

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40437
Docket No. MW-39955
10-3-NRAB-00003-070136
(07-3-136)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union 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 S. Remer to the foreman position on System Gang 9086 posted in Bulletin No. 8342 on January 19, 2006 and instead assigned junior employee J. Becker to work said position beginning February 1, 2006 and continuing (System File UPRM-9781T/1443612).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Remer shall now be compensated for all lost wages beginning February 1, 2006 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 Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it failed and refused to assign the Claimant to a bulletined Foreman position, and instead assigned a junior employee to this position.

The Organization initially contends that the dispute over the Carrier's position that the instant claim was not progressed by the appropriate representative on the property has been decided in the Organization's favor in a Special Board of Adjustment decision rendered by this Referee on October 17, 2006. The Organization therefore asserts that the Carrier's defense on this point is moot and without merit.

The Organization argues that arbitral Boards long have recognized that seniority is a valuable property right of an employee. The Organization maintains that in this case, there is no dispute that the Claimant was the senior qualified applicant for the position at issue, but the Carrier nevertheless assigned a junior employee to the disputed position. Addressing the Carrier's argument that the position in question was a System Material Gang Foreman position and that the Claimant did not possess the necessary qualifications to perform the routines duties of this position, the Organization emphasizes that the Carrier did not demonstrate that the Claimant lacked any skills or qualifications to perform the duties of the disputed position. The Carrier simply has not, and cannot, demonstrate that the Claimant was not qualified, and its actions served to cause the Claimant a loss of compensation.

The Organization insists that the Claimant had a contractual right to the System Gang Foreman position at issue. The Organization emphasizes that Section 4(A) of the Agreement expressly provides that the bidding employee with the superior seniority ranking on the applicable seniority roster will be assigned to the bulletined position. The Organization points out that there is no dispute that the

Claimant possesses a Group 26 System Gang Foreman seniority date of February 14, 1979, while J. Becker possesses a Group 26 System Gang Foreman seniority date of July 1, 2004. Moreover, the assignment bulletin that reflects these seniority dates also clearly indicates the Claimant's status as a qualified employee.

The Organization contends that by virtue of his superior Group 26 System Gang Foreman seniority, the Claimant unquestionably was the senior qualified applicant, and he should have been assigned to the disputed position. The Organization submits that the Carrier's failure and refusal to recognize the Claimant's superior seniority was a direct violation of Section 4. The Organization suggests that the Board need look no further than the clear and unambiguous language of Section 4 to sustain this claim. The Organization then points to a number of prior Awards that fully support and acknowledge the principle of seniority and an employee's basic right to exercise earned seniority in accordance with the Agreement.

Addressing the Carrier's reliance on Rules 19 and 20 and the principles set forth in Awards 27, 28 and 29 issued by Public Law Board No. 6302, the Organization maintains that all are inapplicable to the instant dispute. The Organization asserts that whatever rights the Carrier might have assumed under Rules 19 and 20 in making assignments to Classes A and B of Group 26 prior to June 1, 1998, the Carrier negotiated away those rights when the parties agreed to the 1998 Implementing Agreement, which evolved into Appendix T of the current Agreement. The Organization emphasizes that Appendix T specifically outlines how assignments are to be made for Group 20, 26, and 27 positions. Moreover, the parties agreed, in Side Letter No. 15 to Appendix T, that Appendix T would apply in the event of any conflicts between it and the current Agreement.

The Organization argues that there is a conflict between the terms of the current Agreement and Appendix T. Under Side Letter No. 15, Appendix T will apply. The Organization submits that if the Carrier had wished to preserve its perceived Rule 20(l) right to select employees for service in Class A and/or B in Group 26, it would have been a simple matter to incorporate such language into Appendix T.

The Organization asserts that because Rule 20(l) is not the controlling provision of the Agreement, then it follows that the three PLB 6302 Awards cited by the Carrier, and the doctrine of stare decisis, have no applicability to the instant dispute because those decisions relied on the express language of Rule 20(l).

The Organization notes that the assignment bulletin clearly lists no fewer than four qualified bidders. The Organization contends that the Carrier cannot pick and choose among qualified bidders, but is bound by the seniority provisions of the Agreement. There is no ambiguity in these provisions, and there is no doubt that the Claimant is the senior qualified employee. Accordingly, the Organization asserts that the instant claim must be sustained.

The Organization goes on to argue that the remedy requested would make the Claimant whole for what he lost as a result of the Carrier's violations in this matter. The Organization submits that the requested remedy is entirely proper and in keeping with the "make whole" principle.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that it correctly applied the Agreement when it continued to exercise its managerial prerogative to assign a System Gang Foreman and Assistant Foreman in accordance with Rules 19 and 20 of the Agreement. The Carrier asserts that before and after the signing of the Implementing Agreement in 1998, it continued to make those assignments as these Rules have been interpreted by three on-point decisions issued by PLB 6302. The Carrier argues that the Organization's arguments are misplaced, and this matter can be dismissed under the principle of stare decisis. The Carrier argues that because this issue previously has been decided, it simply is not an Agreement violation for the Carrier to assign the positions of Foreman and Assistant Foreman on its high production system gangs to the employees who are qualified in that class, regardless of seniority date.

