

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29664
Docket No. MW-29686
93-3-91-3-29

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Kansas City Southern Railroad Company

STATEMENT OF CLAIM:

"(1) The Agreement was violated when, effective July 28, 1989, the Carrier assigned Mr. C. L. Welch instead of Mr. S. L. Dossett to the machine operator (ballast regulator) position advertised on Bulletin No. 23 dated July 11, 1989 (Carrier's File 013.31-406).

(2) As a consequence of the aforesaid violation, Mr. S. L. Dossett shall be allowed pay for the difference between what he earned as a machine operator and what he would have earned had he been assigned to the ballast regulator and he shall be afforded a July 28, 1989 seniority date on the ballast regulator."

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 employee 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.

On July 18, 1989, Claimant entered his bid for the bulletined vacancy of Ballast Regulator Operator. At the time, Claimant held seniority as a Trackman and as a Machine Operator. He was serving as a Machine Operator. As the Claim states, Claimant had "... several years of relieving experience on Ballast Regulators. ..." The vacancy was awarded to another employee who held only Trackman seniority at the time and whose seniority was junior to that of Claimant.

Rule 10 of the parties' effective agreement provides, in pertinent part, as follows:

"Promotions from and to positions covered by this agreement shall be based on ability, merit, and seniority. Ability and merit being satisfactory, in the judgment of management, seniority shall prevail..."

The Claim alleges Claimant qualifies ahead of the junior awardee in all three criteria: Ability, merit and seniority, it also stresses Claimant's current service as a machine operator and his past relief service on Ballast Regulators.

Carrier defends on the grounds that Rule 10 provides it the discretion to determine qualifications, and it asserts the junior employee, in its judgment, was more qualified for the position than Claimant.

The parties have cited many prior decisions, involving other properties, which have construed agreement language similar to the instant Rule 10. This precedent stands for the general proposition that the Carrier is to be the judge of ability and merit, that Carrier is accorded wide latitude in exercising its judgment of these criteria, and that this Board, upon review of Carrier's judgment, will not disturb Carrier's determination unless the evidence shows that Carrier's judgment was unreasonable, arbitrary or capricious. See, for example, Third Division awards 13196, 19432, 20724 and 28008.

On this record, the Organization has repeatedly asserted that Claimant was an able and meritorious machine operator who also possessed several years of relieving experience on Ballast Regulators. At no time did Carrier dispute or even comment upon these assertions. Under long established precedent of this Board, these unchallenged assertions of material fact become acceptable as evidence.

In addition, Carrier never alleges that Claimant's ability and merit were in any way unsatisfactory. Rather, Carrier asserts that Claimant's ability and merit were not "equal" to that of the junior employee. The language of Rule 10, however, does not support Carrier's application of an equality test. Absent persuasive evidence to the contrary, and there is none in this record, Rule 10 would require only that promotional candidates meet a threshold level of ability and merit deemed to be satisfactory.

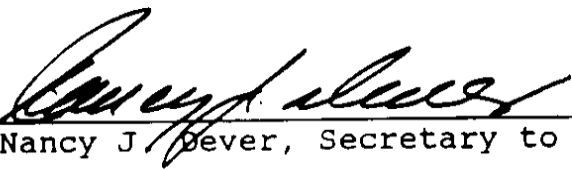
On the record before us, the Organization has supplied probative evidence showing that Claimant possessed the requisite satisfactory level of ability and merit to be awarded the Ballast Regulator Operator position. In our view, this shifted the burden of proof to the Carrier to provide some evidence to support its judgment of the candidate's ability and merit. Our repeated review of the record here fails to reveal any rational basis for Carrier's determination.

For the foregoing reasons, this second provides us no basis for concluding that carrier correctly applied Rule 10 to the situation at hand or that it exercised its judgment in a reasonable and non-arbitrary manner. Accordingly, the Claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Bever, Secretary to the Board

Dated at Chicago, Illinois, this 7th day of June, 1993.