful position. Carrier compounded its violation when it failed to deny the claim within the 60-day time limit. Carrier's File No. 136751. General Chairman's File No. N 19 58 371. BRS File Case No. 13034-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.

The Organization filed the instant claim on behalf of Claimant W. B. Miller, alleging that the Carrier violated the parties' Agreement when it did not allow the Claimant to displace onto an Assistant Foreman's position on Gang 3967 at Highland Park following his displacement.

The Organization initially contends that the Carrier violated the 60-day time limit set forth in Rule 69 when its letter disallowing the claim was received late, some time after July 31, 2003. It asserts that the record shows, without dispute, that the claim was filed on May 4 and the Organization notified the Carrier by letter dated July 29, 2003, that it had not received a letter disallowing the claim and requesting that the claim be allowed as presented. The Organization points out that only then did the Carrier respond, in a letter dated July 31, 2003, alleging that its response was mailed on July 3, 2003, to what was the Local Chairman's last known address. The Organization emphasizes that this was a former address, and that the Local Chairman had informed the Carrier of his new address one year earlier. The Organization maintains that the Carrier's action in mailing its declination to the wrong address is not a mistake on the Organization's part, but obviously was carelessness on the part of the Carrier.

The Organization points to various Awards holding that parties cannot be responsible for the U. S. Postal Service's mishandling of mail, but it asserts that the instant case involves the Carrier's own mishandling resulting in a violation of the time limit provision set forth in Rule 69. The Organization argues that if the Carrier's reason for failing to respond to the instant claim in a timely manner is allowed to stand, then the Carrier could attempt to beat the issue in the next case by taking the same position. The Organization contends that the Board has

consistently held that when a claim is not disallowed within the allotted time, then it must be allowed as presented. Time limit provisions are to be applied as written by the parties, and the Organization asserts that any deviation from this principle would amount to rewriting the parties' Agreement, which no third party is empowered to do. The Organization maintains that the time limit Rule is self-enforcing, so the instant claim should be sustained without consideration of the merits.

Turning to the merits, however, the Organization points out that the case centers on the fact that the Claimant held seniority in Class 1, and he requested to work an open Assistant Foreman's position on Gang 3967. The Carrier denied the request, pointing to Rule 1 in asserting that the Claimant did not have the ability to perform the duties of that position. The Organization contends that the cited portion of Rule 1 is applicable only in situations where two employees apply for the same position and the position is assigned to the junior applicant over the senior applicant. This is not what happened in the instant case.

The Organization emphasizes that the Carrier did not inform the Claimant why he was not qualified to be assigned to the position at issue. It argues that the Claimant's ability to handle the position, and the Carrier's lack of evidence to the contrary, prove that the Carrier had no reason at all for not assigning the Claimant to the position and allowing him the opportunity to qualify for the position pursuant to Rule 52. The Organization asserts that under Rule 52, when an employee exercises seniority rights and displaces another employee, the Carrier has the ability to disqualify the employee within 30 days. In this case, the Carrier clearly failed to identify any valid shortcoming of the Claimant that would keep him from performing the tasks that the position required. The Organization insists that the Claimant was a qualified individual who has met the very same criteria that the Carrier has required of others who currently occupy Assistant Foreman positions.

The Organization goes on to maintain that, contrary to the Carrier's statement, no evidence was provided to support its affirmative defense that the Claimant does not have the ability to be an Assistant Foreman at this time. The Organization contends that numerous Boards have held that a mere statement does not constitute fact, and the Carrier offered no proof of its assertion in this case.

Moreover, the Board consistently has held that when a carrier adopts an affirmative defense, as it has here, then it bears the burden of proving its assertions. The Organization points out that the Carrier had ample opportunity to present evidence to support its assertion that the Claimant did not have sufficient ability, but it failed to do so. The Claimant was entitled to know what caused the Carrier to take the position that he was lacking in an area that would prevent him from performing the required duties of this position.

The Organization acknowledges that the Carrier has the prerogative to determine an employee's qualifications to perform the duties of certain positions, but it asserts that the Carrier's exercise of this prerogative must be based on a foundation of fact and not be an arbitrary action. Moreover, under the clear language of the Agreement and well-established arbitral precedent, the Carrier's prerogative does not encompass actions such as the subjective disqualification of an employee. The Organization insists that by taking the position that the Claimant was not qualified without benefit of a proper explanation, the Carrier acted in an arbitrary and capricious manner that cannot be allowed to stand.

The Organization asserts that the Board repeatedly has held that a carrier is required to support its decision about an employee's qualifications with specific reasons. In this case, the Carrier failed to show by any measure of reasonableness that the Claimant could not perform the required duties of this position. There is no evidence of poor performance or other factors that would have made the Claimant ineligible to be an Assistant Foreman. The Organization contends that in the absence of such evidence, the Carrier's actions were completely arbitrary and unreasonable. The Organization argues that because the Carrier failed to meet the fundamental requirement of providing valid evidence to support its position that the Claimant was not qualified for the Assistant Foreman's position, it can only be concluded that the Carrier's decision was arbitrary, capricious, and violated the Claimant's rights under the Agreement.

As for the Carrier's argument that the instant claim duplicates another claim before the Board, the Organization asserts that although both claims are on behalf of the same Claimant with regard to the same time frame, the other claim addresses the Carrier's decision not to allow the Claimant to obtain the Assistant Foreman

position through the normal function of seniority and it seeks wages. The Organization points out that because the instant claim seeks the difference in pay rates, the instant claim does not duplicate the other claim.

