

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26295
Docket Number MW-26358

Peter R. Meyers, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Consolidated Rail Corporation

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

(1) The Agreement was violated when the Carrier assigned a junior employe instead of Mr. J. J. Garito to the track foreman's position on Gang 0781 headquartered at Clearfield, Pennsylvania on December 1, 1982 and when the Carrier refused to permit Mr. Garito to exercise his seniority to displace the incumbent track foreman on Gang 0781 at Clearfield on December 5, 1982 (System Docket CR-636).

(2) Mr. J. J. Garito shall be compensated for all wage loss suffered as a consequence of the Carrier's failure and refusal to permit him to fill the foreman's position on Gang 0781 at Clearfield, Pennsylvania beginning December 1, 1982 and continuing until the violation is corrected."

OPINION OF BOARD: The Claimant is employed by the Carrier at its Clearfield, Pennsylvania facility. Claimant holds seniority as a Track Foreman. Over the 7 years preceding this dispute, Claimant exercised his seniority to obtain the position of Production Gang Foreman; the position is available only during the production season. At the end of each production season, Claimant returned to a Foreman's position at Clearfield. At the end of the 1983 production season, Claimant applied for the vacant Foreman's position at Clearfield. On December 1, 1983, Carrier assigned another employee to the position. On December 5, 1983, Carrier did not allow Claimant to use his seniority to displace that employee.

The Organization thereafter filed a Claim on Claimant's behalf, charging Carrier with violations of Rule 3, Section 1, and Rule 4, Section 2(a) of the current Agreement. These Rules provide, in part:

"Rule 3 - Selection of Positions

Section 1. Assignment to position.

In the assignment of employees to positions under this Agreement, qualification being sufficient, seniority shall govern.

The word 'seniority' as used in this Rule means, first, seniority in the class in which the assignment is to be made, and thereafter, in the lower classes, respectively, in the same group in the order in which they appear on the seniority roster."

"Rule 4 - Seniority

Section 2. Exercise of seniority.

(a) Except as otherwise provided, an employee may exercise seniority to a position for which he is qualified:

1. when his position is abolished...."

The Organization contends that the cited Rules clearly provide that when employees are qualified for a position, seniority shall govern in the assignment of the employees; further, employees may exercise seniority to positions for which they are qualified when their former positions are abolished. The Organization argues that under these Rules, Claimant was entitled to be assigned to the disputed position on December 1, and also was entitled to displace the employee in that position on December 5.

The Organization points out that Carrier does not dispute Claimant's superior seniority, but Carrier erroneously found that Claimant was not qualified for the position because he does not have a valid driver's license. The Organization argues that there is no past practice, Agreement, or Rule requiring that an employee have a valid driver's license to qualify for the position. Carrier neither denies nor disputes that Claimant held the disputed position in the past, although he never has had a valid driver's license. The Organization argues that past practice proves that a valid driver's license is not required to qualify for the disputed position.

The Organization further argues that under Rule 1 of the Agreement, which sets forth the duties of the various classes of employment, the description of the Track Foreman's duties contains no language that suggests Track Foremen are required to either have a driver's license or drive any sort of vehicle. The Organization points out that operation of motor vehicles is specifically assigned to the vehicle operator's classification. The Organization thus argues that there is no Rule support for Carrier's contention that a Track Foreman must have a valid driver's license. The Organization contends that the Claim should be sustained.

The Carrier asserts that the Organization bears the burden of proving that a Rule violation occurred, but has failed to offer any support for its allegation. The Carrier contends that a valid bump could not have been made at the time that Claimant alleges he was aggrieved. The disputed position was vacant until December 19; Claimant could not have bumped into the position on either December 1 or 5 because it is impossible to bump into a vacant position.

The Carrier also argues that Claimant was not qualified to hold the disputed position. Rule 3 provides that seniority will govern assignments so long as applicants are qualified. Carrier argues that the disputed position

required that applicants have valid driver's licenses; because Claimant does not have a license, Claimant is not qualified to fill the position. The Carrier contends that it has not violated the Agreement.

Carrier further contends that there is no evidence that Claimant has held the disputed position in the past. Carrier maintains that as far as it can determine, Claimant has held the position of Production Gang Foreman, but the position in question is Section Gang Foreman; Claimant's qualifications as Production Gang Foreman are not relevant to this dispute. The qualifications for Section Gang Foreman specifically include possession of a valid driver's license. Again, Claimant does not have a license, so he is not qualified for the disputed position.

In addition, Carrier argues that the Seniority Rules cited by the Organization apply only if the Claimant was the senior, qualified applicant for the position. Because Claimant was not qualified, the Seniority Rules do not apply. The Carrier thus argues that it did not violate any of the cited Rules.

The Carrier next asserts that even if this Board sustains the Claim, no monetary award is appropriate. Carrier points out that Claimant was on duty and earning pay during the period in question; he has not been monetarily aggrieved. Moreover, because the disputed position was not filled until December 19, claims for the period before this date cannot be allowed. The Carrier further contends that under the Agreement, this Board has no authority to penalize Carrier. Carrier therefore argues that no compensation is payable in this matter, and the Claim should be denied.

In rebuttal, the Organization argues that Carrier raised issues before this Board that were not raised during the handling of this dispute on the property. The sole issue raised by Carrier on the property was Claimant's alleged lack of qualifications. The Organization asserts that Claimant's qualifications for the position is the only issue before this Board. Carrier never disputed the factual situation or the dates cited in the Claim. Finally, the Organization contends that Claimant should be made whole for all lost compensation resulting from Carrier's failure to allow him to fill the disputed position.

In its rebuttal, Carrier points out that the employee whom Claimant argues he was entitled to replace as Foreman had more seniority than Claimant. Carrier contends that this fact alone invalidates the Claim.

This Board has reviewed all of the evidence in this case, and we find that the Organization has not met its burden of proof that the Carrier violated any rights of the Claimant when it assigned a junior employee to a Track Foreman's position on December 1, 1983.

The record is clear that the Claimant did not meet the required qualifications for the job in that he did not possess a valid driver's license. Although the Organization argues that the Claimant worked the same job on numerous occasions during the previous seven years and did not possess a driver's license during that time, the record contains no evidence that the Claimant performed the identical job to the one at issue here. Moreover, the

Carrier retains the right to set the qualifications for a job; and if the Carrier determines at some point that it wants to have only employees who possess valid driver's licenses in the particular position, that determination is fully within its managerial rights, as long as there is a rational basis for it. In this case, it is not unreasonable for the Carrier to want a person who can drive in the Track Foreman's position. Consequently, even if the Claimant had performed the identical job in the past, there is nothing to preclude the Carrier from altering the job qualifications and requiring that any applicant who is to be selected have a valid driver's license. The Organization contends that other employees do the driving for that position; however, this Board finds that there is nothing to preclude the Carrier from changing that past practice and requiring that all people assigned to that position be able to drive.

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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of April 1987.