

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40381
Docket No. MW-38712
10-3-NRAB-00003-50120
(05-3-120)**

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

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(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 Foreman L. Peace to the foreman position on Gang 9162 by Bulletin No. 2632, effective December 12, 2003, and instead assigned junior employe D. McDonald (System File T-04-01/1391700 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Peace shall now be assigned to the aforesaid foreman position and he shall “*** be compensated for all overtime earned by any person assigned to the foreman position on Gang # 9162 posted on bulletin # 2632.”**

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.

Claimant L. B. Peace established and holds seniority as a Track Foreman dating from February 20, 1992. At the time of the incident made basis for this claim, the Claimant was assigned and working on Switch Gang 9162.

The Claimant entered the service of the Carrier on October 4, 1988. The Claimant established Track Foremen's seniority as of February 20, 1992 on a position that did not require DOT/CDL certification. On November 14, 2003, the Carrier posted Bulletin No. 2618 seeking applicants for the position of Track Foreman on Gang 9165 with the provision that the Track Foreman must be DOT/CDL qualified. Five qualified employees bid on the position. Nonetheless, the Carrier selected the Claimant to fill the Track Foreman position effective November 28, 2003.

On November 28, 2003, the Carrier posted Bulletin No. 2632 advertising another Track Foreman position on Gang 9162, which also required DOT/CDL qualification. The Claimant bid on this position because he determined it to be more desirable. The Claimant was denied the position, leading to the instant claim.

According to the Organization, although the Claimant was senior to the other applicants and placed a proper bid on the Gang 9162 Track Foreman position, the Carrier improperly assigned junior employee D. D. McDonald to the position in question. The Organization claims that as a result of the Carrier's actions, the Claimant lost overtime opportunities. It submitted a claim contending that the Carrier violated the Agreement by not selecting the Claimant for the position of Track Foreman, because he had more seniority than the other bidders. According to the Organization, the Claimant properly placed his bid, and while he was not DOT/CDL qualified, he could have become qualified during the 30-day qualifying period. The Carrier was required to select the Claimant for said Track Foreman position. As a result of the Carrier's actions, the Organization requests compensation for the Claimant's lost overtime opportunities.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that while it is uncontested that the

Claimant was senior to the other bidders, the Claimant was not qualified for the position of Track Foreman because he did not have DOT/CDL certification. While the Claimant was the senior bidder, he was not the senior qualified bidder and the Carrier had the right to reject him from the Track Foreman position. The Carrier contends that it acted within its managerial rights in rejecting the Claimant from the instant position.

The Board concludes that the Organization failed to meet its burden to show that the Claimant should have been placed on the position of Track Foreman. The Board finds that the Carrier reasonably determined that DOT/CDL certification was required. In Third Division Award 36086 the Board held: "It is well established that in cases of fitness and ability, the Carrier has the management prerogative to judge fitness and ability and the burden shifts to the Organization to demonstrate that the Carrier's decision was arbitrary, capricious, or unreasonable." See also Third Division Award 35310.

In the instant case, we find that the Carrier acted reasonably in denying the Claimant the position of Track Foreman. Accordingly, the claim is 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 25th day of March 2010.