

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37095
Docket No. MW-36885
04-3-01-3-491

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to assign Track Foreman H. Moore to a bulletined track foreman position on the Michigan Seniority District and instead assigned junior employee P. Palon and when it subsequently failed and refused to allow Mr. Moore to exercise his foreman seniority to displace Mr. Palon from said foreman position (Carrier's File BMW-419 NRP).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. Moore shall now ‘. . . be paid for all wages he could have earned until Mr. Moore is returned to work at the Foreman position, and to include any difference in wages if Mr. Moore returns to work in a lower rated position and to continue until he is allowed to displace Mr. Palon.”

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.

This claim raises the issue of whether the Carrier impermissibly exercised its discretion in finding the Claimant unqualified to hold a Foreman's position in April 2000 based solely upon his failure to update his NORAC qualifications during a period when he was on furlough.

The undisputed facts reveal that the Claimant was displaced from his position on November 29, 1999, and exercised seniority to another position effective December 6, 1999, where he remained until January 6, 2000 when he was furloughed. On December 1 and 2, 1999 the Carrier conducted re-certification classes for Operating Rules on the Michigan District, in accordance with past practice to hold such training in December in order for employees to update their certifications. There was no written notice posted concerning the dates of the classes or letter sent to the Claimant about the scheduling. Class attendance records reveal that 66 employees, including the General Chairman and seven employees on furlough, virtually every employee on the Michigan District, attended the training classes. The Claimant did not and his NORAC certification, necessary for exercising the authority to take track out of service as a Foreman, lapsed on December 31, 1999.

On April 4, 2000, while still on furlough, the Claimant filed a bid for the position of Foreman. The position was awarded to P. Palon who is junior in Foreman seniority to the Claimant. Upon the Claimant's recall from furlough to a Trackman's position on April 17, 2000 he attempted to displace Palon in the Foreman's position under Rule 13(3). Both his bid and attempted displacement to this position were denied by the Carrier on the basis that he did not possess the necessary qualifications for the position because he did not have a current NORAC certification. It is this determination that is the subject of the instant claim, which

resulted in much correspondence on the property between the parties concerning issues including the applicability of Rules 8 and 13, the scheduling of training classes by the Carrier to coincide with the end of the working season when employees are routinely furloughed, and a question about whether the NORAC certification paper is necessary to prove the Claimant's ability and qualification to perform the job of Foreman, in light of the fact that he had been in that position throughout 1999.

The Organization argued on the property that the Carrier violated Rule 8 when it failed to honor the Claimant's bid for the Foreman position while he was on furlough, and Rule 13(3) when it refused to permit him to displace Palon upon his recall within 15 days of the award of the position. The Organization also argues that the Carrier violated the Claimant's seniority rights by awarding the position to a junior employee in light of the Claimant's exhibited qualification to perform the position, citing Public Law Board No. 3460, Award 7 and Public Law Board No. 4370, Award 41. The Organization asserts that the Carrier cannot show that it provided adequate notice of the December training classes, and that it abused its discretion by scheduling such classes in the fall when many employees are furloughed, discriminatorily placing the financial responsibility on the employee to attend such classes. It notes that the Carrier is in total control of when and where the rules training classes are scheduled and to permit it to disqualify the Claimant based solely on his lack of re-certification in December because he did not attend a class when he was on furlough is outside the permissible scope of its discretion. It asserts that the Claimant was not given the appropriate opportunity to qualify. The Organization alleges that the Carrier is engaging in a sharp practice of holding classes at the end of the production season, rather than in the spring as other Carriers do, to prevent employees on furlough from attaining the requisite qualifications. The Organization requests that the Claimant be made whole for the difference in wages between the time he was recalled in April 2000 and denied the Foreman position, to the time he was permitted to attain such position after re-certification in August 2000.

The Carrier contends that the Organization failed to sustain its burden of proving that the Claimant was improperly denied the Foreman position in April 2000. The Carrier notes that the issue in this claim is whether its decision that the Claimant was not qualified to hold the Foreman position in April 2000 was arbitrary or discriminatory, relying upon precedent noting that it is a fundamental

Carrier right to determine the qualifications for a particular job, citing Third Division Awards 29480, 30203 and 30531. It asserts that there is no proof that it manipulated the qualification scheduling process to exclude the Claimant from attending the classes on December 1 and 2, 1999, noting that employees were well aware of when the classes were being held despite lack of written notice, and that almost the entire District attended the training including seven employees on furlough at the time. The Carrier posits that it was the Claimant's choice not to keep his certification current by attending the training class, presumably because he would not be paid for such attendance, noting that the Organization never claimed on the property that the Claimant was unaware of the date and location of the training. While asserting that Rule 8 does not apply to employees on furlough, and Rule 13(3) would have permitted the Claimant to displace Palon if he had been qualified, the Carrier states that its determination that the Claimant was not qualified for the Foreman position due to his lack of current certification was reasonable and accurate. The Carrier notes that NORAC certifications expire at the end of the year following either initial certification or re-certification, and that the Claimant's initial certification in April 1998 expired on December 31, 1999. The Carrier requests that the claim be denied, noting that the relief requested is excessive because the Claimant chose not to work until May despite being recalled in April 2000, and was not qualified for the Foreman rate of pay until August 2000 when the Carrier ran a training class for the Claimant and another employee.

A careful review of the record convinces the Board that the Organization failed to meet its burden of proving that the Carrier violated the Agreement by not permitting the Claimant to exercise his seniority to obtain the position of Foreman or displace the junior employee awarded such position in April 2000. Regardless of whether Rule 8 is interpreted to apply to a furloughed employee, a dispute between the parties, this case turns on whether the Carrier properly determined that the Claimant was not qualified for the Foreman position in April 2000, not on the manner in which he applied for the job. It is clear that the basis for denying the Claimant the initial bid or subsequent displacement rights was his lack of current NORAC certification. Based upon the record on the property, we are unable to find that the Organization proved that the Claimant was denied the opportunity to re-qualify in December 1999. While no direct evidence of a written notification of the dates of the training was proffered by the Carrier, it is clear from the attendance at such sessions and the unrefuted past practice that Michigan District employees were

aware of the training class and when it was going to be held. In fact, the Organization never asserted that the Claimant did not know when the training was taking place. Rather, it focused its argument on the fact that the Carrier's scheduling at this time was unreasonable and arbitrary and worked to the disadvantage of employees subject to furlough at the end of the production season. The Organization produced no evidence of discrimination or arbitrariness in the treatment of the Claimant or other employees. The Claimant was provided the same opportunity as other employees to attend the December 1999 training to keep his certification up to date. Nowhere does it require the Carrier to schedule such training at a time when an employee will be compensated for attendance. Because we are convinced that the Claimant's lack of current certification was not the fault of the Carrier, and was a valid job qualification for the Foreman position sought by the Claimant herein, we must deny the claim.

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 July 2004.