

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**George S. Ives, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF RAILROAD SIGNALMEN**

**THE LONG ISLAND RAIL ROAD COMPANY**

**STATEMENT OF CLAIM:** Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Long Island Rail Road Company that:

(a) Protest on behalf of T. L. McMillan, senior employe to E. W. Tvrdik, who made application for position 2538, Bulletin 576, dated February 27, 1959. The position was awarded to E. W. Tvrdik in Bulletin 578, dated March 18, 1959.

(b) Claim on behalf of T. L. McMillan for the difference in earnings, overtime included, and the earnings of E. W. Tvrdik, subsequent to March 18, 1959. [Carrier's File: SG-4-59]

**EMPLOYEES' STATEMENT OF FACTS:** On February 27, 1959, Bulletin No. 576 was issued advertising Position No. 2538, Assistant Foreman, with assigned headquarters to be as per the Assistant Foreman's Vacation Relief Schedule.

Bulletin No. 576 is reproduced in part (Sheet No. 1) and attached hereto and is identified as Brotherhood's Exhibit No. 1.

On March 18, 1959, Bulletin No. 578 was issued, awarding Position No. 2538, Assistant Foreman, to Mr. E. W. Tvrdik.

Bulletin No. 578 is reproduced and attached hereto and is identified as Brotherhood's Exhibit No. 2.

Inasmuch as T. L. McMillan, who was senior to Mr. E. W. Tvrdik, made application for Assistant Foreman Position No. 2538 and did not receive any consideration by the Carrier for the position, a protest and claim was filed by General Chairman F. J. Mashek, Jr., with Mr. C. Meyers, Assistant Chief Engineer, under date of March 22, 1959, as follows:

"Please consider this as a protest and claim on behalf of T. L. McMillan No. 1 Signal Maintainer Long Island Rail Road against the awarding of Position No. 2538, Bulletin No. 576, dated Feb. 27, 1959, to E. W. Tvrdik eff. 3-18-1959.

in the Signal Department. This statement was reviewed by the Chief Engineer's staff and it was determined that the claimant was not qualified to cover the vacation relief position.

This Board has previously ruled in Award No. 3537, Referee Carter, that \* \* \* "whether Management has exercised an honest judgment requires an investigation of an intangible thing difficult of ascertainment. We cannot properly substitute our judgment for that of the management because the official charged with the responsibility is usually familiar with the record of the employe, his habits, personality and character, and many other items bearing upon his fitness and ability which cannot reflect in the record presented before this Board." \* \* \*

The Carrier, in summarizing its position, desires to emphasize the following:

1. The Carrier has not bargained away its managerial right with respect to the selection of a qualified employe for promotion to the Foreman Class.
2. The Carrier properly appointed E. W. Tvrdik to the Assistant Foreman position who was the senior qualified applicant.

The Carrier feels that it has conclusively shown that the instant claim is not supported by any provision of the applicable Agreement, the agreed-upon interpretations thereof, or the established practices thereunder.

Consequently, your Board would be required, in order to sustain this case, to substitute its judgment for that of the Carrier, a prerogative which this Board admittedly does not possess.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The essential facts in this dispute are not in issue. A permanent position was advertised as a new position for the Assistant Foreman's Vacation Relief Schedule which was duly advertised and thereafter awarded by the Carrier to the incumbent, an employe with less seniority than the Claimant.

During the panel discussion in this case, it was urged for the first time that the claim should be dismissed on the grounds that the Statement of Claim does not allege that any specific Rule of the Agreement had been violated by the Carrier and, therefore, did not meet the requirements of Circular No. 1, Rules of Procedure of this Board which provide as follows:

"Under this caption the petitioner or petitioners must clearly state the particular question upon which an award is desired."

The Organization member contends that this is a new matter not raised on the premises and, therefore, cannot be considered at this time. We find that the failure of the Carrier to raise this objection on the property or in its submission here, constitutes waiver and is not properly before us. (Awards 10075, 10315 and 11848.)

The Carrier contends that as the Claimant was not the most senior applicant for the position, the Organization has failed to name the proper

Claimant. Numerous prior awards on this Division have held that the essence of such a claim by the Organization is for the alleged violation of the Agreement and that the claim on behalf of any individual Claimant is merely incidental. The fact that the particular claim might have been submitted on behalf of other employes having more seniority than the named Claimant is of no concern to the Carrier. (Awards 1646, 5195, 10575 and 10874.)

