

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30211
Docket No. MW-28548
94-3-88-3-372

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(National Railroad Passenger Corporation
(Amtrak) - Northeast Corridor

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

(1) The Agreement was violated when the Carrier assigned junior M/W Repairman L. Carango instead of M/W Repairman M. LaBelle to a TLM contract M/W Repairman position in Gang Y-192 effective April 6, 1987 (System File NEC-BMWE-SD-1881).

(2) As a consequence of the aforesaid violation:

'We therefore request that this award be corrected to read that Mr. LaBelle is the awarded candidate. In addition, this is to be considered a claim for all overtime made by Mr. Carango (since his award to this position) and continuing until Mr. LaBelle is properly awarded said position. In addition, should Mr. LaBelle be forced to furlough, due to reduction in force, this claim would commence for all straight time earned by junior employee Carango and continuing again until Mr. LaBelle is properly awarded said position.' "

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 employe 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 instant dispute centers around the Carrier's decision to assign an employee junior to the Claimant to a corridor unit Repairman position in Gang Y-192 effective April 6, 1987. At issue here is the interpretation and application of the bulletining and assignment provisions of the December 15, 1980, Track Laying Machine (TLM) Agreement, which read in pertinent part as follows:

"Article I

* * * *

- B. Assignment to these positions will be based on seniority, qualifications and merit."

The Organization contends that under the foregoing language, an employee is "qualified" for a position if he or she demonstrates general aptitude and ability to perform the duties of that position. The selection of an employee should be based on this benchmark standard, the Organization asserts, and the relative ranking of employees beyond this qualification standard is improper. That is to say, an applicant must have basic training and experience so as to raise a reasonable probability that he or she can perform all duties of the position within a reasonable time; the language does not require the "most qualified" applicant be given preference.

Carrier disputes the Organization's asserted interpretation of the language at issue. It argues that where qualifications and merit are not equal, the most qualified applicant should be, and has been as a matter of past practice, awarded the position under the TLM Agreement. While seniority is a factor, the Carrier argues, it is ultimately an applicant's qualifications that are given determinative weight and preference in accordance with the language of the TLM Agreement.

The parties have not proffered any precedent Awards which interpreted Agreement language similar to that seen in this case. In fact, the cases cited have examined language which is markedly different from the matter here in dispute. Rule 7, for example, states: "fitness and ability being sufficient, seniority shall prevail." This has been interpreted to mean that the senior employee need not be the best qualified; that the senior candidate's fitness and ability need not be greater than or even equal to that of the junior applicant's -- that his fitness and ability need only be sufficient. See Third Division Awards 26903 and 23047. That is essentially how the Organization seeks to interpret the language of Article I(B) of the TLM Agreement.

However, the language here at issue stands on a very different footing. It requires consideration and comparison in the first instance of both seniority and qualifications. Unlike the language referred to in other Awards, there is no indication of the relative weight to be accorded the factors of seniority, merit and qualifications. In Elkouri & Elkouri, How Arbitration Works (BNA 4th Ed., 1985), pp. 612-613, the authors state that in this type of seniority provision, both seniority and qualifications must be considered, and where the difference in length of service is relatively insignificant and there is a relatively significant difference in qualifications, then the qualifications factor should be given greater weight. Conversely, where there is a relatively substantial difference in seniority and relatively little difference in qualifications, then length of service should be given greater weight. In other words, no one factor is determinative; all must be weighed in the balance.

Applying that standard to the facts of the instant case, it is clear that Carrier did not act arbitrarily or unreasonably in selecting the junior candidate over the Claimant. There is no dispute that the two candidates had relatively comparable seniority. Claimant holds seniority as a Repairman at the Bristol Repair Facility dating from March 17, 1980, and seniority as a Repairman on the Southern Seniority District dating from September 30, 1984. The junior candidate holds seniority as a Repairman at the Bristol Repair Facility dating from October 6, 1980, and seniority as a Repairman on the Southern Seniority District dating from August 22, 1985.

With regard to the relative qualifications and merit of the two candidates, Carrier's position throughout the handling of the dispute on the property was that the junior employee's past work experience and performance in the TLM unit, and his work on the particular equipment unique to that unit, made him eminently more qualified for the position than the Claimant, who had not had any similar work experience in the unit. In reviewing the record, the Board notes that the Organization never denied or refuted that crucial point. It is well established that an undenied assertion stands as fact. See Third Division Awards 28460, 28459, 26938, and 14385.

In sum, this Board is of the view that the proper interpretation of Article I(B) of the TLM Agreement requires comparison and weighing of all three factors -- seniority, qualifications and merit. In the instant case, Carrier properly selected a better qualified junior employee over a senior employee, because there was relatively little difference in length of service, thus making relative qualifications the determinative factor. On that basis, we will deny the Claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.