

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

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

(1) The Agreement was violated when the position of Track Welder Helper on Gang 1917 as advertised by Bulletin #71b dated August 7, 1984 was awarded to an applicant junior to Sectionman G. L. Kruger (System File M-53/013-210-19).

(2) (a) The position of track welder helper be awarded to Mr. G. L. Kruger with seniority as such dating from August 7, 1984.

(b) Claimant G. L. Kruger shall be allowed the difference between what he earned as a sectionman and what he should have earned as a welder helper beginning August 7, 1984 and to continue until the violation is terminated."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

The record shows that Carrier assigned the Welder Helper position to a junior employee, rather than to Claimant. By letter of August 14, 1984, the Organization protested Carrier's decision as a violation of the Agreement whereby seniority prevails when ability and qualifications are sufficient.

The Organization stresses that the Claimant had sufficient ability and qualifications and was the senior employee by twenty-two (22) months. It focuses upon Rule 19(a) which states that:

"Promotions shall be based on ability, qualifications, and capacity for greater responsibility and where these requirements are sufficient seniority shall prevail."

The Organization notes that the junior employee promoted had more experience due to Rule 20(a) Option 3 which utilized employees for relief Welder Helper assignments who were "either working in the gang or at the location nearest where the vacancy occur[red]." It also argues that Claimant had a capacity for greater responsibility.

The Carrier asserts that the junior employee worked eighteen weeks as a Welder Helper, while the Claimant worked only two weeks in that capacity. It further notes that the Welding Supervisor recommended the junior employee in accordance with Rule 19. It stated by letter of October 24, 1984, that the junior employee "was the most qualified applicant in accordance with railroad standards." By letter of January 28, 1985, Carrier elaborated to state that Claimant "did not retain sufficient fitness and ability to assume the position of Welder Helper." It is the Carrier's position that the controlling Rule is Rule 19(b) which states in pertinent part:

Rule 19

(b) "....Positions of foremen or supervisors, or other positions that are not filled through bulletining to employees in seniority class, ...will be filled from available qualified employees in the other groups of the subdepartment, and where ability and qualifications are sufficient, seniority shall prevail, the Management to be the judge with respect to positions covered by this section."

Carrier maintains that the Welding Supervisor's decision was that the Claimant did not possess sufficient qualifications and ability for the position as well as "ambition and leadership qualities." It notes S.B.A. 313, Award Number 15 which held in part that:

"The use of the language 'management to be the judge' indicates an intention on the part of the parties that management's decision in regard to qualifications and ability must be given very great weight; otherwise the 'management to be the judge' clause would be mere surplusage."

For many years this Board has found that "fitness and ability" determinations rest with the Carrier. Once the Carrier has found the employee's fitness and ability to be lacking, the burden rests upon the Claimant to show by probative evidence that Carrier's decision is arbitrary, capricious, biased, or defective.

The Organization has the burden of proof in the instant case. It argues that the Claimant was used by the Carrier for two weeks in the relief position of Welder Helper, aided a fellow Track Welder on numerous occasions and received instruction throughout his life on welding from his father who was a welder by occupation. Under the Agreement requiring sufficient ability

and qualifications the Claimant's previous work for two weeks in the position provides this Board with a prima facie case. The burden therefore shifts to the Carrier to go forward with rebuttal evidence or proving affirmative defenses, if it has any.

Our review of the record on property finds no evidence whatsoever that Claimant lacked sufficient ability and qualifications. Carrier provides no evidence that Claimant had a poor work record, failed to perform adequately when he held the relief position or other factual grounds to support its determination. Importantly, the Organization's assertion that the Claimant was never observed by any Welding Supervisor to assess his qualifications while he occupied the Helper position was unrefuted and stands as fact. Mr. McCord's letter of September 24, 1984, was not clearly in the on-property record and was not considered by this Board.

In the facts and circumstances herein, the Board holds for the Organization. Claimant had held the position at a prior time and there is no evidence that the extra time held by the junior employee was the result of other than contractual circumstances. Further, unlike S.B.A. 313, Award Number 15 and other past Awards on property (e.g., Third Division Award 23219), there is no evidence of record that Claimant lacked the welding skills necessary to successfully assume the position or that a past work record suggested that Claimant's qualifications and ability lacked sufficiency. Nor do we find any evidence in the record that Carrier's decision was based on other than "best" qualified, which is not per Agreement language.

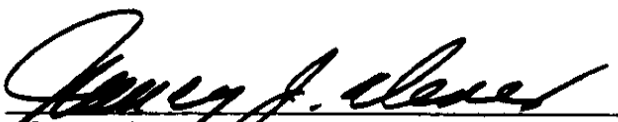
This Board also takes careful note that Rule 19(b) applies to foremen and supervisors and is applicable herein only to complement Rule 19(a) with regard to seniority bidding. In this record the Carrier provided no evidence to challenge Claimant's qualifications for the position or support its conclusion. S.B.A. 313, Award Number 15 also noted that "a mere unsupported conclusion by management... that one employee has greater ability than other may not always suffice..." Consequently, the Claim must be sustained as argued on property from August 13, 1984.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

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