

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40941
Docket No. MW-41038
11-3-NRAB-00003-090391**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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. J. Mussman to one of the Group 6 System Tie & Rail Inspector positions for Gang 8953 on Bulletin 274 effective March 13, 2008 and instead assigned junior employe M. Mazur (System File D-0815U-201/1501429).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Mussman shall now “***be awarded the position of System Tie and Rail Inspector as if he had been properly assigned according to bulletin #274, 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.

The issue presented by this claim is whether the Carrier violated the Claimant's seniority rights when it promoted a junior employee to the Group 6 Section Tie and Rail Inspector position. It involves the interpretation of the following Rules.

"RULE 19 - PROMOTION

(a) Promotion will be based on ability, qualifications, and capacity for greater responsibility and where these requirements are sufficient, seniority will prevail.

(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 the other groups of the Sub-department. Where ability and qualifications are sufficient, seniority will prevail. Management will be the judge with respect to positions covered by this section."

The Carrier advertised four Group 6 Section Tie and Rail Inspector positions for Gang 8953 in March 2008. Three assignments were made to employees with Group 6 seniority. The fourth was given to an employee with less Track Sub-department seniority than the Claimant. There is no dispute that neither employee had seniority in the classification. The Carrier explained that it determined that the

Claimant was not qualified because, in accord with historical practice, it considered previous Foreman seniority to be evidence of ability, qualification and the capacity for greater responsibility. Because the Claimant had no Foreman seniority, and only worked as a Track Machine Operator and Sectionman, and the junior employee assigned the position had previous Foreman and Assistant Foreman seniority and experience, the Carrier concluded that the junior employee was the senior qualified employee for the position. This claim protests such determination.

The Organization argues that seniority has been recognized as the cornerstone of a collective bargaining agreement and a valuable property right, citing Second Division Award 2910 and Third Division Award 20310. It asserts that it made out a prima facie violation of the Agreement because there was no showing that the Claimant did not have sufficient ability for the Inspector position, that there is any requirement for Foreman seniority listed or necessary to qualify for this position, or that the “sophisticated electronic equipment” referenced was anything other than a laptop computer and the ability to download programs and information which almost everyone can do. The Organization points to the fact that this is a sufficient ability clause, not a comparative ability clause, maintaining that the Carrier’s assessment of the junior employee as being better qualified than the Claimant is irrelevant and cannot negate his contractual seniority right to preference over the junior employee, relying on Third Division Awards 27628, 30752 and 39322. It requests that the Claimant be assigned to the position and compensated for all lost earnings associated with this promotion.

The Carrier contends that the burden of proof in a fitness and ability case such as this remains with the Organization which must show that the Claimant was qualified for the position he seeks, citing Third Division Awards 21615, 21932, 26257 and 31930. The Carrier notes that it has the managerial prerogative to determine qualifications for a position and, under Rule 19 (b) specifically, is the sole judge of fitness and ability for promotion, so long as its action is not arbitrary or capricious, relying on Third Division Awards 24193, 29351, 30274 and 37999; Public Law Board No. 7100, Award 15; Special Board of Adjustment No. 279, Awards 39, 59, 204 and 267. In this case the Carrier asserts that the Claimant’s qualifications were not sufficient to perform the difficult and critical job of identifying ties that need to be replaced, and that promotion is not strictly based on seniority. The Carrier argues that this determination is in accord with its historic practice of looking to

Foreman and Assistant Foreman experience in establishing qualification for the Section Tie and Rail Inspector job, pointing to the list of employees holding this position and noting that all have had such experience and seniority prior to obtaining the Inspector position. The Carrier asserts that considering this type of experience is not arbitrary because Foremen supervise renewal and restoration of ties, do spot checking for their replacement, and utilize computers in a similar manner in performing their job responsibilities. Because the Organization failed to establish the Claimant's qualifications for the position, the Carrier submits that it did not meet the burden of proving a violation of the Agreement

A careful review of the record convinces the Board that the claim must fail. We acknowledge that the Carrier has the right to set reasonable qualifications for its jobs, and to make fitness and ability determinations that are not arbitrary. See Third Division Awards 29351 and 31201. Under Rule 19(b) the parties clearly acknowledge management's authority to judge qualifications for promotion, as well as the fact that seniority is determinative only where ability and qualification are sufficient. The Organization did not adequately rebut the Carrier's evidence that all prior candidates for the Section Tie and Rail Inspector position had either Division or System Foreman seniority (establishing its historical practice and its consistent application) or its explanation that there were valid rational bases for its conclusion that those positions provided opportunities for experience related to recognizing when ties needed to be renewed or replaced and also revealed capacity for greater responsibility and computer-related skills necessary for the job. The Organization was also unable to rebut the Carrier's position that the Inspector job at issue was one that has a key impact on the gang's high production capacity, and was not one that someone could go into without knowledge and experience and receive a training period to familiarize himself after being awarded the position. Thus, we conclude that the Organization failed to meet its burden of proving that the Claimant was qualified or that the qualification determination made by the Carrier in this case was arbitrary, unreasonable, or capricious.

AWARD

Claim denied.

Form 1
Page 5

Award No. 40941
Docket No. MW-41038
11-3-NRAB-00003-090391

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.