

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41043
Docket No. MW-40882
11-3-NRAB-00003-090170**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(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. M. Galvan, Jr. to foreman position on Gang 3065 advertised on Bulletin 1779 and instead assigned junior employe H. Cruz (System File MW-07-154/1491447 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now correct Bulletin 1779 to show Claimant M. Galvan, Jr. as the assignee and with seniority as foreman on the applicable roster and the Claimant shall be compensated for the difference in pay between what he earned and what he would have earned had he been properly assigned to the aforesaid foreman position beginning November 9, 2007 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.

Bulletin No. 1779 issued October 26, 2007, advertised a permanent Track Foreman position on Gang 3065 effective November 9, 2007. When no employee holding seniority in the Foreman classification bid for the position, the Carrier promoted H. Cruz, who is junior to Claimant M. Galvan, Jr. Both held seniority in the Assistant Foreman classification at the time the promotion decision was made. The Organization timely filed this claim. The Carrier lists the Claimant as "Qualified" on the bid form to fill the position.

Rules 19 (a) and (b) as well as Rule 20 (b) are the operative provisions that govern the determination of this claim. The Rules provide, as follows:

"Rule 19. (a) 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."

(b) In the application of this Rule, the senior employee in the next lower classification within the sub-department will be given preference with due regard to their ability and merit in filling vacancies in higher classifications.

Rule 20 (b) 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 Organization argues that the record evidence establishes that the Claimant is the senior qualified employee in the next lower classification. According to the Organization, he should have been promoted to the Foreman position on Rail Gang 3065 in November 2007.

The Carrier argues that the Claimant was not qualified to fill the position. It relies on a statement filed by Manager of Track Maintenance (MTM) Tyk provided by the Carrier during the on-property handling of this claim:

“After some investigating on Mr. Galvan’s past work history I feel that the right decision was made. He lacks the leadership skills it takes to operate The Todays RailRoad (sic). Not saying he will never get there but at the time I feel he wasn’t ready.”

The Carrier notes in its arguments that the Claimant was disqualified from an Assistant Foreman position. That disqualification is not in dispute. The record is devoid of any evidence as to when he was disqualified or the reason for the disqualification. The Organization acknowledges that the Claimant was disqualified from System Curve Gang 9112 but notes that Gang 3065 is a Rail Gang.

The Board’s mode of analysis regarding a promotional claim was set forth in Third Division Award 36902 as follows:

“In line with consistent determinations made over many years, the Board finds that once the Carrier stated that the Claimant lacked the fitness and ability for the position, its burden of proof shifted to the Organization to demonstrate by sufficient probative evidence that the Carrier’s actions were in error.”

The Organization failed to submit any evidence to address this shifting burden. It did not submit any evidence to rebut the Carrier’s contention that the Claimant lacked the leadership skills necessary for the Foreman position. The Carrier had a rational basis for its decision. Third Division Award 10403 cited Third Division Award 3273 wherein the Board held: “Where there is evidence, which if believed, is sufficient fitness and ability for the position sought, the judgment of the Carrier will not be disturbed.” The Board concludes that the

**Form 1
Page 4**

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Organization did not present sufficient evidence in this case to disturb the Carrier's determination.

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 23rd day of August 2011.