

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36760
Docket No. MW-35984
03-3-00-3-76

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company [former Southern
(Pacific Transportation Company (Western Lines))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior Track Sub-department employe T. Cisco to a welder helper's position on Gang 7421 on May 1, 1998, instead of assigning Mr. F. J. Lucero who was senior and made application for the position (Carrier's File 1153662 SPW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant F. J. Lucero shall be assigned to the position in question and he shall be paid for all time lost.”

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 entered the Carrier's service on July 17, 1978 and, at the relevant time, held seniority within various classes of the Carrier's Track Sub-department, Tucson Division, Western Seniority District. At the time this dispute arose, the Claimant was a Truck driver - Crane Operator headquartered at Tucson.

The Claimant submitted a bid for a posted vacancy dated March 20, 1998 for a Welder-Helper position. On April 3, 1998, the position was awarded to the Claimant. On April 13, 1998 - prior to the Claimant's reporting to begin work on the Welder-Helper position - the Carrier advised the Claimant that he was disqualified from that position. The position was then given to T. Cisco, who had a seniority date of September 23, 1997.

The Carrier's reasons for disqualifying the Claimant from the Welder-Helper position before he assumed the duties of the position are set forth in a memo from Manager of Track Maintenance J. E. Travers:

"On April 7, 1998 Mr. Mark Woodbury, Manager of Track Welding and myself met with Mr. Floyd Lucero to discuss the bid he was awarded as the Welder Helper at Tucson Az. The first item we discussed is Mr. Lucero's recent violation of on track safety occurring on December 15, 1997, while working as a watchman for non-railroad contractors. Mr. Lucero was observed by me to be standing away from these employees by his truck and reading the newspaper. Mr. Lucero was upgraded for his inattentive behavior. He is a member of the Union Pacific's PAL program where I meet with him periodically to discuss safety issues and Mr. Lucero has strongly voiced his opinion that he feels he was doing nothing wrong with his actions pertaining to this incident. Mr. Lucero's work habits, negative attitude and lack of attention to his work we feel are grounds to disqualify him as a Welder Helper. He has shown a lack of understanding on how serious of a safety violation it is not to pay full attention to the men he is responsible for while on or near the tracks which is the main function of a Welder Helper."

The relevant Rules cited by the Organization provide:

"RULE 7 – PROMOTIONS

* * *

A promotion is an advancement from a lower class to a higher class. Subject to applicable qualification requirements set forth in other rules of this agreement, promotions will be based on seniority. Fitness and ability being sufficient, seniority shall prevail.

RULE 8 – QUALIFICATIONS

File Application.

- (a) . . . Employees who have filed written application . . . will be accorded cooperation by the employees' immediate supervisor in obtaining on-the-job training in order to acquire proficiency in the class for which application was made.

* * *

Examinations.

- (b) At periodic intervals when service requirements indicate an expected future need for additional employees to meet the requirements in a class, employees who have filed written application to qualify for service in such class shall, in the order of their seniority date in the seniority district, and after having passed any required physical and/or written examinations, be accorded a fair chance to demonstrate their ability to meet the practical requirements of the class. . . .

Failure to Qualify.

- (c) An employe who fails to meet the necessary requirements shall be advised in writing of the reason or reasons therefore and he shall not be privileged to again make application to qualify for the same class for 90 days, but shall not be precluded from making application to qualify for other classes during such period. An employe may not make application under the provisions of this rule to qualify for a specific class more than twice.

The Carrier cites us to Rule 18:

- (a) Promotion shall be based on ability, qualifications, and capacity for greater responsibility and where these requirements are sufficient, seniority shall prevail.”

The Organization’s argument is straight forward. Citing Rules 7 and 8, which provide that employees who have filed written application will be accorded cooperation by the Carrier in obtaining on-the-job training in order to acquire proficiency in the class and that such employees must be accorded a fair chance to demonstrate their ability to meet the practical requirements of the class, the Organization asserts that this record shows that the Claimant was disqualified from the Welder-Helper position awarded to him before he assumed the duties of that position without even being given the opportunity to demonstrate his skills and abilities for the job. At first blush, that is an appealing argument. Stated differently, according to the Organization, how can the Carrier disqualify an employee who was not even given the chance to qualify?

