

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36976
Docket No. MW-36490
04-3-00-3-765

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned the foreman position advertised by Bulletin No. 2152, effective September 17, 1999, to Mr. S. R. Travis instead of Assistant Foreman M. B. Landry (System File MW-0024/1213045 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. B. Landry shall now be assigned the aforesaid foreman position and he shall be compensated at the respective straight time rate of pay for all straight time hours and compensated at the respective time and one-half rate of pay for any and all overtime acquired by Mr. S. R. Travis on said position beginning September 17, 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.

The claim arose when the Carrier assigned the Foreman vacancy in question to the employee (S. R. Travis) who had the greatest craft seniority of the three bidders on the bulletin. Travis did not hold Assistant Foreman seniority. The Claimant, albeit junior in craft seniority, did hold Assistant Foreman seniority. The Organization maintains that the Claimant should have received preference for the vacancy.

Two issues were in controversy as the claim record developed on the property. The first dealt with whether the Claimant and Travis had sufficient fitness and ability to be awarded the vacancy. The Carrier contended that Travis did, but the Claimant did not. The Organization contended that the Claimant did possess the requisite fitness and ability. The second issue focused on the application of Rule 10(a) of the Agreement. That Rule reads as follows:

"Promotions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail, the management to be the judge subject to appeal."

It is undisputed that the vacancy in question was a promotion because there were no bidders that held Foreman seniority.

In its Submission to the Board, the Organization advanced contentions based on Rule 10(b). The subdivision provides that Assistant Foremen will be given preference in the application "... of this rule. ...". However, careful examination of the record developed by the parties on the property fails to reveal that Rule 10(b) was ever cited as a basis for the claim. Indeed, in much of the early record development, the Organization cited provisions of an Agreement that had been superseded before the date of the instant claim. Accordingly, we are required to treat contentions based on Rule 10(b) as new evidence and/or argument. It is well settled that such new matters may not be considered by the Board.

On the strength of Rule 10(a) alone, the claim must be denied. The Rule does not explicitly provide for a preference based on seniority in the next lower classification when there are no bidders with seniority in the classification. Moreover, the

Organization did not establish a proper interpretation of Rule 10(a) by past practice or negotiating history that undercut the Carrier's contention that seniority within the craft controlled.

On this record, the Carrier also must prevail on the ability and merit issue. The statement of the Carrier's Manager of Track Maintenance established the sufficient ability and merit of Travis. He had served satisfactorily as acting Foreman and Employee in Charge of others in the past. For the most part, the Organization's contentions about the Claimant's ability and merit are based only on assertion. It is undisputed that the Claimant's seniority as an Assistant Foreman was acquired solely through the performance of Flagman duties for contractors and not through supervision of employees. Moreover, the Claimant's service as an acting Foreman came months after the disputed vacancy was awarded to Travis. Such post-action events are not proper considerations. See Award 122 of Special Board of Adjustment No. 279.

Given the foregoing state of the instant record, the claim cannot be sustained.

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 21st day of April 2004.