As for the Organization's position that these prior Awards do not apply because they pre-date the 1998 Implementing Agreement, the Carrier acknowledges that PLB 6302's three Awards on this issue were issued in 1997. The Carrier points

out, however, that PLB 6302 issued an Award in 2001, three years after the signing of the Implementing Agreement, that affirmed the holding in the earlier Awards. The Carrier insists that these Awards clearly are on point and controlling in this matter.

The Carrier contends that because the issue presented here previously has been settled by PLB 6302, the Board is justified in dismissing this case under the doctrine of stare decisis. With a controlling Award, there is no reason for the Board to charter new territory.

The Carrier contends that this matter involves the Claimant's desire to be promoted to a System Gang Material Foreman position for which he did not have the qualifications. The Carrier points out that the Organization has not shown that the Claimant was qualified, nor did the Organization contradict that such assignments consistently have been made in accordance with Rules 19 and 20. The Carrier argues that it has always had the right to select employees for Foreman assignments on its System Gangs, pursuant to provisions that have remained in the parties' Agreements for at least 70 years.

The Carrier emphasizes that prior Third Division Awards demonstrate that promotion is not strictly a seniority Rule, as the Organization suggests, but instead there are variables that make up the criteria for being promoted. The Carrier submits that if it did not have this management right, then the consequences and impact would be hard to imagine. The Carrier further argues that it only is in recent years that the Organization has taken it upon itself to challenge this 70-year-old Rule.

The Carrier contends that the parties could have stricken Rule 19(f) from their Agreement when it was revised in 1992 and reprinted in 2001. Moreover, the parties could have stricken this language in the 1998 Implementing Agreement if it was not to apply. They did so in addressing other specific Rules. The Carrier submits that because this did not occur, Rule 19(f) is a very viable Rule.

The Carrier goes on to assert that the assignment of an employee other than the Claimant to the disputed position was proper and in accordance with the

Agreement. The Carrier argues that the Organization never refuted that the Agreement was not violated and that the Claimant was handled no differently than countless other employees in the past.

The Carrier further contends that there is no language anywhere in Rule 20 or in Appendix T that supersedes the language and application of Rule 20(I). The Carrier contends that the Carrier accordingly preserved its rights in filling System Gang Foreman positions.

The Carrier insists that because the Claimant had no qualifications or specialization as a System Gang Material Foreman, the decision to appoint another employee to this position was neither arbitrary nor capricious. Under these circumstances, there was no Agreement requirement to promote the Claimant to the subject position. The Carrier insists that it is not required to award such a position blindly based on seniority and afford the applicant 30 days in which to qualify. The Carrier emphasizes that it has the managerial right to pass on applicants' lack of qualifications prior to assigning them to a System Foreman position.

The Carrier points out that the Organization never established that the Claimant had worked any of the positions and, therefore, was not qualified on the System Foreman positions. The Carrier reiterates that its actions were not arbitrary, capricious, or an abuse of discretion, and it treated the Claimant in the same manner as countless other individuals in the same situation.

The Carrier submits that it is in complete compliance with the Agreement language when it is read as a whole. The Carrier suggests that in placing its reliance on Section 4 of Appendix T, the Organization elected to ignore the absence of any language indicating that Section 4 would supersede the other Rules of the Agreement. The Carrier submits that Section 4 is only used as a tie-breaker when all qualifications are equal and seniority was established by all of the bidders prior to January 1, 1998. The Carrier insists that the Organization seriously misrepresented Section 4 of Appendix T. The Carrier argues that the Agreement must be read and interpreted as written and applied over the years.

Citing prior Awards, the Carrier suggests that it is not the role of the Board to write Agreement language. The Board is to interpret existing language, and the Agreement must be applied as written.

The Carrier argues that the Organization failed to support its claim with proof. As found in prior Awards, the Organization must prove a definite violation of the Agreement. The Carrier contends that the Organization failed to meet its burden of proof, so there is no basis for sustaining this claim.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board carefully reviewed the record evidence and concludes that the Organization failed to meet its burden of proof that the Carrier acted in violation of the Agreement when it did not assign the Claimant to the Foreman position on System Gang 9086 and instead assigned a junior employee to that position. Therefore, the claim must be denied.

The record is clear that the employee who was assigned to the System Material Gang Foreman position had experience working on that job and that the Claimant had never worked on that position. The Agreement which governs that particular assignment allows the Carrier to select qualified employees for the System Gang Foreman positions. Moreover, in recent Third Division Award 39299, the Board held that the Carrier had the right to assign a junior qualified employee who had previous experience on that position. The Board wrote the following:

“The Board has no intention of disturbing this precedent. If the Claimant did not have the requisite experience, the Carrier was within its rights to bypass him, no matter the obviously high caliber of his record.”

In Award 27 of Public Law Board No. 6302, the Board held:

“On its face, Rule 20(l) appears to allow Carrier to bypass a senior foreman in Classes (a) and (b) of Group 19 who does not have

experience and specialization in the type of work involved for a junior foreman who has such experience and specialization when establishing new gangs.”

See also Awards 28 and 29 of Public Law Board No. 6302.

Consequently, it appears that under the Agreement, the Carrier has a right to select an experienced qualified employee rather than a more senior employee who does not have experience on that specific job.

For all of the above reasons, 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 14th day of May 2010.