The Carrier initially contends that there is no truth to the assertion that the Local Chairman notified the Carrier of the change in his address. It asserts that it never had been notified in any correspondence from the Organization that the Local Chairman had changed his address. It argues that it first learned of the address change on July 31, 2003. It contends that it followed the requirements of Rule 69 to the letter, pointing out that its response was dated June 27, 2003, i.e., 54 days after the initial claim. It emphasizes that its denial therefore was issued well within Rule 69's 60-day time limit. The Carrier further points out that it never received the June 27 letter back from the U. S. Postal Service marked "undeliverable."

The Carrier emphasizes that the Organization is responsible for providing the Carrier with accurate addresses. It insists that neither the Local Chairman nor any other member of the Organization notified the Carrier of the Local Chairman's alleged address change. It contends that it properly responded to the initial claim within the prescribed 60-day time limit.

The Carrier then argues that the Organization bears the burden of proving all necessary elements of its claim. The Carrier asserts that the lack of a specific date as to when the alleged violation occurred means that the Organization has not met its required burden. Moreover, this also does not allow the Carrier to adequately respond to the allegations. The Carrier contends that the claim should be denied on this basis alone.

The Carrier also asserts that the Organization's addition at the appellate level of a new allegation that the Carrier violated Rule 52 was improper and an attempt by the Organization to perfect its claim on appeal. The Carrier contends that any arguments made pursuant to Rule 52 should be discarded due to the untimely nature and improper addition of this allegation.

The Carrier goes on to contend that the plain language of the Agreement belies the Organization's position that seniority alone determines who should be

assigned to a particular position. It points out that Rule 1 states that such assignments shall be based on seniority, fitness, and ability, with management to be the judge. Moreover, the Board has held that the Carrier has the right to utilize its managerial prerogative to determine qualifications for employees.

The Carrier argues that in the instant case, it determined that the Claimant lacked the ability required of an Assistant Foreman. The Carrier points out that at no time during his short time as a Carrier employee has the Claimant ever held an Assistant Foreman position. It further contends that because the Organization never refuted this fact, the material facts set forth by the Carrier now must be taken as true.

The Carrier then points out that the Board repeatedly has held that once a carrier has elected to exercise its managerial right in the assignment of a position, the burden of proof falls on the claimant or the organization to supply substantial evidence of the claimant's qualifications in order to support any claimed Agreement violation. The Carrier argues that in the instant matter, the Organization made no effort to meet its burden. Instead, the Organization offered mere argument and unsupported allegations.

The Carrier further contends that Rule 1(a) allows employees an opportunity to pre-qualify for positions such as Foreman and Assistant Foreman, but the Claimant did not utilize this avenue to verify that he was, in fact, qualified. Because the Claimant had never worked as an Assistant Foreman and did not avail himself of the testing opportunity, the Claimant did not have the proper ability to displace onto the Assistant Foreman position at issue. The Carrier insists that it was not in violation of the Agreement for not allowing him to work that position. It argues that even under Rule 52, employees must be qualified to be assigned to the position.

The Carrier insists that the Organization failed to meet its burden of proving that the Claimant possesses the necessary fitness and ability for the position at issue. It contends that not only is the claim without merit, there is no Agreement support for the remedy requested by the Organization. The Carrier asserts that it is not responsible for supplementing the Claimant's income for his personal choice to work on Gang 2138. The Carrier asserts that in choosing to displace to that gang,

the Claimant undertook the assigned work schedule of that gang, which had regular assigned work days of Saturday and Sunday. The Carrier emphasizes that the Claimant is not entitled to overtime for these days.

The Carrier then asserts that the instant claim stemmed from one occurrence, i.e., the Carrier's refusal to allow the Claimant to displace on the Assistant Foreman position on Gang 3967. The Carrier emphasizes that this does not constitute a continuous claim. It also argues that this claim is duplicative of another claim that also is before the Board, which is evidence of an end run by the Organization to obtain compensation for the Claimant that he is not rightfully due.

The Board reviewed the record and finds that this case sets forth a different issue than the other case filed by the same Claimant. Consequently, there is no jurisdictional issue here for the Board to decide.

The Board reviewed the procedural arguments raised by the Organization and finds them to be without merit. The record reveals that the claim was filed on May 4, 2003, and the Carrier mailed its response to the Vice General Chairman on June 27, well within the 60 days required by the Rules. There is some evidence that the Vice General Chairman had changed his address, and the Carrier had sent its response to his previous address. However, there is no indication that the Organization or the Vice General Chairman notified the Carrier of his new address. Consequently, we find that the Carrier's response was timely filed and the timeliness arguments raised by the Organization are rejected.

The Board further finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it failed to pay the Claimant as an Assistant Foreman. The record reveals that the Claimant failed to qualify for the job and, therefore, the Carrier did not violate any Rule by not placing him in that position and paying him as an Assistant Foreman. It is fundamental that the Carrier has the right to determine the qualifications of an employee for a particular position. In this case, the Carrier took the position that the Claimant did not have the ability to perform the job, and the Organization did not come back with any evidence to rebut it. Consequently, the Claimant was not improperly paid as the Organization alleges.

It is fundamental in cases of this kind that the Organization bears the burden of proof. In this case, the Board finds that the Organization failed to come forward with sufficient proof to support its claim that there was a violation of the Agreement. Therefore, the claim must be 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 April 2008.