In Second Division Award 13699 (with this Referee sitting on the Board as the neutral member), the Second Division ruled in accord with a similar argument made by the Organization in this case. The Board found in that case:

“The Claimant was displaced from his position. On June 3, 1999, the Claimant attempted to displace the junior employee Rancourt, but was not allowed to do so. Rule 26.1 clearly allows the Claimant

the ability to exercise displacement rights over junior employees ("Employees . . . who are displaced by senior employees . . . will exercise their seniority rights to positions held by junior employees within 48 hours from being affected by abolishment or displacement."). Rule 12.5(a) clearly allows the Claimant the ability to demonstrate his qualifications in the position he attempts to displace into ("Employees . . . after . . . exercising displacement rights, will be allowed up to 20 working days in which to demonstrate their ability to competently perform the job."). The Claimant was not given that ability to demonstrate his qualifications when he attempted to displace the junior employee Rancourt. The Organization has therefore demonstrated a violation of clear language of the Agreement.

It may be that the Claimant (who the Carrier contends is a Painter) will not be able to satisfactorily demonstrate his "ability to competently perform the job" for the Carman's position into which he attempted to displace as required by Rule 12.5(a). However, Rule 12.5(a) clearly gives the Claimant the opportunity to at least demonstrate his abilities."

However, the difference between this case and Second Division Award 13699 is that in Award 13699 there was mandatory language which required the Carrier to allow the employees to demonstrate the ability to perform the job - "[e]mployees . . . after . . . exercising displacement rights, will be allowed up to 20 working days in which to demonstrate their ability to competently perform the job" [emphasis added]. That mandatory language is not present in this case. Here, the Rules cited by the Organization require cooperation in on-the-job training and a fair chance to demonstrate their ability to meet the practical requirements of the class with the overriding principle stated in Rule 7 that "[f]itness and ability being sufficient, seniority shall prevail." But the same Rule 7 places a qualification on that seniority entitlement by also providing that that "[s]ubject to applicable qualification requirements set forth in other rules of this agreement, promotions will be based on seniority." The relevant applicable "other rule" is Rule 18(a) cited by the Carrier - "[p]romotion shall be based on ability, qualifications, and capacity for

greater responsibility and where these requirements are sufficient, seniority shall prevail" [emphasis added].

In short, there is no language in the Agreement that prevents the Carrier from disqualifying an employee from a position prior to the employee assuming the duties of that position. Again, compare Second Division Award 13699 which mandated that the employee have a period of time in the position to demonstrate qualifications thereby not permitting the disqualification of an employee prior to his assuming the duties of the position.

Therefore, absent specific language prohibiting the Carrier from disqualifying an employee before he assumed the duties of the position, this dispute becomes one concerning whether the Carrier was arbitrary when it disqualified the Claimant from the Welder-Helper position prior to the Claimant's assuming the duties of that position? The right to determine qualifications of an employee rests with the Carrier. But that right is not an unfettered one. In making those determinations - particularly in cases such as this where the employee is not even given a chance to actually demonstrate his abilities in the position - the Carrier must have a rational basis or justification for its action. These cases are therefore case-by-case calls.

In this case, the record supports a non-arbitrary determination by the Carrier. The Claimant was disciplined as a result of an incident on December 15, 1997 where, while working as a watchman, he "... was observed ... standing away from these employees by his truck and reading the newspaper." We recognize that this promotion dispute arose in April 1998 - some four months later. If that is all that was before us, we would find the Carrier's actions in not allowing the Claimant to begin working the Welder-Helper's position in order to demonstrate his qualifications to be arbitrary. The Claimant was disciplined for the December 1997 event and, given the passage of time, that discipline should have taken care of his prior misconduct. But there is more. It is un rebutted in this record that the corrective message from the December 1997 discipline did not get through to the Claimant. According to Manager Track Maintenance Travers, the Claimant "... is a member of the Union Pacific's PAL program where I meet with him periodically to discuss safety issues and Mr. Lucero has strongly voiced his opinion that he feels he was doing nothing wrong with his actions pertaining to this incident." Given that

unrebutted assertion, we find that the Carrier had a non-arbitrary reason for denying the Claimant the promotion to Welder-Helper. Welders must rely upon their Helpers to keep lookout and to otherwise protect them. The Claimant did not look out for others in December 1997 while serving as a Watchman and, most importantly, did not get the message that he was obligated to do so. Given that the record shows the message did not sink in, it was not arbitrary for the Carrier to conclude that the Claimant might similarly engage in the same lack of attentiveness to other employees in the Welder-Helper position. The Carrier's conclusion was perhaps debatable - but we cannot find that it was arbitrary. We shall therefore deny the claim.

In light of the above, the parties' arguments concerning the effect of the Claimant's subsequent dismissal in March 1999 upheld by the Board in Third Division Award 36368 are therefore moot.

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 29th day of December 2003.