The instant dispute will be determined upon its merits and the fundamental issue is whether or not the Carrier violated the effective Agreement between the parties by failing to award an assistant foreman position to the Claimant who was senior to the successful applicant.

The Organization asserts that the Carrier violated the Agreement when it assigned a junior applicant to the position in question without due consideration of the qualifications possessed by the Claimant as required by Rule 47 (b), which is as follows:

**"RULE 47**

(b) Employees covered by this Agreement who possess the necessary qualifications to plan, direct, lead, regulate and coordinate the work of other employees will be given consideration for promotion to positions in the foreman class. When two or more employees do possess the necessary qualifications (referred to in the preceding sentence of this paragraph) the senior employee in the successive lower classes, specified in Rule 34 (c), shall be selected for promotion to the foreman class."

In support of its position, the Organization submitted into evidence a resume of the Claimant's experience which, in part, states that since 1946 he has worked as a leading signalman on two occasions; as acting assistant foreman on one occasion and, in addition, has had wide and diversified experience in correcting signal failures over the entire system of the Carrier. Moreover, the record discloses that since September 1959, the Claimant has been assigned to a position of Leading Signalman which by definition includes certain supervisory duties (Rule 2 (b) of the effective Agreement).

The Carrier contends that it carefully considered the qualifications of the Claimant for the assistant foreman position, as well as those of other senior applicants and found that none of them possessed the necessary qualifications. In this connection the Carrier points out that during a prior dispute between the parties, which it considers to be controlling in this case, it proposed that the parties prepare an examination to determine the qualifications of applicants for such positions. This proposal was rejected by the Organization at that time and the position of the Carrier was upheld in our Awards 11121 to 11124 inclusive.

It is well established under prior awards of this Board that in agreements of this nature, the Carrier has the right to determine the necessary qualifications of its employes and that the Board will not substitute its judgment for that of the Carrier unless it is shown that such determinations were biased, arbitrary or capricious. (Awards 10584, 10459, 10403, 10345 and others.)

In the instant dispute, the Carrier primarily relies on previous awards involving the same issue, parties and rules under similar circumstances. Awards 11121-11124 inclusive (Dolnick). As before, the Organization has offered evidence concerning the experience and work assignments of the

Claimant in support of his qualifications for the position in question, but has submitted nothing of probative value to support its assertion that the action taken by the Carrier was biased, arbitrary or capricious.

It is the opinion of the Board that these recent decisions are not palpably wrong and were applicable to substantially similar factual situations. Under the doctrine of *stare decisis*, we find these prior awards effecting the same issue controlling and the claim must be denied. (Awards 11336, 11449 and 11788.)

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 26th day of June 1964.

#### DISSENT TO AWARD 12669, DOCKET SG-12068

The Majority, consisting of the Referee and the Carrier Members, very properly rejected the Carrier Member's attempt to inject a new issue into the dispute as a means of getting the case dismissed. Likewise the Majority properly rejected the Carrier's contention that the Organization failed to name the proper Claimant. However, the Majority erred in holding that Claimant was properly denied the position for which he made application.

The Carrier did not, as the Majority endeavors to make it appear in the fourth last paragraph of Opinion of Board, make any mention of an examination in connection with a prior dispute or otherwise. Neither did the Carrier rely upon a prior dispute between the parties as being controlling in this case. All of this was just another gimmick injected by the Carrier Member during panel discussion.

In light of the record it is understandable why the Carrier did not suggest an examination for Claimant in this case.

The Majority seems obsessed with the idea that because the Carrier was upheld by the Division in four prior cases involving qualifications of another individual Carrier is entitled to be found faultless in subsequent cases though a different Claimant is involved.

Apparently, the Majority was so carried away by its misapplication of the doctrine of stare decisis that they were unable to distinguish between form and substance.

"\* \* \* Important as consistency is, it must be observed, however, that unless they are grouped, each claim must be approached individually as an ad hoc matter, and that the awards are indeed final and binding as to them, but not to all subsequent claims even of like nature. No formal doctrine of stare decisis ever evolved, even in the common law system of the Anglo-American courts, has become that rigid." First Division Award 19389, Referee Sembower.

Award 12669 completely misses the real issue; therefore, I dissent.

G. Orndorff  
Labor Member