

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32068
Docket No. SG-32531
97-3-95-3-437**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(The Atchison, Topeka and Santa Fe Railway Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka & Santa Fe Railway (ATSF):

Claim on behalf of M.E. Hacker for assignment to the position of Foreman on Floating Gang 14 on the New Mexico Division and for payment of the difference between the Foreman's rate and the Signalman's rate, beginning March 21, 1994 and continuing until he is properly assigned to the Foreman's position, account Carrier violated the current Signalmen's Agreement, particularly Rule 37 and the Memorandum of Agreement of September 21, 1988, when it assigned a junior employee to the Foreman's position and denied the Claimant's application for the position. Carrier's File No. 94-14-20. General Chairman's File No. 37-1223. BRS File Case No. 9675-ATSF.”

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 were given due notice of hearing thereon.

Claimant is employed as a Signalman on the New Mexico Division. In March 1994, Claimant applied for the position of Signal Foreman on Floating Gang 14 on the New Mexico Division Seniority District. On March 21, 1994, Carrier awarded the position to a signal employee junior to Claimant.

On May 18, 1994, the Organization filed claim on behalf of Claimant contending violation of Rule 37 and Memorandum of Agreement of October 1, 1988, when it denied Claimant's application for the Signal Foreman position and awarded it to a junior employee.

Claim was denied by Carrier on June 8, 1994, based upon its judgement that Claimant did not have the ability to perform the duties of Signal Foreman. Carrier based its decision on current work practices displayed by Claimant.

The claim was progressed to a conclusion on the property in accordance with the provisions of the Agreement. Failing satisfactory resolution, it was appealed to this Board on August 22, 1995.

In the handling on the property, the Carrier took the position that the Claimant was not qualified for the position; that he voluntarily gave up a Foreman position to which previously assigned, and therefore, forfeited his preferential right to subsequent promotion; and that "prior rights" provided in the Memorandum of Agreement of October 1, 1988, do not apply to the Signal Foreman position under claim.

The Organization argues that the Claimant was qualified for the position because he had about three years previous experience as a Signal Gang Foreman during which time there were no formal complaints about his abilities; that "prior rights" set forth in the Memorandum of Agreement of October 1, 1988, grant Claimant the right to the position; and that Carrier's assignment of Claimant to relieve for two weeks on the position to which denied shows that he does have the ability.

Rule 37 - Promotions, Transfers and Qualifications - provides in paragraph (a):

“...the promotion of employes to positions of Signal Inspector, Signal Shop Foreman or Signal Foreman, shall be based on seniority and ability the Management to be the judge of ability.” (Emphasis added)

and paragraph (c) provides:

“In filling vacancies of Signal Inspectors, Signal Shop Foremen and Signal Foreman, under this Rule, employees with prior satisfactory service on such positions will be promoted before considering an applicant with no previous experience. If such employee declines promotion or voluntarily relinquished the last such position he held, he shall forfeit his preferential right to subsequent promotion.” (Emphasis added)

The record before the Board reveals that the Claimant had previously held a Signal Gang Foreman's position for approximately three years, and it is not disputed that he voluntarily gave up the position and returned to a position of Signaller. He therefore, under the provisions of Rule 37(c) forfeited his preferential right to be promoted to the position under claim.

On the question of qualifications and ability, Rule 37(a) *supra*, provides that management shall be the judge, and it exercised its right and found Claimant did not possess the ability necessary to handle the position of Signal Foreman. At that point the burden to prove the necessary ability for the positions falls squarely on the shoulders of Claimant and the Organization. See Third Division Award 16871 where the Board held:

“The Awards are legion that it is the Carrier's prerogative to determine the fitness and ability of an employe for a particular position. See Awards 15780, 15494, 14976, and 13876 among others. Less a showing that the Carrier's determination as to fitness and ability is arbitrary and capricious it will not be disturbed. The burden is on the Petitioner to make such a showing. See Awards 16546, 16360, 16309 and 15494 among others.”

The Organization made an effort to bear the burden in this instance by asserting that Claimant was qualified by reason of having held a Signal Gang Foreman's position

in the past for approximately three years without formal complaint. It did not, however, explain why Claimant voluntarily gave up the position. Without an explanation, this Board finds itself in no position to determine whether Claimant's prior service as a Signal Gang Foreman sheds any light on whether he now has the ability to efficiently handle a Signal Foreman's position.

Claimant and the Organization have not carried their burden of proving that Claimant has the necessary ability to fill the position of Signal Foreman. Neither have they shown by competent evidence that Carrier's judgement on Claimant's ability was arbitrary or unjust. Allegations do not constitute evidence.

This Board is not persuaded that "prior rights" as argued by the Organization take precedence over Rule 37(a) and (c). Qualifications and ability must first be shown before "prior rights" come into play. If this were not so, Carrier would be burdened with employees unable to perform the work required. We are not convinced that the "prior rights" Agreement was so intended.

Finally, this Board is not impressed with the argument that Carrier's assignment of Claimant to relieve for two weeks on the position to which he was denied proves that he does have the ability to fill the position.

Carrier denied that Claimant relieved on the Foreman's position, and states without contradiction that Claimant was assigned to work as Lead Man while the Foreman was on vacation, and that he claimed the Foreman's rate and was erroneously paid that rate. No evidence exists in the record to support the claim that he was appointed to relieve on the Foreman's position.

Claimant and the Organization failed to bear the burden of proving their assertions, and the claim will be denied.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of June 1997.