

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36994
Docket No. MW-36080
04-3-00-3-264

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 Employes
(Duluth, Missabe and Iron Range Railroad 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 Mr. B. Reppe to the foreman position advertised in Bulletin No. T-138-98 beginning on January 8, 1999 and continuing (Claim No. 05-99).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Reppe shall now be allowed the foreman assignment of Bulletin No. T-138-98 and he shall be compensated for the difference in pay between wages he earned as a laborer and the foreman rate of pay for all hours of the foreman's position in question beginning January 8, 1999 and continuing until this matter is resolved.”

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 relevant time, the Claimant was a Laborer in the Track Subdepartment at Keenan. On December 29, 1998, the Carrier posted Bulletin No. T-138-98 for B and C Machine Operators and a Track Foreman at Two Harbors. The stated days and hours for the positions were Wednesday through Sunday, 3:00 P.M. - 11:00 P.M. Requirements for the jobs stated in the bulletin were that "[s]uccessful bidder must possess a valid On-Track Operator's Permit and a current Timetable."

The Claimant, who had an Operator's Permit and Timetable, applied for the Foreman's position and was the senior applicant for that position. However, the Claimant was not awarded the Foreman's position. By notice dated January 8, 1999, the Carrier awarded the B and C Machine Operator positions, but cancelled the Foreman's position.

On January 25, 1999, the Carrier again bulletined the Foreman's position at Two Harbors, Wednesday through Sunday, 3:00 P.M. - 11:00 P.M. (Bulletin No. T-006-99). Requirements for the job stated in that bulletin were the same as in the December 29, 1998 bulletin for the Foreman's position - "[s]uccessful bidder must possess a valid On-Track Operator's Permit and a current Timetable."

On January 29, 1999, the Carrier awarded the Foreman's position to M. R. Staples, who was senior to the Claimant. This claim followed asserting that the Claimant was improperly denied the ability to fill the position pursuant to the bulletin dated December 29, 1998.

According to the Carrier in its March 9, 1999 letter, the Claimant had no Group A seniority and, therefore, was not the senior qualified applicant entitled to the position. Then, according to the Carrier in its July 7, 1999 letter, with respect to the cancellation of the Foreman's position on January 8, 1999, it did so because it "... evaluated the work requirements at the time and determined the work could be covered for a period of time with a day foreman." Further, according to the Carrier in that letter, "[w]hen the Carrier later determined there was a need for a fulltime foreman, the position was bulletined..."

The Organization pointed out in its January 15, 1999 claim that two other employees who hired out on the same date as the Claimant were awarded Foreman positions and, at the time of those awards, those employees only had valid On-Track Operator's Permits and current Timetables, as did the Claimant.

Rule 3 provides:

"RULE 3 Promotion

* * *

- (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.
- (c) Vacancies or new positions will be filled first among those employees who hold seniority in the classification of the vacancy or new position. Assignment will be made from that group in the following order:
 - (1) Senior qualified applicant,
 - (2) If there is no qualified applicant from among the employees holding such seniority, the junior man holding such seniority and currently assigned at the headquarters point of the vacancy or position will be forced to the assignment.
 - (3) There being no such employees at the headquarter point, then the junior qualified man holding such seniority in the class will be forced to the assignment.

Track Subdepartment: If not so filled, then the senior applicant in the next succeeding classification within the group will be assigned. This method is to be followed through the

succeeding lower classification in the order they are listed in the group until the position is filled. If no applicants are received from the track subdepartment, the following procedure will be used in filling the vacancy:

- (1) Recall furloughed employees in the track subdepartment;
- (2) Assign the senior qualified applicant working in the B&B subdepartment.

* * *

- (f) An applicant who possesses the necessary fitness and ability and who is promoted will be given a fair opportunity (not to exceed sixty calendar days) to demonstrate his ability to meet the practical requirements of the position. Failing to qualify, the employee may return to his former position provided a senior employee has not exercised displacement rights thereto. If so, the disqualified employee may exercise his seniority to any position held by a junior employee, in compliance with these rules."

Simply put, the Carrier argues that it exercised its managerial prerogatives when, after it bulletined the Foreman's position on December 29, 1998 and the Claimant bid on that position, it decided to cancel that position on January 8, 1999 and have the work performed by a Foreman on another shift. Further, according to the Carrier, after it determined that the work needed to be performed by a Foreman on the same shift, on January 25, 1999 it again bulletined the position, but this time awarded the position to the more senior applicant Staples.

