NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23368
THIRD DIVISION Docket Number MW-23337

John B. LaRocco, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
((Pacific Lines)

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

(1) The Agreement was violated when the Carrier failed to provide Welder Robert Quintero with on-the-job training as a welder foreman and when it failed to accord him a fair chance to demonstrate his ability to meet the practical requirements thereof (Carrier's File MofW 138-50).

(2) The Carrier further violated the Agreement when it failed to advise Mr. Robert Quintero of its reason or reasons for disqualifying him as a welder foreman.

(3) The Carrier shall now

(a) accord Mr. Robert Quintero on-the-job training as a welder foreman

and

(b) promote Mr. Robert Quintero to the position of welder foreman with seniority as such retroactive to April 7, 1978

and

(c) allow Mr. Robert Quintero the difference between the welder foreman's rate and the rate at which he has been paid beginning with April 7, 1978 and continuing until such time as he is promoted to and assigned as welder foreman."

OPINION OF BOARD: Both parties have raised procedural objections which, if sustained, would deprive this Board of jurisdiction to adjudicate the merits of the claim. According to the Carrier, this claim for denial of a promotion was not presented to the Carrier within 60 days of the occurrence on which the grievance is based as mandated by Rule 44(1) (a). The Organization asserts that the Carrier failed to respond to the claim within sixty days after it was presented, so that, under Rule 44(1) (a), the claim must be allowed.

On April 7, 1978, the Carrier awarded a vacancy in the Track Welding Foreman position (Class 1) to an employe with less seniority than the claimant. On or about May 9, 1978, the General Chairman sent a claim letter to the proper carrier officer in San Francisco. The Carrier never received the letter. On July 19, 1978, the General Chairman sent another letter to the carrier officer on behalf of the claimant notifying the Carrier that its failure to respond to the May 9 letter operated to automatically allow the claim. The Carrier immediately notified the Organization by letter dated July 21, 1979 that the Carrier had never received the initial claim dated May 9 and the Carrier simultaneously denied the claim.

Based on the above correspondence, we have jurisdiction to hear this claim on the merits because both parties complied with the Rule 44 time provisions. On this property, the parties engage in a regular flow of correspondence through the United States Postal Service. Neither party should suffer hardship if the mail is slow or if mail is lost where such delay or loss is attributable to the postal service. Third Division Award No. 22531 (Edgett). In this instance, there is no proof that either the Organization or the Carrier was responsible for the Carrier's failure to receive the May 9 letter. Therefore, the Organization timely instituted this claim on May 9, 1978. Similarly, the Carrier timely denied the claim on July 21, 1978 since it did not have actual notice of the claim until July 19, 1978.

On the merits, the Organization asserts that the Carrier improperly rejected claimant's application for a promotion from Grinder Operator to Track Welding Foreman because a junior employe was awarded the position. In addition, the Organization argues that the Carrier was obligated under Rule 8 to provide the claimant with on-the-job training so that the claimant might acquire additional skills and demonstrate his qualifications to be a track welding foreman. The Carrier contends that, after due consideration, it determined that claimant lacked the fitness and ability to be a foreman while the junior employe had amply demonstrated his capacity to perform foreman duties.

Rule 7 provides that seniority shall determine advancement from a lower class to a higher class as long as all candidates are qualified. Rule 8 governs qualifications for promotion. The Carrier may determine fitness and ability among competing applicants and this Board will uphold the Carrier's determination provided the Carrier's decision is not arbitrary, capricious or in bad faith. Third Division Award No. 12994 (Hall). As a recent award of this Board ruled, the Organization must show that the Carrier acted arbitrarily or abused its discretion. Third Division Award No. 20724 (Lieberman). Since claimant was applying for a supervisory position (Class 1), the Carrier is vitally concerned in promoting only qualified workers. In choosing a candidate for promotion, the Carrier may exercise some discretion. Third Division Award No. 17612 (Ritter). After reviewing the work records of both the claimant and the junior employe, we find that the Carrier fairly evaluated the qualifications of each worker. The record here does not contain proof of Carrier arbitrariness. Thus, the claimant was not entitled to the promotion to Track Welding Foreman. Correspondingly, his claim for back pay must be denied.

However, Rule 8 imposes dual duties on the Carrier. Not only must the Carrier fairly evaluate the qualifications of all applicants but also it must provide the applicants with on-the-job training. Third Division Award No. 21699 (Ables). Without such training, applicants in claimant's position would have little opportunity to acquire the knowledge and skills essential to advancing to a higher class. In this instance, the Carrier made no effort to provide the claimant with on-the-job training so that he could acquire the level of proficiency necessary to perform Class 1 supervisory duties. Therefore, claimant may, at his option, file an application for the position of Track Welding Foreman. If claimant submits an application, the Carrier shall, in good faith, provide the claimant with on-the-job training. This Board then expects the Carrier to comply with the examination and written notice requirements of subsections (b) and (c) of Rule 8.

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 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 Agreement was violated.

A W A R D

Claim sustained but only to the extent indicated in our Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of August 1981.