

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40994
Docket No. MW-41307
11-3-NRAB-00003-100172**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 Carrier violated the Agreement when it failed and refused to assign Mr. D. Johnson to the advertised Brandt Power Unit position on System Gang 9450 and when said position was assigned by bulletin to junior employe M. Gore (System File WGF-2008-50/1515482 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Johnson shall now be compensated for the difference in pay between the Brandt Power Unit restricted pay and spike puller system rail starting on October 24, 2008 and continuing and the bulletin assignment shall be corrected to reflect the Claimant as being assigned.”

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 Claimant holds a Roadway Machine Operator seniority date of August 10, 1981. M. Gore is junior to the Claimant, holding a Machine Operator seniority date of March 3, 2006.

Bulletin GSSM05492 dated October 10, closing October 20, and effective October 24, 2008, advertised a Roadway Machine Operator position for a Brandt Power Unit on Gang 9450. According to the Carrier — and due to protest by the Organization — that bulletin was canceled because certain qualifications were not listed on the bulletin. Bulletin GSSM05503 dated October 24, closing November 3, and effective November 7, 2008, re-advertised the position.

The Claimant submitted bids under both bulletins. Gore submitted a bid under the second bulletin only. The Carrier's bid records show that the Claimant was marked unqualified under both bulletins. The Carrier's bid records also show that Gore was marked unqualified under the second bulletin. Although marked unqualified at the time, the position was awarded to junior employee Gore. This claim followed.

Rule 19(a) provides:

“Promotions will be based on ability, merit and seniority. Ability and merit being sufficient, seniority will prevail, the management to be the judge subject to appeal.”

“Qualification, fitness and ability to perform a job are determinations to be made by the Carrier, subject only to limited review by the Board as to whether the Carrier was arbitrary in its determination.” See Third Division Award 35808. In simple terms, by the Carrier's bid records, the Carrier had two unqualified employees and awarded the position to the junior unqualified employee. We find that arbitrary. Rule 19(a) dictates that if the Carrier is going to award a position as between two unqualified employees, it must do so based on seniority.

Rule 20(b) does not change the result:

“When vacancies advertised under this Rule are not filled by reason of no bids from qualified employees, the position will be filled by (1) appointment of the junior unassigned qualified employee in that classification; (2) appointment of the junior qualified employee, from the

next lower classification; or (3) the hiring of a new employee, in that order.”

The Carrier’s bid records show that at the time Gore submitted a bid and was awarded the position, he was unqualified. Rule 20(b) requires a “qualified” junior employee. Rule 20(b) therefore does not apply.

The fact that other records of the Carrier show that Gore was qualified on the Brandt equipment does not change the result. Although the Carrier states in its January 9, 2009 letter that its records show that “. . . the Machine Operator’s Qualification Database (MOQD) . . . shows Mr. Gore was qualified as a Brandt Power Unit Operator prior to the bulletin and assignment of Bulletin Number GSSM05503 . . .,” from examination of that document we cannot tell if that qualification came before the bidding process or after Gore began working on the equipment. The bid records, however, show that Gore was not qualified when the bid was posted and awarded. Those bid records must be given the determinative weight in this case.

As a remedy, the Claimant shall be awarded the position and made whole.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of July 2011.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 40994 – DOCKET MW-41307

(Referee Edwin H. Benn)

It is apparent that the Referee fell victim to a new argument made by the Organization's advocate for the first time while presenting the case during the Referee Hearing. The Organization's advocate, who has no prior experience with regard to the BMW – UP Agreement, put his own spin on what the vacancy bulletin printout terminology meant. This is the same language which has been used since 1987 at the inception of the Carrier's Gang Management System and has never been interpreted to mean what the Majority now says it means. If the author of BMW's Submission or its advocate before the Board would have checked with their constituents they would have known that the Machine Operator Data Base is used to determine qualification for assignments to vacancies. Moreover, they would have been educated with regard to the number of meetings and exchanges of correspondence including Letter Agreements which have been written and signed concerning this issue.

Stated differently, it is unfortunate that the Referee relied upon argument not made during the on-property handling of this case to make his decision to sustain the claim when he wrote, in part:

“The fact that other records of the Carrier show that Gore was qualified on the Brandt equipment does not change the result. Although the Carrier states in its January 9, 2009 letter that its records show that ‘. . . the Machine Operator's Qualification Database (MOQD) . . . shows Mr. Gore was qualified as a Brandt Power Unit Operator prior to the bulletin and assignment of Bulletin Number GSSM05503 . . . ,’ from examination of that document we cannot tell if that qualification came before the bidding process or after Gore began working on the equipment. The bid records, however, show that Gore was not qualified when the bid was posted and awarded. Those bid records must be given the determinative weight in this case.”

While the impact of this decision will be mitigated because the Carrier implemented a new bid and bulletin system during the intervening period, which removes this terminology (which did not signify what the author of BMW's Submission portrayed) it nevertheless requires this vigorous dissent because the

author of BMW's Submission inappropriately affected the outcome of the case and led to the Majority's erroneous conclusion. In short, the Award stands as one more example of new argument adversely impacting the outcome of a case. The Carrier will continue to use the Machine Operator Qualification Data Base to determine qualification for assignments and apply the Agreement.

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Michael C. Lesnik

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July 20, 2011