

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40926
Docket No. MW-41075
11-3-NRAB-00003-090426**

The Third Division consisted of the regular members and in addition Referee William R. Miller 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 Mr. A. Hellbusch to the Group 6 System Tie & Rail Inspector positions for Gang 9089 on Bulletin 282 effective March 27, 2008 and instead assigned junior employee G. Mumford (System File D-0815U-204/1501885).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Hellbusch shall now “***be awarded the position of System Tie and Rail Inspector as if he had been properly assigned according to bulletin #28 (sic), and compensation equal to the amount he would have been entitled to had he been assigned to perform the previously described duties. That is, Claimant must be allowed the difference in pay between what he is currently assigned to and that of Group 6 System Tie and Rail Inspector for every hour and every day that this violation of our Agreement continues.***”

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.

In March 2008, a Group 6 System Tie and Rail Inspector position for Gang 8953 with headquarters on line in the vicinity of Hiawatha, Kansas, was advertised with the bidding cycle ending on March 24, 2008. The position required that incumbents have the ability to inspect ties for replacement in connection with major tie renewal programs. The Claimant and junior employee G. Mumford both made application for the assignment and neither held seniority in the Group 6 System Tie and Rail Inspector classification. On March 27, 2008, Mumford was assigned to the position.

It is the position of the Organization that Rule 19(b) clearly states that if applicants do not have seniority in the group and class the positions will be filled from qualified employees in the other groups of the Sub-department and "Where ability and qualifications are sufficient, seniority will prevail."

The Organization argued that there is no dispute that the Claimant had superior seniority within the Track Sub-department and further he was qualified and able to fulfill the duties of a Tie and Rail Inspector. It further argued there is no requirement in the Agreement that the disputed position could only be filled by a person holding Foreman seniority. It asserted that many classifications of BMWE-represented employees inspect ties including Sectionmen and Extra Gang Laborers. On the property, it offered a statement from Tie and Rail Inspector C. Roland who stated in pertinent part: "In my opinion, you don't need a foreman's date to do this job, just a good understanding of track conditions and a basic knowledge of the computer." It stated that the Claimant met those qualifications from his prior job experiences and should have been assigned. It concluded that the Carrier erred when it assigned the junior employee rather than the Claimant and it requested that the claim be sustained as presented.

It is the Carrier's position that the assignment of Mumford to the position in dispute over the Claimant was correct because he had previously been assigned various System Foreman and Assistant Foreman positions whereas the Claimant only had seniority as a Kansas Division Laborer, District Laborer, District Sectionman, System Laborer and Track Machine Operator. According to the Carrier, Mumford had the ability and qualification while the Claimant did not. According to the Carrier, positions of System Tie and Rail Inspectors had historically been filled from the ranks of exempt employees who had at one time been Agreement covered Foremen. When the Carrier began migrating some of this work back to the Agreement represented System Tie and Rail Inspectors it promoted to these positions from the Foreman group. In support of its position the Carrier offered records of two employees who were assigned to same on the basis they had been either Division Foreman/Assistant Foreman and/or System Foreman/Assistant Foreman as proof that customarily and historically employees needed those qualification before being assigned. It additionally offered a list of all Inspectors, all of whom had previous seniority as Foremen. It closed by asking that the claim remain denied.

The record is clear that the Carrier awarded the System Tie and Rail Inspector position to Mumford even though he had less seniority than the Claimant did. The Organization insisted that was a violation of the Claimant's seniority rights under Rules 19(b) and 20(e) which state in pertinent part the following:

“Rule 19(b) - Positions of foremen and supervisors will be filled by promotion of available qualified employees. Positions of foremen, supervisors, or other positions that are not filled through bulletining to employees in seniority class will be filled from available qualified employees in the other classes of the seniority group. In the event they are not so filled, they will be filled from available qualified employees in other groups of the subdepartment. Where ability and qualifications are sufficient, seniority will prevail. Management will be the judge with respect to positions covered by this section.

Rule 20(e) . . . In the event there are no qualified employees furloughed or regularly assigned in a lower class, the vacancy or

new position may be filled in accordance with the provisions of Rule 19(b). . . .”

If seniority was the only controlling factor, the Organization would prevail. However, as stated above the Carrier argued that historically before employees could be considered for the position of System Tie and Rail Inspector they had to have prior seniority as a Foreman as a necessary qualification. To buttress that argument the Carrier offered a list of all employees who were assigned as System Tie and Rail Inspectors (28 employees) who either had Division Foreman Class Seniority and/or System Foreman Class Seniority that preceded their respective seniority dates as Inspectors including Inspector Roland who championed the Claimant's cause. A review of that document reveals that all employees previously assigned to a System Tie and Rail Inspector position had prior seniority as a Foreman and no one had been assigned to those positions that did not have Foreman seniority. In summary, the evidence indicated that the Carrier has customarily assigned Tie and Rail Inspectors based upon their prior Foreman experience. There was no significant rebuttal made to that argument and evidence. Therefore, the Board finds and holds that the Carrier was within its rights to select the junior employee rather than the Claimant and there was no violation of the Agreement.

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 24th day of March 2011.