

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41650
Docket No. MW-41763
13-3-NRAB-00003-110378

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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. A. Clark to the bulletin for a restricted work equipment mechanic position on Gang 9822 on April 9, 2010 and continuing (System File UP725BT10/1537998 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Clark shall now ‘. . . be paid difference in pay between a mechanic apprentice (\$23.84 per hour) and a restricted mechanic position (\$25.90 per hour), for all hours worked by gang 9822, including overtime, from April 9, 2010 and until Mr. Clark is assigned to the restricted position. This claim also includes any additional mileage incurred and overtime pay for additional time traveled and continuing until such time that the Carrier correctly places Claimant as a Restricted Mechanic.***”

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 entered the Carrier's work equipment trainee program in September 2007. This dispute arises from the Carrier's refusal to promote the Claimant to an advertised Restricted Work Equipment Mechanic position on Gang 9822 on April 9, 2010. The claim is premised on Rules 19(a) (Promotion) 20(b) (Advertisement of Positions) and Section 6(b) of the January 1, 2000 Training Agreement, which provides, in pertinent part:

"Trainees who have successfully completed the first period of the training program will be eligible for promotion into the position of Work Equipment Mechanic. Such promotions will be made in the order in which trainees entered the training program. Trainees may only be promoted to positions on the seniority territory where employed. Such trainees, however, must continue in the training program and must successfully complete the program in the time allowed. Failure to do so will result in forfeiture of seniority as provided in Section 3(c) above."

The Training Agreement for Work Equipment Mechanics contemplates trainees accepted into the apprenticeship program will be subject to four different training periods of 122 work days each, the first being a probationary period, and will be given work experience, classroom instruction and homework. Trainees are required to take and pass examinations on various elements of the job that form part of the instruction. The Claimant was a trainee in this program in excess of the 488 work days required, but, on April 5, 2010 when the Restricted Mechanic position on Gang 9822 was posted, he had not yet completed the required Advanced Welding Course or taken the certification exam. The Carrier found that there were no qualified bidders for this

position when the posting period closed on April 9, 2010, giving rise to the filing of the instant claim. The record contains the statement of Manager Ken Watson, who explains that the Claimant had the Basic Welding training in March 2010 but did not take his Advanced Welding course until the end of May 2010, and received his Advanced Welding Certificate on May 28, 2010. Watson notes that, because the Restricted Mechanic position had not been filled, it was re-bulletined in June and the Claimant was awarded it. Watson also rebutted the contention by the Organization that the Claimant trained another employee to do the job that he was not awarded, indicating that he was sent to familiarize Operators with the equipment, but not to make the repairs, because there was a senior mechanic present to do so.

The Organization argues that the Claimant had completed 671 work days in the training program, was working on the position of a Mechanic Apprentice performing all duties of the posted job, including training others to perform the job, but that the Carrier failed to timely permit him to take an exam to demonstrate his welding qualifications. It asserts that the Claimant established his fitness and ability to perform the work by regularly and sufficiently doing the job and training another employee to do so. Because he possessed sufficient ability and seniority for the posted position, the Organization maintains that he should have been awarded it on April 9, 2010, and that he should be compensated for the difference in pay between that date and the date he assumed the position. Furthermore his seniority date in the classification should be adjusted to reflect April 9, 2010.

The Carrier contends that the Claimant was denied the posted position on April 9, 2010 because he did not meet the qualifications for the job, inasmuch as he did not have the required Advanced Welders Certificate, a necessary skill for the position of Restricted Mechanic. It notes that the Carrier retains the managerial right to determine ability, merit and capacity for greater responsibility when making promotion decisions, citing Rule 19(a) and Third Division Award 36976. The Carrier argues that once it had determined that the Claimant did not meet the qualifications for the position, the burden shifted to the Organization to demonstrate that the Claimant was qualified, relying on Third Division Awards 21615 and 39706. It states that the Organization failed to meet its burden, because no direct evidence was furnished by the Claimant and it is admitted that he did not possess the Advanced Welders Certificate. The Carrier notes that once the Claimant met all job qualifications he was immediately awarded the still vacant position.

A careful review of the record convinces the Board that the Organization failed to meet its burden of proving a violation of the Agreement. It is undisputed in the record that the Claimant did not possess his Advanced Welders Certificate when he bid on the posted position in April 2010, and that such requirement was necessary to the proper performance of the Restricted Mechanic job. Thus, the Carrier established that its determination that the Claimant was not qualified for the job when he bid in April 2010 was a reasonable exercise of its managerial discretion to determine qualifications, as well as skill and ability for promotions. The Organization was unable to meet its burden of showing that the Claimant was, in fact, qualified for the job by merely asserting that he had trained another employee (a fact that was rebutted by the Manager) or that he had worked on the job for a lengthy period. See, Third Division Award 39706. Further, the Organization presented no evidence that the Carrier unreasonably or unnecessarily delayed the Claimant's Advanced Welder training or testing. Because it is admitted that the Claimant received the position in June 2010 after he had obtained his Advanced Welders Certificate, there has been no loss of wages or seniority established in this case.

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 April 2013.