

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

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

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

(1) The Carrier violated the Agreement when, on December 22, 1983, it issued Award No. 80 awarding the B&B Inspector's position advertised by Advertisement No. 80 to junior employe R. L. Swope effective December 27, 1983, instead of awarding the position to the senior qualified applicant as between Messrs. L. Cunningham, J. Rose, R. Estep, Jr., L. Kurtz, C. Craine, P. Goshey, G. Day, L. Pugh, A. Bozzella, Jr., J. Boley, J. E. Kos, G. P. Huggler and T. Plunkett (System Dockets CR-744, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767 and 768).

(2) The senior qualified applicant as between Messrs. L. Cunningham, J. Rose, R. Estep, Jr., L. Kurtz, C. Craine, P. Goshey, G. Day, L. Pugh, A. Bozzella, Jr., J. Boley, J. E. Kos, G. P. Huggler and T. Plunkett shall be awarded the B&B Inspector's position advertised by Advertisement No. 80 dated December 8, 1983. In addition, if it is determined that Mr. T. Plunkett is the senior qualified applicant, he shall be afforded a B&B Inspector seniority date of December 27, 1983 and he shall be compensated for all straight time and overtime wage loss suffered as a consequence of the violation referred to in Part (1) hereof."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

A claim was filed on February 20, 1984, by the District Chairman on behalf of Claimant L. A. Cunningham (hereinafter identified only as Claimant), on the grounds that he, and not a junior employe, should have been awarded the B&B Inspector job advertised by the Carrier under Job Advertisement No. 80 which was dated January 26, 1984. In his denial of the claim the Division

Engineer did so because the Claimant was among those on the roster who failed to sufficiently qualify for the position. The denial of the claim was further clarified by the Carrier by subsequent correspondence dated April 17, 1984. In that correspondence to the District Chairman, the Carrier's Manager of Labor Relations states that according to the Division Engineer, Claimant failed a verbal test given to him by Supervisor of Structures on February 22, 1984 and was not awarded the position because of this.

The Organization's response to the above is that the Claimant failed the test for a number of reasons which underline alleged discriminatory practices by the Carrier. First of all, with respect to the form of the test, the Organization states that the Claimant's verbal responses to the questions put to him by the Supervisor were transcribed by another Supervisor and the Claimant was never given a chance to verify the authenticity of the answers he gave. Secondly, with respect to the content of the test, the Organization alleges that inclusion of the Book of Rules into the qualifications for the B&B Inspector's job was a violation of Rules 39 and 40 since no other B&B Inspector position advertisement in the Allegheny Division ever required an applicant to be tested on the Rules in the manner required by Job Advertisement No. 80. The Organization further alleges that subsequent advertisements for B&B Inspectors in the Allegheny Division have not required the applicant to pass an examination on the Book of Rules. Lastly the Organization simply alleges that the filing of the position was rigged: — the junior employee who was assigned to the position had worked in the Supervisor of Structures office on light duty for a year prior to the position assignment and he alone was given the opportunity to be taught the Book of Rules.

At the time Position No. 80 was advertised, twelve employees in the Allegheny Division already held seniority as B&B Inspector. The Organization subsequently filed claims on behalf of each of the other eleven. Claimant, however, was the most senior employee on the B&B Inspector roster at the time the position was awarded to the junior employee. This junior employee was the fourteenth person on the seniority roster as B&B Mechanic and he neither held seniority as a B&B Foreman nor as a B&B Inspector prior to being awarded the Inspector's position. A separate claim was also filed for the thirteenth employee on the B&B Mechanic roster, Employee Plunkett. This was done because this employee did not hold B&B Inspector seniority and relief requested in his case is different than that requested in the case of the other twelve. The issue of pay differential was part of the grievance filed on behalf of Employee Plunkett and not the other twelve. All of these claims were combined in the present case.

In subsequent exchanges on property relative to all of the claims the position of the Carrier was that none of these claims were valid because only the employee actually assigned to the position "...demonstrated that he was qualified for it and was thus properly awarded the job." The Carrier also accuses the Organization of pyramiding by filing different grievances covering the same situation. It holds that "...if the agreement has been violated in the instant case...only the senior, qualified Claimant....would have been damaged...."

