

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39025
Docket No. SG-38408
08-3-NRAB-00003-040345
(04-3-345)

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 compensation of five days lost time at the Assistant Foreman’s rate of pay, account Carrier violated the current Signalman’s Agreement, particularly the September 10, 2002 Agreement concerning contractors working on signal projects on the Union Pacific Railroad when the Claimant was on furlough from April 7, 2003 through April 14, 2003. Carrier also violated the 60-day time limit for denying the claim. Carrier’s File No. 136752. General Chairman’s File No. N 19 58 372. BRS File Case No. 13035-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' September 10, 2002 Letter of Agreement when contractors were working on signal projects while the Claimant was furloughed from April 7 through April 14, 2003.

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 9 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 it 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 July 3 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 of this dispute, the Organization contends that the Carrier violated the parties' Agreement, particularly the September 10, 2002 Letter of Agreement, by forcing the Claimant on furlough status from April 7 through April 14, 2003, and not allowing the Claimant his right to exercise his seniority by bidding on other positions. The Organization points out that the September 2002 Letter Agreement provides that when third parties are working under the terms of this Agreement, then signal forces on the Carrier's system will not be furloughed. The Organization asserts that the record demonstrates that the Claimant did everything he could to stay working, but the Carrier denied his opportunity to continue working.

The Organization maintains that the Claimant held Class 1 seniority and requested to work an Assistant Foreman's position on Gang 3969, which was an open job, but the Carrier denied this request because the Claimant did not have a CDL. The Organization emphasizes that the Carrier provided no evidence to show that the position required a CDL, but it nevertheless denied the Claimant's request. The Organization goes on to assert that when the Claimant thereafter asked to work the open Assistant Foreman position on Gang 3967, the Carrier denied that request under Rule 1(a) asserting that management had determined that the Claimant was not qualified for the position. The Organization contends that Rule 1(a) applies only to situations where two employees apply for the same position, and the position is assigned to the junior applicant over the senior applicant. This did not occur 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. In fact, when the Claimant reported for that duty, the Carrier denied him the work and sent him home without pay, even though the Claimant was on the job for more than four hours.

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 and the September 2002 Letter Agreement.

As for the Carrier's argument that the instant claim duplicates another claim before the Board, the Organization asserts that the instant claim seeks to cover a loss of pay for the Claimant due to the Carrier's decision not to allow the Claimant to obtain any position through the normal function of seniority, which would have made wages available to the Claimant. The Organization emphasizes that instead of allowing the Claimant to work one of several positions in which the Claimant was interested, the Carrier advised the Claimant to go home, thus forcing the Claimant to a furlough status. The Organization points out that the other claim seeks to compensate the Claimant for the pay differential between an Assistant Foreman's position that the Claimant placed himself on in a manner consistent with the Rules, and the Signalman's position that the Claimant was forced to accept due to the Carrier's improper actions. The Organization insists that the only similarity between the two claims is the time frame, and 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 July 3, 2003, i.e., 55 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 asserts that the Organization's addition at the appellate level of new allegations that the Carrier violated Rules 52 and 58 was improper and an attempt by the Organization to perfect its claim on appeal. It contends that any arguments made pursuant to Rules 52 and 58 should be discarded due to the untimely nature and improper addition of these allegations.

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 Claimant did not possess the necessary ability to perform the essential functions of this position, and he did not possess a CDL. 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 or worked a position requiring a CDL. The Carrier 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 asserts that the Organization actively avoided

producing evidence to meet its burden, and such a failure of proof could hardly be more clear-cut.

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.

As for the Organization's position that the requirement of a CDL is improper, the Carrier asserts that the requirement of a CDL certification is a reasonable qualification that is not restricted by any language in the parties' Agreement. The Carrier points out that this qualification allows it to ensure that the operation of its vehicles is in compliance with federal and state law. The Carrier emphasizes that numerous Awards have upheld the Carrier's right to place qualifications on a bulletin unless restricted in some way. The right to set qualifications is part of the Carrier's managerial prerogative, and the Organization admitted that the Claimant did not meet the CDL qualification when he attempted to displace onto the position at issue.

The Carrier argues that allowing the Claimant to displace onto a position without the required federal license would result in placing the Carrier in the position of allowing employees to illegally operate Carrier vehicles. Moreover, federal law takes precedence over the parties' Agreement with regard to the CDL qualification, and the Organization has no right to demand that the Carrier violate the law for the benefit of the Claimant. The Carrier points out that if the Organization wished to dispute the CDL requirement, then it should have protested this requirement when the position was placed on the bulletin, not when the Organization finds it useful in the claims-handling process. The Carrier contends that the Organization's arguments on this requirement are untimely and should not be considered.

The Carrier asserts that the Organization failed to prove violation of any Agreement provision. The applicable Rules condition assignments on fitness and ability, and the Organization has not met its burden of proving that the Claimant possesses the necessary fitness and ability.

As for the Organization's position that the Carrier violated the parties' September 10, 2002 Letter Agreement, the Carrier emphasizes that the Organization has not shown what portion of the Agreement was violated. It points out that this Letter Agreement provides that the Carrier would not furlough any employees for one year after an outside contractor has completed work on the Carrier's property. The Carrier insists that it has not furloughed any employees, and there is no basis for the Organization's reliance on this Letter Agreement.

The Carrier acknowledges that the Claimant did not work during the time period at issue, but it contends that this was due to the Claimant's own actions and not the actions of the Carrier. The Carrier did not place or force the Claimant into a furloughed status, and work was available to the Claimant if he chose to avail himself of it. The Carrier emphasizes that the Claimant chose to ignore management's advice regarding other positions that the Claimant could have worked. Moreover, the Organization has not disputed the fact that other positions were available to the Claimant during the week in question, so this undisputed fact must now be taken as true.

The Carrier points out that once the Claimant was told that he was not qualified to hold certain positions, it was his duty to find a position where he could exercise his seniority. The Carrier argues that it cannot be held liable for the Claimant's own inaction. It appears that the Claimant did not want to exercise his seniority to the fullest, and he chose to be furloughed. The Carrier asserts that this should be at the Claimant's own expense, and not that of the Carrier. Accordingly, there is no Agreement support for the remedy sought.

The Carrier also argues that this claim is duplicative of another claim that also is before the Board. The Carrier points out that the two claims are based upon identical facts, with the Organization seeking different remedies based on different asserted Rule violations. The Carrier asserts that this 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 procedural arguments raised by the Organization and finds them to be without merit. The record reveals that the Carrier responded to the claim in a timely fashion. The record reveals that the Carrier sent the response to the Local Chairman's former address because it had not received any notice of a change of address from him. The response to the claim by the Carrier was made within the 60-day time limit required by the Rules.

The Board also finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when the Claimant was furloughed from April 7 through April 14, 2003, and was not awarded an Assistant Foreman job so that he could continue to work. The record reveals that the Claimant did not meet the requirements of the Assistant Foreman job and that he did not possess the necessary abilities to perform the essential functions of the job and he did not possess a CDL. The Claimant had never worked the Assistant Foreman position, and he did not avail himself of the testing opportunity in order to qualify for the job. The record also is clear that the Claimant was not required to take the furlough status, but he only wanted to take the Assistant Foreman job for which he did not qualify. Once he did not get the Assistant Foreman job, he elected to go on furlough without attempting to take a different job.

Consequently, the Board finds that the Organization failed to meet its burden of proof that any of the Claimant's rights were violated in this matter. Therefore, the claim must be denied.

AWARD

Claim denied.

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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.