

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35742
Docket No. MW-35263
01-3-99-3-111**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to assign employee T. Daum to the assistant foreman position advertised on Bulletin No. 97-21, posted August 12, 1997 (System Docket MW-5072).**
- (2) As a consequence of the above-mentioned violation, Mr. T. Daum shall be allowed compensation at the ‘*** assistant foreman rate from August 25, 26, 27, 28, 1997, September 2, 3, 4, 8, 9, 10, 11, 1997 and (8) hours 9/1/97. This claim shall be continuing as per Rule 26 (f) until a correction of the award is made, giving applicant an opportunity to qualify. Claimant shall be made whole for any overtime associated with this position and the 8/25/97 assistant foreman seniority date. All hours being claimed are (10) hours for each date with exception to any Holidays which will be claimed as (8) hours.”**

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.

The Claimant applied for three positions that were advertised in Pittsburgh Production Zone Bulletin No. 97-21 and was awarded a Trackman position. He had also applied for an Assistant Foreman position, but was not selected. The Assistant Foreman position had a NORAC Book of Rules qualification. Because the Claimant had failed his most recent Book of Rules test on May 28, 1997, the Carrier determined that he was not qualified for the Assistant Foreman position.

The Organization contends that, in accordance with the policy of the Pittsburgh Division, the Carrier should have awarded the Claimant the Assistant Foreman position and then given him a second opportunity to take the NORAC Book of Rules test. The Organization argues that the Carrier's policy and practice has been to afford each employee, upon request, the opportunity to qualify not once but twice.

In further support of the claim, the Claimant provided a written statement during the handling of this case on the property, to the effect that he signed up for the next NORAC Rules class at a safety meeting on August 4, 1997. However, he stated, the Carrier did not notify him of the date or location of such training despite several attempts on the Claimant's part to inquire about the matter. The Organization asserts that the Claimant was available and willing to attend the next NORAC class and to take the qualification test administered immediately following such class and would readily have done so had the Carrier provided the opportunity.

The Organization also asserts that the Carrier has customarily assigned positions based on seniority in a lower class pending qualification. It relies on a statement provided by employee J. Tatum which indicates that he was awarded a Foreman position pending NORAC Book of Rules qualification. The Claimant should have been afforded the same treatment, the Organization submits.

The Carrier argues that the Claimant was not qualified for the Assistant Foreman position because he failed to pass the Book of Rules examination on May 28, 1997. Moreover, the Carrier insists that there are no Rules or Policies which would have permitted an employee to be considered qualified if, after failing the NORAC Book of Rules once, he had not yet taken the examination for a second time. Finally, the Carrier maintains that the responsibility for failing to take the second NORAC test must rest with the Claimant, as he did not avail himself of the opportunity to take the test again between May 28, 1997 and the claim date of August 25, 1997.

It is a well-settled principle that decisions regarding an employee's qualifications for a particular position are within the purview of the Carrier, and can be successfully challenged only where there has been a showing that the Carrier's decision was arbitrary or capricious. We find in the instant case that the Organization has not made that necessary showing of proof.

The essence of the Organization's claim is that the Claimant should not have been considered unqualified for the Assistant Foreman position simply because he failed the NORAC Book of Rules test. In the Organization's view, the Claimant should have been awarded the position pending further opportunity to pass the NORAC Book of Rules test. However, that argument runs counter to several significant factors in this case. First, the Carrier's stated policy regarding the application of the NORAC Rules does not support the Organization's position. The policy states in pertinent part:

"What will the assignment clerk or a supervisor look for when an employee bids or attempts to bump a job which requires NORAC qualification?

If the employee passed his last test AND the test was taken this year or last year, he is considered qualified.

If the employee failed his last test, he is considered not qualified.

If the employee has not taken a test within the past two years, he will be awarded a job or allowed to bump pending qualification.

How many chances to pass? Employees will be able to attend twice on company time."

The Organization relies on the last sentence, which provides employees two chances to pass the qualifications test. However, it is apparent when read in context, as we must, that there is no language requiring the Carrier to award an employee a bid position in addition to offering two chances to pass the qualification test. On the contrary, the policy specifically states that if an employee failed his last test, he is considered not qualified. In other words, an employee may be afforded another opportunity on company time to pass the test if he fails the first time, but it does not necessarily follow that he should also be awarded a bid position after failing to pass the test. The Organization's interpretation of the Carrier's policy in that regard is not consistent with the plain meaning of the language expressed therein.

Second, we find unpersuasive the Organization's contention that the policy has been applied in a disparate manner. The only evidence offered on that point consisted of a statement from an employee who claimed that he had been awarded a Foreman's position pending NORAC qualification. Even if the employee's statement is fully credited, however, we still do not know whether his situation is comparable to the Claimant's. Absent evidence that this employee or any other failed the NORAC qualification test and was nevertheless awarded a bid position pending a second qualification opportunity – the precise circumstance here - the Board is of the view that disparate treatment has not been proven.

Finally, although the Claimant stated that the Carrier never gave him an opportunity to take the qualification test a second time, the record is at best conflicting and fails to demonstrate that the Carrier acted in an arbitrary or capricious manner. The precedent Awards cited by the Organization must be distinguished on that basis. Certainly, the Carrier may be in violation of seniority rights if there is proof that qualifications classes have been deliberately withheld or not scheduled in an attempt to prevent an employee from being awarded a bid position. However, review of the facts presented here does not persuade the Board that the Carrier acted in such a manner or beyond its discretion.

AWARD

Claim denied.

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 24th day of October, 2001.