

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41045
Docket No. MW-40884
11-3-NRAB-00003-090181

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud 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 Agreement was violated when the Carrier failed and refused to assign Mr. J. Courtney to the machine operator position on Gang 2267 advertised on Bulletin 13980 and instead assigned junior employe J. Obregon (System File MW-07-155/1491448 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now correct Bulletin 13980 to show Claimant J. Courtney as the assignee and with seniority as machine operator on the applicable roster, and the Claimant shall be compensated for any wage loss (the difference in pay between what he earned and what he would have earned had he been properly assigned to the aforesaid machine operator position) beginning September 28, 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.

By Bulletin No. 13980, the Carrier advertised a Machine Operator (backhoe) position on Gang 2267 on the Palestine Seniority Division. The Carrier promoted junior employee J. Obregon instead of Claimant J. Courtney effective September 28, 2007. At the time of the promotion, the Claimant held seniority as a Truck Driver and as an Assistant Foreman. In the very same bulletin cycle and effective September 28, 2007, the Carrier granted the Claimant's bid for a Foreman position at a higher rate of pay than the Machine Operator position, at issue here. The Organization notes that the Machine Operator bid was the Claimant's first choice.

The resolution of this claim is governed by the application of Rules 19 and 20.

"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.**

* * *

Employees accepting promotion and failing to qualify within thirty (30) days may return to their former positions without loss of seniority.

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 qualification; (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 contends that the promotion went to the senior qualified employee. There is no dispute that Obregon is junior to the Claimant; however, the Claimant was not qualified on the backhoe. The Claimant maintains that Supervisor Escamilla provided Obregon the opportunity to train and qualify on the backhoe before providing that opportunity to him.

This underlying training issue has its roots in an understanding the Carrier and the Organization reached in 2003. The understanding addresses the maintenance of a database of employee qualifications. It was memorialized in a letter dated July 9, 2003. In pertinent part, it provides, as follows:

“Notwithstanding our respective positions on this matter, it was agreed that an employee’s qualifications would be entered into the database. The employee may make application to be trained on equipment that he/she is not qualified upon. If the equipment comes up for bid before the employee has been trained, the employee has bid on the position, and is the senior bidder, he/she will be assigned to the position and will be given full cooperation and assistance in his/her efforts to qualify. It is understood that the request for training must be on record at least 60 days prior to the position coming up for bid. It is further understood that if an employee is not shown in the database as being qualified on a piece of equipment, the employee will not be permitted to displace onto that position.”

The Carrier placed in evidence an unsigned document which indicates that the Claimant asked for training on August 13, 2007 - 32 days before the position came up for bid. The Organization notes the document is unsigned. It argues that the Carrier is slow in updating this database. However, there is no evidence in the record that

demonstrates that the Claimant asked for training more than 60 days before the Machine Operator (backhoe) position came up for bid.

The Carrier makes the initial decision about the qualifications of employee applicants for the position. See Third Division Award 36902. Then, the Organization must prove that the Carrier's determination was arbitrary, or that it represents an abuse of its discretion. At the time the Carrier made the promotion decision, the Carrier determined that the Claimant was not qualified on the backhoe; Obregon was qualified. The Carrier did not make its decision based on a relative ability comparison of the Claimant and Obregon. Rather, the Carrier determined that the Claimant did not have sufficient ability to fill the position. The Board concludes that the Carrier did not abuse its discretion when it determined that the Claimant did not have sufficient ability to fill the Machine Operator (backhoe) position.

The Organization argues that the Claimant should have been afforded 30 days to demonstrate his ability to operate the backhoe. That provision of Rule 19 comes into play only after the Carrier makes its initial promotion decision. See Third Division Award 10403. The Board concludes that the Organization failed to establish that the Carrier violated Rules 19 and 20 when it made the promotion decision at issue here.

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.