Award No. 6256
Docket No. MW-6436

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the effective agreement when they failed to call Steel Bridge Mechanics F. O. Murrell and H. C. Witt to perform eight hours of work on Bridge No. 163.6, on September 22, 1951 and in lieu thereof, called junior Steel Bridge Mechanics;

(2) That F. O. Murrell and H. C. Witt, be allowed eight hours pay each, at the applicable time and one-half rate because of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier maintains a system Steel Bridge Gang which is under the supervision of Foreman E. F. Turner, consisting of a number of Steel Bridge Mechanics, among whom are the following:

Name	Seniority as Steel Bridgemen
H. C. Witt	July 7, 1925
F. O. Murrell	November 26, 1926
A. S. Kimmel	October 31, 1941
W. E. Burpo	December 9, 1948

The terms "steel bridgeman" and "steel bridge mechanics" are used synonymously on the property.

The Steel Bridge Gang above referred to was regularly assigned to work Mondays through Fridays, with their regularly assigned rest days designated as the Saturdays and Sundays of each week.

On Saturday, September 22, 1951, the Carrier required the services of two steel bridgemen, and notified steel bridgemen A. S. Kimmel and W. E. Burpo that they would be required to perform the Saturday work.

Steel bridgemen H. C. Witt and F. O. Murrell, who are senior to the steel bridgemen who were assigned the Saturday overtime work, were not

the work week here involved, the Carrier was required under this rule to use the regular employe for this work. Steel Bridgemen Kimmel and Burpo are the regular employes who perform electric welding work in this steel bridge gang, and under the provisions of this rule they were entitled to this work and properly used when that was done. If the Carrier had failed to use them no doubt they would have made claim account not used in accordance with this rule. The Carrier is not required to use both the senior employe and the regular employe, or two employes, for the same work. This rule, under the facts and circumstances here involved, clearly required the use of the regular employes or Kimmel and Burpo for the electric welding work on Saturday, September 22, 1951, which was not a part of any assignment, and did not require but prohibited the use of the senior employes or Witt and Murrell, the claimants in this dispute.

This handling is also in accordance with various awards of the Adjustment Board that any overtime work on any particular job, in the absence of a rule to the contrary, belongs to the incumbent of that position and not to some other employe regardless of seniority. If the overtime work in this instance had been on a regular work day, instead of an assigned rest day, Kimmel and Burpo would have been entitled to the work and not Witt and Murrell or any other senior employe on basis of such Board awards.

The claim here is also for punitive or time and one-half rate for work not performed. The agreement rules provide for payment of punitive or time and one-half rate for work performed under certain conditions, but they do not provide for such payment for work not performed. While this claim is without merit under the facts and agreement rules here involved if the claim was valid, the proper payment would be at pro rata rate, instead of the punitive or time and one-half rate claimed. This is supported by Award No. 4432, involving the same parties and agreement, in which the Board held, in part, in its Opinion, as follows:

> "The Claimant is therefore entitled to the work lost because of the failure of the Carrier to give the overtime work to the senior employe qualified to perform the work. The wage loss to Claimant is the pro rata rate of the position for the number of hours lost because of the agreement violation."

For each and all of the foregoing reasons the Carrier did not violate the effective agreement, as alleged but not affirmatively established by the Petitioner, in this instance, but as a matter of fact, the whole record and all the evidence conclusively show the Carrier complied with the provisions of the Agreement, and therefore this claim is without merit and agreement support.

The Carrier respectfully requests that the Board deny the claim.

Except as expressly admitted herein, the Carrier denies each and every, all and singular, the allegations of the Petitioner's claim, original submission and any and all subsequent pleadings.

All data submitted in support of Carrier's position as herein set forth have been heretofore submitted to the employes or their duly authorized representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The complaint here is that the Carrier used Steel Bridge Mechanics A. S. Kimmell and W. E. Burpo to perform work on Saturday, September 22, 1951, and did not call Claimants, F. O. Murrell and H. C. Witt, who are in the same gang as Kimmel and Burpo and who hold greater seniority than the latter two. September 22 was the rest day for the members of this gang.

The Employes cite and rely primarily upon Award 4393, involving the same Carrier and Organization involved here, and also involving the same type of work, structural steel welding. That Award would be strong support for the present claim were it not for the existence of one significant difference between the two cases. In Award 4393 there was no contention or indication whatsoever that the senior employes there making the claim were not reasonably qualified to do the necessary welding.

In the present case, on the other hand, the conclusion is inescapable that Claimants were absolutely unqualified to do the work with reasonable proficiency. The work required knowledge and skill which could have been obtained only by considerable previous electric welding experience. Neither Witt nor Murell had previously performed any electric welding work.

In seeking to minimize the weight to be given to the "qualification" factor in this type of case, the Employes quote from Award 5092 wherein it was stated that "The Board has held many times that it is the work assigned in controversies of this kind which governs, and not the qualifications of the employe chosen by the Carrier to do the work." Without indicating either agreement or disagreement with any part of the just-quoted statement, it suffices to say that there is no room for its application under the circumstances of the present case where, as has been noted, the senior employes making the claim were absolutely unqualified to do the work in question. In Award 4432, involving the same Carrier and Organization involved here, this Division said: "We think the senior **qualified** employe is entitled to the work. (Emphasis added.) Also see Award 5940.

