

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39466
Docket No. CL-40011
08-3-NRAB-00003-070214
(07-3-214)

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

**(Transportation Communications International Union
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)**

STATEMENT OF CLAIM:

**“Claim of the System Committee of the Organization (GL-13181)
that:**

- (1) Carrier acted in an arbitrary, capricious and unjust manner violating Rules 5, 6, 8 and other related rules of the Agreement, when it failed or refused to award the Claimant (Kurt Bauer) bulletined Train Director position TD MC-1 on or about November 17, 2004.**
- (2) Carrier shall now be required to immediately award Train Director Position TD MC-1 to the Claimant.**
- (3) Carrier will now be required to compensate the Claimant for all days he would have worked but did not on position TD MC-1 and he is to be paid at the overtime rate of time and one-half for days he worked on his present position that would have been rest days on position TD MC-1.”**

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.

Many of the basic facts of the instant case do not appear to be in dispute. At the time of the events leading to the claim, the Claimant was a qualified Train Director with more than 20 years of seniority with Amtrak. His seniority date was July 6, 1981. On November 10, 2004, Amtrak advertised three permanent vacant positions for the position of Train Director TD-MC 1 in Michigan City, Indiana. Within the year prior to the events in this matter, the work of operating the Michigan City line had been obtained by Amtrak from another railroad. The Claimant submitted an application on November 11, 2004. On November 17, 2004, at the end of the bidding period, the Carrier posted a bulletin that the position advertised went "no bid." On this same date, the Carrier designated the Claimant's application as "not qualified."

The Organization contends that the Carrier violated the Agreement when it did not place the Claimant into the relevant position. According to the Organization, the Carrier's decision not to place the Claimant into the relevant position was arbitrary, capricious and discriminatory and a violation of Rules 5, 6 and 8 of the Agreement. The Claimant had the fitness and ability to become qualified for the position, but was denied. As a remedy, the Organization requests that the Claimant be compensated for all days he would have worked, but did not, on position TD MC-1 and he is to be paid at the overtime rate of time and one-half for days he worked on his present position that would have been rest days on position TD MC-1.¹

Conversely, the Carrier contends that it acted properly in finding that the Claimant was not qualified for the position. According to the Carrier, it had

¹ It is uncontested that the Claimant was dismissed. Said dismissal was upheld by Public Law Board No. 6242, Case 82 (Referee Parker) on June 5, 2007. Therefore, placement into the TD MC-1 position is not at issue.

recently acquired 90 miles of track that the Claimant would have been in charge of had he been assigned the position. The Carrier stresses that said 90 miles of track was mainline track, newly acquired, requiring a fundamentally different set of skills from the interlocking territory in the Chicago area. Amtrak determined that formalized training on mainline track procedures was necessary. In sum, the Carrier asserts that it did not act inappropriately when it did not accept the Claimant's bid and asks that the claim be denied.

In Third Division Award 31059, the Board dealt with a similar case in which the minimum standard for "fitness and ability" was discussed:

"'Sufficient fitness and ability,' as those words are used in Rule 8, means that an employee must be given an opportunity to qualify for a job if the employee evinces the minimum capacity to be able to master the duties of the position. Sufficient fitness and ability does not mean that an employee is immediately qualified to execute the duties of the position."

In the instant case, after a review of the evidence and the positions of the parties, the Board finds that the Organization failed to meet its burden of proof in part. The Organization has shown that the Claimant, having been a Train Director for many years, had the minimum fitness and ability to be assigned the position at Michigan City, at least for the initial 30-day qualification period. Whether the Claimant could have mastered the position is an entirely different question. It is clear that the Claimant was the most senior bidder and should have been given the opportunity to attempt to qualify for the position. Therefore, the Board has determined that at a minimum, the Claimant's bid should have been accepted. However, in light of the fact that it is unclear whether the Claimant would have ultimately succeeded in his training and in light of the fact that he was dismissed for cause in 2007, no backpay shall be awarded.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of December 2008.