

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(St. Louis Southwestern Railway Company

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

(1) The Carrier violated the Agreement when it failed to recall Water Service Repairman M. J. Smith to service on February 11, 1985 (System File MW-85-16-CB/53-813).

(2) Because of the aforesaid violation, Water Service Repairman M. J. Smith shall be allowed one hundred twenty (120) hours of pay at the water service repairman's straight time rate for the period February 11, 1985 through March 1, 1985."

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 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 dispute involved herein.

Parties to said dispute waived right of appearance at he

On May 3, 1983, a new position of Water Service Repair established. As a prerequisite for the position, an individual was to be able to read piping and construction prints and diagrams, and be certified to properly perform welding on 1" to 8" pipe in accordance with standard ASME codes.

The position was advertised in Bulletin No. 2 on February 7, 1985. However, it was necessary to fill the position on a temporary basis until the successful bidder was determined and could be assigned. The senior furloughed Water Service Repairman was the Claimant, who has a seniority date of July 16, 1979. The next most senior furloughed Water Service Repairman was M. L. Kimmel, with a seniority date of July 29, 1979. Kimmel was a certified welder and had also been assigned previously to a position of Water Service Repairman/Welder. Based on the Carrier's determination that Kimmel was the senior qualified furloughed employee, he was recalled from furlough status to fill the temporary vacancy.

Claimant contacted the Carrier and stated that he felt he should have been recalled to this position. According to the Carrier, Claimant was offered the opportunity to take a test in order to demonstrate his welding ability. Carrier claims that Claimant declined the offer and stated that he was not a qualified welder.

The Organization disputes Carrier's version of the events at issue. In a letter received by the Organization on February 22, 1985, Claimant indicated that on February 12, 1985, he contacted his supervisor, B. S. Giacona, who informed him that if he could satisfactorily pass the welding certification test required by the Carrier prior to the expiration of the bid (Sunday, February 17, 1985), he would be allowed to fill the position. Claimant reported to the office on February 13, 1985, and discovered that he had not been provided any pipe, the welding rods were wet, and the battery had been removed from the welding machine. On February 14, 1985, Claimant maintains that he contacted the office but was advised that Supervisor Giacona was out of town and would not return until Friday, February 15, 1985, the last day Claimant could qualify for the position. According to the Claimant, his supervisor did not want to give him a chance to qualify as a welder because Supervisor Giacona was friendly with employee Kimmel and wanted to see him get the new job instead.

Claimant's statement was presented to the Carrier on February 14, 1986, nearly one year after the events at issue occurred.

The Organization contends that the evidence adduced on the property shows that Carrier refused to allow Claimant to take the requisite welding test, thereby preventing him from filling the position in question. In the Organization's view, Carrier's refusal to recall the Claimant on February 11, 1985, and its refusal to permit him to fill the position in question in preference to a junior employee was unquestionably in violation of the Agreement.

Carrier argues that M. L. Kimmel was properly recalled and assigned to the temporary position of Water Service Repairman/Welder on February 11, 1986. Mr. Kimmel was the senior qualified furloughed employee, Carrier asserts. The position of Water Service Repairman/Welder clearly states the requirements of the position. Since Claimant was not a certified welder, Carrier maintains that he failed to meet these requirements.

Moreover, Carrier submits that Claimant was offered the opportunity to take a test in order to demonstrate his welding ability, but he declined to do so. As it is unrefuted that Claimant was not a qualified welder and that M. L. Kimmel was qualified, Carrier contends that Mr. Kimmel was properly assigned under the provisions of the current Agreement.

The Board, in its review of the evidence and arguments presented by the parties, agrees at the outset with the Carrier that there are many Awards of this Division holding that judgment as to fitness and ability is the Carrier's prerogative, and that when Carrier's judgment is challenged by the Organization, the burden falls on the Petitioner to establish, by competent evidence, proof of his fitness and ability. (Third Division Awards 21507, 21615, 20787, 21446).

However, the question posed in the instant case is not whether the Claimant was qualified to hold the position or whether the Carrier had the right to make such a determination. The issue here is whether Claimant was improperly denied the opportunity to demonstrate his welding skill. Under the Agreement signed by the parties on May 3, 1983, Carrier agreed that when the new position of Water Service Repairman/Welder was bulletined, ". . . repairmen will be allowed the opportunity to qualify, demonstrate welding skill and take certification test as Carrier may require."

In the instant case, the Organization had the burden to establish, as a prima facie matter, that Claimant attempted to demonstrate his welding skill but was prevented from doing so. We find that it has not satisfied its evidentiary burden here. Crucial to the Board's determination is the fact that the Claimant's own statement refutes his contention that he was denied the opportunity to qualify for the position. In the postscript to his February 22, 1985 letter, Claimant states:

"About 1:45 P.M., today, Feb. 15, Mr. Giacona told me he got the 2" Sch 80 Blk. pipe. It's a little late for that, right?"

Although no explanation was ever forthcoming from the Claimant or the Organization as to why Claimant thought it was a "little late" to demonstrate his welding skills when the bid remained opened for two more days, Claimant's statement indicates that he was given an opportunity to take the welding test. Therefore, we disagree with the Organization's contention that the Carrier failed to abide by the Agreement or that the evidence shows any explicit or implicit refusal on the part of the Carrier to enable Claimant to qualify for the position.

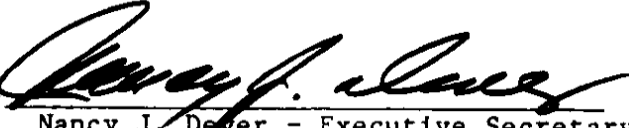
Having found that the Organization failed to make a prima facie case that Claimant was denied the opportunity to qualify for the position, we find no basis upon which to disturb the Carrier's decision that Mr. Kimmel was the senior experienced furloughed employee qualified for the position of Water Service Repairman/Welder. Accordingly, we rule to deny the Claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1990.