

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36572
Docket No. MW-36161
03-3-00-3-360**

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

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Duluth, Missabe and Iron Range Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to assign senior applicants M. Beal, J. Myers, Jr. and M. Ojard to the foreman trainee positions advertised in Bulletin T-028-99 on March 30, 1999 (Claim No. 22-99).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants M. Beal, J. Myers, Jr. and M. Ojard shall now each be allowed the foreman trainee assignments of Bulletin T-028-99 and their respective proper foreman roster ranking in accordance with said assignment, and each shall be compensated for the difference in pay between their wages earned and the foreman trainee's rate of pay for all hours of the foreman trainee positions involved here beginning March 30, 1999 and continuing.”**

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.

On March 19, 1999, the Carrier posted Bulletin T-028-99 advertising four Track Foreman Trainee positions. The Claimants, who had established and held seniority in various classes within the Track Department, submitted bids for the Track Foreman Trainee positions. On March 30, 1999, the Carrier assigned junior applicants B. W. Berglund, J. L. McGrath, J. R. Sonneson and R. W. Voltzke to the positions.

The Organization maintained that the more senior Claimants possessed sufficient fitness, ability and qualifications and had submitted proper applications for the Track Foreman Trainee positions. As a result, the Organization argued that the Claimants should have been awarded the positions. The Organization stated that, "[T]he Carrier did not seriously dispute that the Claimants possessed sufficient qualifications to be promoted . . . " and that the Carrier had nothing to document its position that the Claimants lacked experience, leadership qualities and maturity. The Organization submitted that the Carrier's failure to assign the Claimants to the bulletined positions based on their seniority was a violation of Rules 2, 3 and 4. Furthermore, the Organization asserted that Third Division Award 32439 and Award 7 of Public Law Board No. 3460, among others, support its position that the senior Claimants had a contractual preference over the junior applicants.

According to the Carrier, the Board should support its selection of the junior employees because the record contains substantial evidence that its decision to assign the junior employees complied with Rule 3 and Supplement 33 governing the selection of employees for its Foreman-Track Inspector Training Program. It is the Carrier's position that Supplement 33 supercedes Rule 3 and allows the Carrier to judge the qualifications of the employee applicants, and if the Carrier finds that qualifications are equal, then seniority will determine their assignment.

The Carrier emphasized that its selection of the junior employees over the more senior Claimants was not arbitrary or capricious, and that the Carrier used objective standards to determine the qualifications of all applicants before assigning four of them to the Trainee positions based on their actual numeric scores. Finally, the Carrier stated that the Organization provided no evidence to rebut the Carrier's findings

regarding the Claimants' qualifications. In support of its position that the Board has afforded carriers substantial discretion regarding findings of employee fitness and ability, the Carrier cited Third Division Awards 28254 and 35809.

From the Board's examination of the pertinent Rules cited in this case, it appears that Rule 2 provides that employees are to be considered for positions based on their relative seniority within the subdepartment in which they are employed. Rule 3 defines "promotion" as "an advancement from a lower classification to a higher classification within groups." Rule 3(b) reads as follows:

"(b) Promotion shall be based on fitness, ability, and seniority. Fitness and ability being sufficient, seniority shall prevail. Carrier is to be the judge in determining fitness and ability, subject to appeal."

Rule 4 sets forth the Carrier's procedures for posting bulletins and making appointments, and specifies that, "... Appointments will be made in accordance with Rule 3. . . ." The first paragraph of Supplement No. 33, regarding the Carrier's "Foreman-Track Inspector Training Program, states:

"The Company may establish Foreman-Track Inspector Trainee positions. These positions will be bulletined. Other considerations being equal, senior applicant will be successful bidder. Carrier will be the judge of qualifications."

The record reveals that the Carrier's issuance of Bulletin T-028-99 was for the purpose of establishing four Track Foreman Trainee positions at Proctor and Keenan on the Carrier's Missabe Division and at Two Harbors. Under the "Assignment Duties" portion of the Bulletin, it is specified that the successful bidders will, "Attend Track Foreman Training program in accordance with the provisions of Supplement No. 33, Track Foreman - Track Inspector Training program. . . ." The same portion of the Bulletin also states, "Trainees will be selected based on qualifications, fitness for service and suitability for the position. . . ."

From the above it is evident that the Bulletin clearly conveyed that seniority would not be the sole selection criterion, but that "qualifications, fitness for service and suitability for the position" would provide the basis for selection. The Board notes that the inclusion of this information on the Bulletin was consistent with the first paragraph

of Supplement 33, quoted above. A careful reading of the quoted language in both Rule 3(b) and the Supplement reveals that seniority is not the sole factor to be used when determining whether an applicant is entitled to a position under advertisement. Rule 3(b) provides that qualifications shall be deemed "sufficient," while Supplement 33 states that seniority will form the basis for selection once other considerations, i.e., qualifications, are found to be "equal." The Board finds in this case that the selection criteria specified in the first paragraph of Supplement 33 are governing because the positions under advertisement were Track Foreman Trainees.

According to the Chief Engineer, the selection of Track Foreman Trainees was based on several criteria including leadership, initiative, trainability, safety, and "overall." In his June 16, 1999 letter to the General Chairman, the Chief Engineer explained that managers familiar with the applicants' abilities ranked their abilities on a scale from one to ten. The Chief Engineer's letter reports each individual score and indicates that the Claimants ranked the lowest of all the applicants with the reasons therefor provided. Their qualifications, as a result, were not "equal" to those of the junior employees.

It is the Board's opinion that, based on the language contained in the first paragraph of Supplement 33, quoted and discussed above, that the Carrier properly awarded the Foreman Trainee positions to the junior employees based on their superior qualifications. There is no evidence that the Carrier did not make a fair and reasonable evaluation of the qualifications of all applicants, including the Claimants, and the Organization has not established that the selection process was arbitrary, biased or otherwise unfair. Accordingly, the Board finds that the claim must be denied.

Regarding the Organization's reliance on Third Division Award 32439 and Award 7 of Public Law Board No. 3460, the Board finds that the facts and issues present in those cases differ from those in the instant case. Here, all applicants for the Foreman Trainee positions were evaluated on the same objective criteria, and there is no evidence that the Carrier improperly filled the Forman Trainee positions pursuant to the first paragraph of Supplement 33.

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 16th day of June 2003.