The Board is faced with a complex situation because this case involves thirteen separate claims which have been combined into one case. The relief requested on property was not changed when the claims were presented to the Board: the complexity involves their combination under one Docket. Since the parties have agreed to handle all of these claims in one case it is the position of the Board that the only reasonable way to treat the issue of relief is that suggested by the Carrier with this qualification: if it is not determined, on merits, that Claimant was qualified for the position in question, then the Board must go to the claim of the second most senior employee on the B&B Inspector roster and so on. In the event the first twelve claims are denied, then the Board must consider the claim of Mr. Plunkett who is the thirteenth employee on the B&B Mechanic roster. In the event the Board does sustain the claim of the first employee on the B&B Inspector roster, the Board must conclude that all of the other claims then become moot and should be dismissed.

Evidently, for the sake of the parties and for the sake of the Board it is salutary when various claims dealing with the same issue can be combined. In the instant case, however, this has presented certain logistical problems related to potential granting of relief in the event of a sustaining Award which had to be resolved by the Board prior to any ruling on the merits of the claims before it.

The Rules at bar in this case are the following:

"Rule 3(1):

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 3(2):

In making application for an advertised position or vacancy, or in the exercise of seniority, an employee will be permitted, on written request, or may be required, to give a reasonable, practical demonstration of his qualifications to perform the duties of the position.

Rule 3(3)(a)

All positions and vacancies will be advertised within thirty (30) days previous to or within twenty (20) days following the dates they occur. The advertisement shall show position title, rate of pay, headquarters, tour of duty, rest days and designated meal period."

"Rule 3(4)(a):

A position or vacancy may be filled permanently pending assignment. When new positions or vacancies occur, the senior qualified available employees will be given preference, whether working in a lower rated position or in the same grade or class pending advertisement and award."

"Rule 3(5):

An employee failing to qualify for a position within thirty (30) days will not acquire seniority dating on the position for which he failed to qualify and will, within five (5) working days, return to his former position unless it has been abolished or filled by a senior employee, in which event he may exercise seniority."

"Rule 40(a):

The parties to this Agreement pledge to comply with Federal and State laws dealing with non-discrimination toward any employee. This obligation to not discriminate in employment includes, but is not limited to, placement, transfer, demotion, rates of pay or other forms of compensation, selection for training, lay-off, and termination."

On November 23, 1983 the Carrier issued Advertisement No. 77 for a new B&B Inspector position with headquarters in Thompsontown, Pennsylvania, in its Allegheny Division. The qualifications required for this position included the following:

"Must be able to read and understand blue prints and specifications. Must be qualified as a B&B Inspector. Must pass a satisfactory examination and be able to read and write the English language."

Thereafter, the Carrier cancelled this Advertisement and it issued another one under title of Advertisement No. 80 on December 8, 1983. No. 80 was for the same position, same headquarters, same Division and same pay rate. The only difference between the two Advertisements was that No. 80 included, under qualifications required, the following language:

"Must be qualified on the Book of Rules for the Transportation Department, and territory assigned."

At the time these Bulletins were issued there were twelve employees, as noted in the foregoing, who held seniority on the B&B Inspector roster. Claimant was the senior most person on this roster with seniority date of January 24, 1977. He was rejected by the Carrier in favor of Employee Swope, who held seniority on neither the B&B Inspector roster, nor the B&B Foreman roster as noted in the foregoing. The position was assigned to the latter because he, and not the Claimant passed, according to supervision, the oral examination dealing with the Book of Rules as required by the re-issued Advertisement No. 80. According to the Organization no Advertisement for B&B Inspector's position before No. 80, nor since, has ever contained such requirements. As a factual point the record is silent on why the Carrier decided to cancel one Bulletin for a position and then re-issue shortly thereafter a new Bulletin for the same position.

