

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36086
Docket No. MW-34589
02-3-98-3-238**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri-
(Kansas-Texas Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior Trackman C.M. Arnold to a B&B mechanic position advertised on Bulletin No. MKT 05592 dated January 23, 1997 instead of assigning senior Trackman C. E. Showalter (System File Y9709/1055123 MKT).
- (2) As a consequence of the afore-stated violation, Trackman C. E. Showalter ‘... shall be allowed the difference between what he earned as a Trackman Gang 9117 and what he should have earned as a B&B Mechanic if he had been awarded the B&B Mechanics position beginning with the date of Mr. Arnold’s initial assignment thereto and to continue until the violation is terminated.’”

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.

At the time of the incident in question, Claimant C. E. Showalter and C. M. Arnold had established and held seniority on the 7111 Roster as Track Laborers dating from August 9 and September 13, 1995 respectively. The Claimant was assigned and working as a Laborer on Gang 9117 and Arnold was assigned and working as a Laborer on Gang 8760.

The facts in this matter appear to be uncontested. On January 23, 1997, the Carrier issued Bulletin No. MKT05592, advertising a vacancy for a B&B Mechanic on Gang 8708. While neither the Claimant nor Arnold held seniority in the B&B Department, both men applied for the position. The Carrier received no bids for the position. On January 30, 1997, the Carrier assigned the position of B&B Mechanic to junior employee Arnold. It is clear that while the Claimant was more senior, Arnold did possess a CDL while the Claimant did not. Further, it is uncontested that the relevant Bulletin did not list a CDL as a requirement for the B&B Mechanic position.

The Organization takes the position that the Carrier failed to recognize the Claimant's superior seniority over Arnold when awarding the B&B Mechanic Position to Arnold. According to the Organization, because neither the Claimant nor Arnold held seniority for the position of B&B Mechanic and because the Claimant was senior to Arnold, the Claimant was entitled to be awarded the position. While it is true that the Claimant did not possess a CDL, such was not listed as a prerequisite for the position. Therefore, the Organization claims that this did not make the Claimant unqualified for the position and in fact, the Claimant should have been placed in the position and given a period of 30 days to obtain his CDL. The Organization claims that while Arnold might have been better qualified than the Claimant, such is not a sufficient reason to ignore the Claimant's superior seniority for the B&B Mechanic Position. Because of this error in assignment, the Claimant is entitled to receive the difference in compensation between what he earned as a Track Laborer and what he would have earned as a B&B Mechanic for all time involved.

Conversely, the Carrier takes the position that junior employee Arnold possesses superior "fitness and ability" under Article 5 of the Agreement. The Carrier contends that it has the management prerogative to judge fitness and ability and the burden is on the Organization to show that the Carrier's decision was arbitrary, capricious or unreasonable. As to the Organization's position that the Bulletin did not include a requirement for a CDL, the Carrier contends that it is so well known and understood that simply listing a B&B Mechanic position is sufficient to notify parties that a CDL is required. Finally, the Carrier states that it has no obligation to allow the Claimant to obtain a CDL after being awarded the position. Thus, the Carrier maintains that its

determination was reasonable and it acted properly in awarding the position to Arnold. The Carrier requests that the claim be denied.

After a thorough review of the evidence, the Board finds that it must agree with the Carrier that it did not violate the Agreement when it selected junior employee Arnold for the position of B&B Mechanic. We note that the relevant language of the Agreement is that "Promotions shall be based on ability and seniority; ability being sufficient seniority shall govern." Here, it is clear that neither Arnold nor the Claimant had any seniority as B&B Mechanics. However, while the Claimant was the senior applicant, Arnold did possess a CDL, which the Claimant did not. We note that the possession of the CDL was the basis of the Carrier's decision. The question that we must address is whether the Carrier had a legitimate right to rely upon the possession of such license as a basis for awarding the position to Arnold. In sum, we find that the Carrier acted properly in awarding the position to Arnold.

We acknowledge that the Organization is correct that the bulletin for the position did not list a CDL as a requirement for the position. While the Carrier asserts that it did not have to list such a requirement because it is common knowledge that such license is a prerequisite for the B&B Mechanic Position, we reject this contention. We believe that the Carrier is obligated to list all known requirements when it bulletins a position.

However, the question which arises is where the Carrier nonetheless had a right to rely on the possession of the CDL to grant the position to junior employee Arnold over the Claimant. In this respect, we must look at the standard in such a case. It is well established that in cases of fitness and ability, the Carrier has the management prerogative to judge fitness and ability and the burden shifts to the Organization to demonstrate that the Carrier's decision was arbitrary, capricious, or unreasonable. See Third Division Awards 32455, 35186, 35197.

Specifically, the Board held in Third Division Award 35186:

"There is little doubt that, under the language of Rule 3(b), the Carrier is the judge of determining an employee's fitness and ability for a promotion. The Board has repeatedly upheld the Carrier's prerogative in this regard and will not disturb that determination unless the Organization can show that it was arbitrary, or that the Claimant, does in fact, possess sufficient fitness and ability for the job in issue. See Third Division Awards 20361, 21328, 21119."

In Third Division Award 35197, the Board held:

“Rule 5 gives the Carrier the right to judge fitness and ability so long as it is not ‘capricious, arbitrary and discriminatory.’ It was not.”

In the instant case, we find that even though it was not listed as a qualification in the Bulletin, it was reasonable for the Carrier to consider Arnold’s CDL as the determining factor to find that he was better qualified than the Claimant. Based on this determination, we find that the Carrier acted properly in awarding the position to Arnold over the Claimant. We have not been able to determine that the Carrier acted in an arbitrary, capricious or discriminatory manner.

Thus, in sum, based on the record in the instant case, we find that the Organization has been unable to meet its burden of proof. The claim will be denied.

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 22nd day of July 2002.