

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40771
Docket No. MW-40169
10-3-NRAB-00003-070295
(07-3-295)**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Northern 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 Mr. B. Kutschara to Section Foreman Position 42105 at Guernsey, Wyoming, per Award Bulletin L0506A-11A on June 15, 2005 and instead assigned junior employee S. Stengel [System File C-05-A080-1/10-05-0257 (MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Kutschara shall now ‘. . . be given a foreman seniority date of June 15, 2005. Furthermore, we request that Mr. Kutschara be allowed to place himself as section foreman on position #42105, in the event that a person senior to June 15, 2005 is holding this position that Mr. Kutschara be allowed to place himself with his foreman date if possible. In addition we request that Mr. Kutschara be paid the difference in pay between the position he has held since June 15, 2005 and the date this claim is settled.***”**

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.

This claim was timely processed and properly presented by the Organization and the Carrier at all stages of appeal including the filing with the Board.

Bulletin L0506A-11A (Section Foreman) stated that bidders had to possess a number of qualifications, such as Federal Railroad Administration (FRA) certification, at the time the bulletin closed (June 10, 2005). This is a longstanding Carrier policy. Rule 22 states that "each new position or vacancy bulletined as provided in Rule 21 will be assigned to the senior qualified applicant who holds seniority on the roster[.]"

The Organization states that the Carrier violated Rules 2, 4, 5 and 22 when it selected an employee with less seniority than the Claimant for the disputed Section Foreman position on June 15, 2005. Although the Carrier states that the Claimant was not assigned the position because he was not FRA qualified, the Claimant earned FRA qualification as a Relief Track Inspector in the last quarter of calendar year 1984. A Track Inspector is required to be FRA qualified and, once qualified, remains on the list unless removed for a violation or disqualified, which is not the Claimant's situation. The Claimant met all criteria under FRA regulations to qualify to perform Section Foreman duties.

According to the Carrier, the Claimant did not possess all required qualifications when the bulletin closed, whereas the selectee, although junior in seniority to the Claimant, did. Therefore the Claimant was not the "senior qualified applicant" as required by Rule 22.

Notwithstanding any experience earned by the Claimant as a Relief Track Inspector during October through December 1984, there is no record of his attaining FRA qualification. The qualification list has been published on a quarterly basis and, more recently, annually. The Carrier provided the Organization with copies of the 2000 and 2001 lists. The list is accessible at any time, any day on the Engineering Department website. None of the records show the Claimant as FRA qualified. More than 20 years lapse and now the Claimant claims FRA certification due to his Relief Track Inspector experience. Under the principle of laches, this claim should be dismissed or denied in its entirety.

The Organization's statement that the Claimant met all criteria under FRA regulations to qualify to perform Section Foreman duties is not substantiated. Pursuant to Title 49, Track Safety Standards Part 213, § 213.7, only the FRA can determine that. In 2006, the Claimant was scheduled for an FRA class, but he cancelled it and he has not rescheduled. As of August 2007, he still is not showing as qualified on the FRA list.

Having reviewed the record, the Board denies this claim for the following reasons. When the Section Foreman position was awarded (June 15, 2005) there were no records showing that the Claimant met all the requisite qualifications for the position. Specifically, he was not FRA-qualified.

The Claimant waited from the time the job award was posted up to the effective date of the award to state he was the "senior qualified applicant" which would include satisfying all qualifications at the time the bid closed. The Claimant failed to establish that the work he performed in October through December 1984 made him FRA qualified. The qualification card, relied upon by the Carrier and updated and maintained by the Claimant, does not reflect that he is FRA qualified.

The Claimant is responsible to ensure that his qualification card is accurate and his failure (inadvertently or otherwise) to list his FRA qualification for more than 20 years cannot sustain this claim. There is no record of the Claimant's FRA-qualification preceding the date he bid on the position and continuing through August 2007.

In short, the Carrier complied with the Agreement when it determined that the Claimant was not the "senior qualified applicant." Accordingly, this claim is denied in its entirety.

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 15th day of December 2010.