

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40331  
Docket No. MW-40571  
10-3-NRAB-00003-080382**

**The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(Union Pacific Railroad Company (former Missouri  
( Pacific Railroad Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier failed and refused to assign Machine Operator D. Johnson to the ballast regulator operator position on Gang 9182 (his 2<sup>nd</sup> choice) by Bulletin 4331 on January 2, 2007, which thereby assigned said position to a junior employe and instead assigned the Claimant to the ballast regulator operator position on Gang 9064 (his 12<sup>th</sup> choice) by Bulletin 4336 on January 2, 2007 (System File MW-07-51/1471794 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Johnson shall now be awarded the ballast regulator operator position of Bulletin 4331, and for any and all lost compensation, effective January 2, 2007 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.**

**The Carrier challenges the authority of the Board to consider this matter charging that the Organization altered its claim. On the property, the Organization did not demand any compensation for the Claimant for the Carrier's violation, but on appeal in its Submission to the Board, it does. After careful review of the record, the Board finds that the parties considered the compensation question on the property. Any doubt as to whether the parties addressed the matter of compensation is resolved by the Director of Labor Relations' July 18, 2007 letter, in which the Carrier emphasizes:**

**"Secondly, Claimant did not lose any work opportunity. Not only was he assigned to the same rate of pay and both positions were on-line, but Claimant was not available for work. Enclosed is Claimant's assignment history . . ."**

**Accordingly, the Board dismisses the Carrier's objection to the Board's review of the merits of the claim.**

**Claimant D. Johnson holds seniority as a Machine Operator. Over several years, he was assigned to a Ballast Regulator Operator position. The Claimant requested, but did not receive training on this equipment. The Carrier did not "qualify" him on this equipment. The Claimant bid on Ballast Regulator Operator positions in Bulletin Nos. 4331 and 4336 in December 2006, with an effective date of January 2, 2007.**

**The Claimant's second choice was the Ballast Regulator Operator position on Gang 9182. He held a Ballast Regulator Operator position on Gang 9182 from October 27 to December 5, 2006, when he was cut off as a consequence of the Carrier abolishing the gang. The position was advertized in Bulletin No. 4331, when the Carrier decided to re-constitute the gang. It bulletined the position on Gang**

**9182 as a restricted position in accordance with the 2003 Agreement between the Organization and the Carrier.**

**The Carrier awarded the Ballast Regulator Operator position to an employee junior to the Claimant. The Carrier responded to this claim on April 17, 2007 and stated the reason for its action, as follows:**

**“The Claimant was not a qualified bidder to exercise his seniority choice on the Ballast Regulator position on Bulletin 4331 to Gang #9182. The position was awarded to an employee who subsequently possessed the requisite fitness, ability, qualifications, and seniority to be assigned the position.” (Emphasis added)**

**The Carrier awarded the Claimant his 12th choice, a Ballast Regulator Operator position on Gang 9064. The Claimant challenges the Carrier’s denial of his preferred choice, i.e., the position on Gang 9182.**

**In Third Division Award 23866 the Board set forth the principal for deciding a case in which the Carrier determines that the Claimant is not qualified and the Claimant disagrees with that determination, as follows:**

**“Only if Petitioner proved by a preponderance of the evidence that Carrier exercised its judgment in an unreasonable, arbitrary, capricious, or discriminatory manner could we consider whether the Agreement was violated. The burden of proof was Petitioner’s. It did not meet it.”**

**More recently, in Third Division Award 39706 (a case between these very same parties) the Board set the mode of analysis when the focus of the dispute is the Claimant’s qualifications:**

**“Well established precedent dictates once the Carrier stated that the Claimant lacked the qualifications to perform the position at issue, the burden of proof shifted to the Organization to demonstrate by sufficient probative evidence, that the Carrier’s assessment was incorrect.”**

The Organization bears a heavy burden. It meets that burden, here, by establishing on the property, without contradiction, that prior to 2007, the Carrier assigned the Claimant to a Ballast Regulator Operator position. He filled such position on Gang 9182 from October 27 to December 5, when he was cut off by the abolition of the gang. The Organization emphasizes that he functioned in the job and the Carrier deemed him sufficiently qualified to award his bid to Gang 9064.

The Carrier counters by noting that the Claimant failed to qualify for the Ballast Regulator Operator position on Gang 9064 on April 14, 2007. The Organization argues that what happened on April 14 is irrelevant to the decision made on or about January 2, 2007.

The question at issue is the Carrier's decision to deny the Claimant his second choice bid. Any promotion decision must be viewed as the facts were extant at the time of the decision, not months later as the parties process a claim. What happened subsequent to January 2007 has no bearing on whether the Carrier violated the Rules, when it found the Claimant not qualified for the Ballast Regulator Operator position on Gang 9182. In Award 36902 cited above, the Claimant qualified for the position at issue well after the position had been awarded. The Board found the Claimant's subsequent qualification after the position was awarded irrelevant to the Carrier's decision that the Claimant was not qualified for the position.

The Carrier continues by asserting that it accepted the Claimant's bid, because there were no other bidders for the position on Gang 9064. Rule 20 (b) provides:

“When vacancies advertised under this Rule are not filled by reason of no bids from qualified employees, the position will be filled by (1) appointment of the junior unassigned qualified employee in that classification. . . .”  
(Emphasis added)

The Organization argues that the Carrier's award of the Claimant's bid reflects its acceptance of the Claimant's qualifications for the position. The Board finds that the ultimate acceptance of the Claimant's 12th choice bid for the position is a piece of evidence that supports the Organization's case. The Carrier's

contention that as the last bidder standing the Carrier accepted the Claimant's bid does not comport with the contractual language of Rule 20 (b) quoted above.

The Carrier's assignment of the Claimant to the Ballast Regulator Operator position for some period of time prior to and including the period preceding the bulletining of the position at issue on Gang 9182 (the very gang at issue and Claimant's second choice) suggests the Claimant's familiarity with the position and the Carrier's acceptance of his work. These two elements, the acceptance of the bid for Gang 9064 and the Claimant's work history as a Ballast Regulator Operator, support a finding that the Claimant's qualifications were sufficient to accept his bid for the position on Gang 9182.

The Carrier's denial of the Claimant's second choice, because he was not qualified, is inconsistent with the award of his 12th choice for the Ballast Regulator Operator position. Both awards were made at the same time. Nothing happened between the denial of his second choice, when the Carrier deemed the Claimant unqualified and his 12th choice, when he was deemed sufficiently qualified to merit the award of a Ballast Regulator Operator position on Gang 9064. Based on the unique facts and circumstances in this record, the Carrier's decision was arbitrary and capricious. Accordingly, the Board concludes that the Organization met its evidentiary burden, and partially sustains the claim.

As previously noted above, the Carrier initially raised a procedural objection to the Board's processing of this claim. The Board dismissed the Carrier's objection finding that the parties addressed the matter of compensation on the property. Now, the Board must determine whether the Claimant is entitled to any compensation. The Board finds that the Director of Labor Relations' reference to the Claimant's assignment history is well supported in the record. There is no evidence that the Claimant suffered a loss. For that reason, no compensatory award is warranted. Our decision herein is limited to the determination that the Claimant was sufficiently qualified for the position for the Carrier to award his bid to the second choice position on Gang 9182.

### **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 1st day of March 2010.**