The Board has closely studied the record wherein the Carrier makes response to and denial of the claim filed for Claimant. The position of the Carrier is found in both its response to this particular claim and to it and all of the other claims taken collectively. The reasons for denial are either procedural, or on the merits of the claim itself. Procedurally, the Carrier holds that the claim lacks specificity because it did not state the Claimant's rate (of pay) nor the overtime hours and dates worked by Mr. Swope for which claim was made. Since both of these factual questions could have been answered by a search of the Carrier's records the Board finds them insufficient to warrant denial of this claim on those grounds. On merits, the position of the Carrier is that the Claimant was found to be unqualified after demonstrating his qualifications as noted in the foregoing and was not entitled to the position under Rule 3(1) and (2). The Carrier specifically addresses no other issues raised by the Organization with respect to past practice dealing with required qualifications for the position in question, the format of the test and so on. Most of the Organization's specific grounds for filing the claim in the first place are met with silence.

Any objective observer would find it peculiar at best that the Claimant who had already qualified as a B&B Inspector (as well as eleven other fellow Inspectors) could not qualify for the same and that an employee who had not qualified in the past for such position and whose seniority date was some three years less than any of his fellow employees, in any classification, could qualify for the position. The behavior of Carrier's supervision here with respect to Claimant has to be understood in terms of a pattern of which

its manner of dealing with him was just the first step. The other B&B Inspectors refused to apply for the position, or refused to take the test, because they had heard how Claimant was tested according to the Organization. The qualification requirement? The Organization states that at no time in the past, nor at any time after Advertisement No. 80 was issued, did the Carrier require an examination on the Book of Rules. The Carrier does not dispute this. Did the requirement serve a purpose and was it a reasonable one on the part of the Carrier? It may have been, but the Carrier refused to address this issue. Since the requirement was so idiosyncratic, the Board must conclude that it was tailored to fit the situation. The fact that the Carrier changed the requirement in the Advertisements for the same position substantiates this conclusion. The manner in which the test was given further reinforces such.

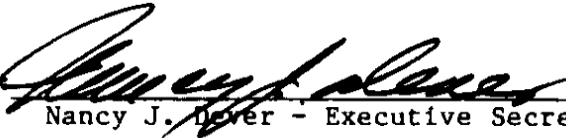
The Carrier states that Claimant was not entitled to the position under Rule 3(1) and (2). Neither provision of that Rule, cited in the foregoing, permits the Carrier to idiosyncratically change position requirements at its whim. Rule 3(2) states that in the exercise of seniority an employee may be required to give "...a reasonable, practical demonstration..." of his qualifications. Evidently, the Claimant had done that in the past otherwise he would not have been on the roster. Secondly, as noted in the foregoing, the record does not support, by means of evidence, that the requirement introduced into the Carrier's Advertisement No. 80 was either reasonable or practical. The record is silent, as noted earlier, on what occupational purpose the new requirement on Advertisement No. 80 served. Rule 3(4)(a) makes it clear that the senior employee will be given preference, pending assignment, and that if he fails to qualify within thirty days, according to Rule 3(5), he will then be returned to his former position. These Rules, mutually negotiated and agreed upon by the parties to the Agreement were meant, as the language of the Agreement unambiguously implies, to protect the seniority of employees who had shown qualifications and who were on rosters. It did not guarantee them positions, but it provided them with a reasonable chance to fill positions according to their seniority. The whole record before the Board warrants the conclusion that in this case the supervision of the Carrier made unreasonable attempts to thwart the intent of these provisions of the Agreement. In so doing, the Board can reasonably conclude that the Carrier was also in violation of Rule 40(a) of the Agreement by showing favoritism, for whatever its reasons, for one employee. The claim in behalf of Claimant is sustained on merits. All other claims in this case before this Board are dismissed. The Agreement was violated. There is no monetary settlement associated with this sustaining Award. Employee R. Swope's assignment to the position of B&B Inspector on December 27, 1983 was improper. If he is available, and if he wishes, Claimant may attempt to qualify for the position in question if it has not been abolished. As a good faith gesture by the Carrier, in view of the conclusions of the Board in this Award, the position should be re-advertised as it was under Advertisement No. 77, and not under Advertisement No. 80. If Claimant does not wish to attempt to qualify for the position, the next most senior employee on the B&B Inspector's roster shall be permitted to do so and so on down the roster. There are no other penalties associated with this Award.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1988.