The Carrier stated in its March 9, 1999 letter that it "... is not obligated to fill a position [and it] certainly has the right to cancel a bulletin and determine the number of positions necessary to meet its service requirements." We agree. Clearly, the Carrier has the managerial prerogative to determine when to post and cancel bulletins for positions. Further, the Carrier has the managerial prerogative to determine that it may have been wrong in its assessment of the situation and, at a

later date, determine that it does need an employee in a position and again bulletin the position for bid. The Carrier's discretion in this regard is broad. The Carrier has the right to run its railroad.

But the Carrier's right to exercise its managerial prerogatives is not an unfettered and unreviewable one. While it is not the function of the Board to review the Carrier's exercise of its managerial rights to determine whether, in our view, the Carrier's managerial decisions were correctly made, in the exercise of its discretion the Carrier cannot act in an arbitrary fashion. Stated differently, when it comes to exercising its managerial prerogatives, the Carrier has the "right" to be "wrong" - it just cannot be arbitrary.

Arbitrary conduct is action that is taken without a rational basis or justification. And, in these cases, because the burden of proof is on the Organization, the Organization must demonstrate the existence of arbitrary conduct. The showings by the Organization that the Carrier bulletined the Foreman's position for bid on December 29, 1998; the Claimant was the senior qualified bidder because of his seniority and the fact that he met the posted requirements of having an On-Track Operator's Permit and current Timetable; other employees who hired out on the same date as the Claimant were given Foreman dates in other similar circumstances; the Carrier cancelled the bid on January 8, 1999; and then, most importantly, re-bulletined the exact position slightly more than two weeks later on January 25, 1999, are collectively sufficient to shift the burden to the Carrier to articulate a rational basis for its decision to cancel and then re-bulletin the position, with the end result that the Claimant did not get the Foreman's position.

The Carrier first argued that it had the managerial right to take such action. Again, as a general rule, it does. However, it cannot do so in an arbitrary manner - and that is the question in this case.

The Carrier next argued in its March 9, 1999 letter that the Claimant had no Group A seniority and, therefore, was not the senior qualified applicant entitled to the position. But Rule 3 clearly contemplates filling vacancies from different groups ("If not so filled, then the senior applicant in the next succeeding classification within the group will be assigned [and t]his method is to be followed through the succeeding lower classification in the order they are listed in the group until the position is filled").

Then, in its July 7, 1999 letter the Carrier stated that with respect to the cancelled position it “. . . evaluated the work requirements at the time and determined the work could be covered for a period of time with a day foreman.” However, according to the Carrier in that letter, “[w]hen the Carrier later determined there was a need for a fulltime Foreman, the position was bulletined. . . .” That is the key to this case. What specifically was it that changed between January 8 and January 28, 1999 that caused the Carrier to determine that as of January 28, 1999 now “. . . there was a need for a fulltime foreman. . .”? Aside from the Carrier’s conclusion that there was a change, close examination of this record does not show what that change was, or what the Carrier’s error was in initially determining in early January 1999 that it did not need a Foreman on that shift. All we have is an unsupported conclusion made by the Carrier that it changed its mind after it “evaluated the work requirements” and determined that a Foreman was needed and assignments by a Foreman on another shift would not suffice to get the job done to its satisfaction. Had the Carrier demonstrated specifics concerning its decision to cancel and then re-bulletin the position, given the Carrier’s right to make managerial decisions, we would be hard pressed not to defer to that decision. But here, the Carrier does not specifically tell us what caused it to change its mind. In the end, the Carrier just tells us that it looked at the situation and changed its mind. That is not a rational basis to justify the Carrier’s action. In this case, that is insufficient to refute the Organization’s prima facie showing that the Carrier acted in an arbitrary manner.

What we are left with is a record which shows that the Claimant was going to get the position by operation of the bidding Rules; he met the fitness and ability requirements for filling the position; and, when the Carrier saw who was going to get the position, rather than affording the Claimant “. . . a fair opportunity (not to exceed sixty calendar days) to demonstrate his ability to meet the practical requirements of the position” as required by Rule 3(f) the Carrier simply cancelled the position only to re-bulletin it a little over two weeks later allowing someone other than the Claimant to get the Foreman’s job. While the Carrier has broad decision making abilities, in this case to avoid the conclusion that it acted without a rational basis and in an arbitrary manner, the Carrier had to do more to explain its decision making process. We shall therefore sustain the claim. The Claimant shall be given the Foreman’s assignment and given the opportunity to demonstrate his ability to meet the practical requirements of the position as called for in Rule 3(f). The Claimant shall also be made whole.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 18th day of May 2004.