And the Record permits no other conclusion than that Claimants were unqualified. Especially enlightening in this respect is the handling of the claim on the property. [The claim for each of the Claimants, Witt and Murrell, was handled on the property by a special series of letters—the letters for each man were essentially the same, however, making it unnecessary to consider both series of letters individually here.] For instance, by letter of November 20, 1951, Assistant General Manager A. F. Winkel directed a letter to General Chairman Jones, stating: "It would seem the work performed was electric welding; that Mr. Murrell had not performed electric welding and was not qualified to perform electric welding. Is it you dispute the statement of the Chief Engineer that Mr. Murrell was not qualified to perform electric welding?" General Chairman Jones' response of November 28, 1951, completely avoided the issue of qualifications, and defended the claim entirely on the basis of the seniority factor. Accordingly, by letter of December 3, 1951, Mr. Winkel again asked whether Claimants disputed the statement of the Chief Engineer that Mr. Murrell was not qualified to perform the work. And again, by letter of December 12, 1951, Mr. Jones responded making reference only to the seniority factor. So, by still another letter, that of December 17, Mr. Winkel again posed the unanswered question. This time, by letter of December 18, Mr. Jones responded that "Mr. Murrell has not at any previous date been afforded an opportunity to determine whether or not he could perform services as an electric welder." To this Mr. Winkel responded by letter of January 4, 1952:

> "Have investigated further with the Chief Engineer concerning the allegations contained in your letter of December 18, 1951, to the effect that Mr. Murrell was not afforded an opportunity to learn electric welding. Chief Engineer advises that Mr. Kimmel was taken off of welding early in 1951 and the other men in the gang were urged to learn to perform electric welding. On refusal of all other men in the gang to learn electric welding, Mr. Kimmel was permitted to return to the business of performing electric welding and was the qualified member of the gang to perform this service. The business in which Kimmel and Burpo were engaged on September 22, 1951 was that of adding metal to the main stress carrying members of the steel bridge by electric welding in order to strengthen these members and permit the bridge to carry heavier loads. The work required the services of a skilled welder for which work Murrell had failed to qualify himself."

Upon receipt of this letter, Mr. Jones requested by letter of January 7, 1952, that the matter be discussed at their next conference. Mr. Winkel agreed to this. The Record contains no minutes of the conference, but letters exchanged between the parties subsequent to the conference indicate that nothing new in the way of contentions or denials resulted at the conference; at least the letters themselves contain nothing new in either respect. Thus, in so far as can be determined now, in handling the claim on the property the Employes at no time denied the Carrier's contentions as to Claimants' lack of qualifications.

Indeed, nowhere in the Record is there a denial or anything that can reasonably be taken as a denial of Carrier's contentions that Claimants were not qualified and had failed to take advantage of opportunity to learn to do welding. Certainly the Carrier's contentions along these lines have not been adequately refuted. The nearest thing to a denial was made not during discussion of the claim on the property, but after the case was submitted to this Division, when, in one of their submissions, the Employes declared: "Surely, an employe who has long since qualified as a Steel Bridgeman must be assumed to be qualified to perform all the duties and requirements of the position or else have been disqualified as such long ago." Possibly there should be a presumption as contended by the Employes. But certainly any such presumption should be prima facie only, not conclusive. And the Record simply does not establish actual existence of that which is suggested by the presumption; the Record, to the contrary, requires the final conclusion that Claimants were not qualified to do the work and had failed to take advantage of opportunity to learn to do it.

However, it cannot be said that Claimants have failed to fulfill the obligations of their job. Their failure to qualify for electric welding work is explained by the Record, which shows that past practice on this property has been not to require all steel bridgemen to learn to do electric welding work. The Carrier explains one result under this past practice to be that "Both of the claimants involved are the two senior steel bridgemen in this gang and therefore their seniority will permit them to hold a regular job without qualifying for and performing electric welding work." Thus, Claimants have not failed to qualify for work required of them; rather, they have simply taken advantage of a choice made available to them by past practice, and have elected not to qualify for electric welding work.

It might be noted in passing that the Employes also urge, somewhat inconsistently it seems, that "when a person qualifies as a Steel Bridge Mechanic, he is qualified for any and all work of that class and the Carrier may not unilaterally compel occupants of certain such positions to qualify to any greater extent than other similar classes of employes." The answer to this argument is that the Carrier obviously has not **compelled** any one of the four employes herein involved to qualify to any greater extent than any of the remaining three. The Carrier under established practice has simply permitted the employes to elect whether or not to qualify for electric welding work, work which customarily has been performed by the type of gang to which Claimants belong [also, in this connection, see Paragraph 9 on page 37 of Agreement No. DP-173, effective September 1, 1949, between the Carrier and Organization involved here; this provision recognizes the propriety of performance of welding work by steel bridgemen].

In the circumstances of this case it would be manifestly unjust to require the Carrier to assign electric welding work to Claimants merely because of their seniority. Indeed, it would be unjust to Claimants themselves, for if they have a right to demand the work, the Carrier has a right to demand that they perform it with reasonable proficiency. The Record leaves serious doubt that they could have done so had they been called and accepted the call on September 22, 1951.

Had Claimants in the past been refused opportunity to qualify for electric welding, or were the Carrier to refuse to honor a future request by

Claimants that they be given opportunity to learn electrical welding work by being permitted from time to time to perform less important and intricate electrical welding work than that involved in the present case, then the Carrier would obviously be subject to a reasonable charge of violating the agreement. But so long as Claimants by choice fail to qualify for electric welding work they cannot be justified in demanding that they be given important welding work such as is involved here.

What the Carrier asks in this case is not unreasonable. It does not ask that the senior employe possess greater qualifications than his juniors to do the work in question; nor does it ask even that the senior employe be equally qualified as compared to his juniors. The Carrier asks only that the senior employe be qualified to perform the work with reasonable proficiency. The Record supports the Carrier's action in the present case and it can only be concluded that the Carrier did not violate the Agreement when it called Kimmel and Burpo instead of Claimants for electric welding work on January 22, 1951.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the agreement.

AWARD

Claim (1) and Claim (2) both denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 7th day of July, 1953.