

Award No. 8132
Docket No. MW-7416

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY 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 permit Section Laborer G. P. Bausch to fill a position of tie tamper operator which was established on an extra gang effective as of April 16, 1953, and in lieu thereof assigned the position to a newly hired employe who held no seniority rights under the Agreement;

(2) Mr. G. P. Bausch now be reimbursed for the exact amount lost while improperly denied and withheld from filling the position referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: As of April 16, 1953, the position of tie tamper operator was established on Extra Gang No. 17, with headquarters at Cassville, Wisconsin.

When positions in the Roadway Equipment Machines Sub-department, such as a tie tamper operator, are not filled by employes holding seniority in that sub-department, the Agreement rules provide that preference will be given to qualified applicants from other sub-departments for such positions.

Prior to April 16, 1953, Section Laborer G. P. Bausch made application for the aforementioned tie tamper's position to Track Supervisor, Mr. A. H. Schwab who, in turn, advised Roadmaster, Mr. J. P. Malay, of Mr. Bausch's application for this position. In addition, under date of April 2, 1953, Local Chairman, Mr. L. R. Marshall, addressed Mr. J. P. Malay, Roadmaster, as follows:

"Glen Haven, Wis.
April 2nd, 1953.

Mr. J. P. Malay, Roadmaster
No. LaCrosse, Wis.

Dear Sir:

In making assignment on the Tamping Machine, position, with the Extra Gang, which is soon to start, at Cassville, Wis. That is in event no one from the Work equipment Dpt. desires the position.

tion to assigning claimant to the position. However, the obligation for applying for a position under Rule 24(i) and Rule 28 rests upon the employe who desires the position to file his application with the officer who issues the bulletin. There is no provision in the agreement which will permit a local chairman to file an application for a position for anyone except himself. The record is clear that claimant did not make application, either in writing or verbally, for the position in question, consequently the provisions of Rule 24(i) are not applicable.

In conclusion, the Carrier respectfully asserts that:

(1) Claimant's seniority and the scope of his activities is clearly confined to service as a section laborer, and he is not permitted to work in any other capacity unless and until the discipline assessed is modified or removed by the Carrier.

(2) The record is clear that claimant is not a qualified applicant because no application has ever been received by the roadmaster from the claimant requesting the position in question.

In the light of the record, there can be no decision other than denial of the claim in its entirety.

* * * * *

The Carrier affirmatively states that all data herein and herewith submitted has been previously submitted to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: Petitioners here assert that Claimant G. P. Bausch, then classified as Section Laborer, was improperly denied the right of assignment to the newly established position of Multiple Tamper Operator within the meaning of Rule 24(i) the pertinent portion of which provides:

" * * * In the event such positions are not so filled, preference will be given to qualified applicants from other sub-departments for such positions * * * "

Reparations are sought to the extent of all wage loss incurred as the result of this alleged improper action.

The Organization asserts that Claimant was qualified to perform the duties of Multiple Tamper Operator, that request for such assignment was made in claimant's behalf and finally that the Respondent is improperly attempting to restrict service by claimant to that of Section Laborer for the duration of his employment.

The Respondent pointed out that as the result of a prior dereliction of duty which resulted in the demotion of claimant to Section Laborer, the said claimant was not eligible to fill the position in question. In this connection it was pointed out that no timely appeal had been made when the original imposition of discipline, that is claimant's demotion to Section Laborer, had been imposed; and that the Respondent had not vacated or modified its initial decision. It was further asserted that claimant was not qualified to fill the position in question, and lastly that claimant did not make the required application for the said position.

The record indicates that after investigation the claimant was demoted from the position of Section Foreman which he was temporarily holding, to that of Section Laborer. This action took place during October, 1952, at which time the claimant was advised that he stood demoted to Section Laborer.

We cannot agree with the Respondent that its decision as written amounted to a continuing restriction to service as a Section Laborer. The

written decision, while clearly demoting the claimant, made no mention of future restrictions or the duration of the penalty. However, even when the Organization's contention in this connection is considered meritorious we think that this claim cannot be sustained for the reasons that (1) there are conflicts in the record as to the qualifications of claimant to fill the position of Multiple Tamper Operator and (2) Claimant did not file application for this new position as contemplated by Rule 28.

On the question of determination of fitness and ability in filling positions this Board in Award 4040 stated:

" * * * In its consideration of claims involving fitness and ability for a position, this Division of the National Railroad Adjustment Board will not substitute its judgment for that of the Carrier or disturb its action, (1) if it appears such action was taken in good faith and with due regard for both the letter and the spirit of the Agreement; (2) except in those instances where such action is so fraught with bias and prejudice or with manifest intent to circumvent the Agreement as to lead to the conclusion its conduct with respect thereto was arbitrary, capricious and unreasonable; (3) if it appears there was just and reasonable basis for such action; and (4) if it appears from the record the evidence supporting such action was substantial even though there was other evidence of such character reasonable minds might differ as to the construction to be placed upon all the evidence when considered in its entirety."

We here reiterate our adherence to these principles.

As to claimant's making application for this position Rule 28 specifically provides:

"Bulletin Notices covering new positions * * * will be posted for a period of ten (10) days * * * during which time employes may file their applications * * *."

The claimant here made no application for the position in question, therefore Rule 28 was not complied with.

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 effective agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November, 1957.