

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39299
Docket No. MW-38248
08-3-NRAB-00003-040139
(04-3-139)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific 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. D. W. Selby to the System Steel Gang 8501 foreman position on January 4, 2003 and again when it failed and refused to assign him to the System Steel Gang 8501 foreman position on February 2, 2003 (Carrier’s File 1357486).
- (2) As a consequence of the violations referred to in Part (1) above, Claimant D. W. Selby shall now be compensated at the applicable foreman rates of pay for all straight time and overtime hours that he was denied to work on Gang 8501 beginning January 4, 2003 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.

Claimant D. W. Selby applied for a bulletined position as System Steel Gang Foreman for Gang 8051 in January and February 2003. Both times the position was awarded to a junior employee because the Carrier deemed him unqualified. As part of his application, the Claimant submitted a lengthy resume which indicated experience as a Foreman dating back to 1972, including time spent on the Southern Pacific Transportation Company which was eventually acquired by the Carrier.

The Carrier's first response to the Organization's claim submitted on behalf of the Claimant came from the Manager, Special Projects who denied the claim and stated: "As a result of my investigation into the merit of your claim, Claimant does not show as a qualified Steel Gang Foreman and therefore was not assigned to the bulletins in question."

A subsequent response to the Organization's appeal came from the Director of Labor Relations. He stated in pertinent part:

"I do not find where he has been assigned to a system steel gang under the Consolidated System Gang Agreement, which has been in effect since January 1, 1998. Enclosed is a copy of his job history record contained in People Soft. I was unable to determine if he had been assigned to a similar gang when working for the former Southern Pacific Transportation Company. As I am unable to dispute I am unable to make a comparison to know whether or not Mr. Selby was supervising a curve gang or a rail relay gang. As you are now aware, under the UP agreement there is a difference between these type of operations."

It is well-established that the Carrier has the right to select its Foremen. In Award 27 of Public Law Board No. 6302, Referee M. H. Malin stated:

“On its face, Rule 20(l) appears to allow Carrier to bypass a senior foreman in Classes (a) and (b) of Group 19 [now Group 26] who does not have experience and specialization in the type of work involved for a junior foreman who has such experience and specialization when establishing new gangs. Carrier contends that its long standing practice has been to award the position to the senior foreman who has such experience and specialization and who bid on the position, but if no qualified bidders are available, to recall a junior foreman who has the requisite experience and specialization.

The language of Rule 20(l) supports Carrier’s interpretation and practice.”

The Board has no intention of disturbing this precedent. If the Claimant did not have the requisite experience, the Carrier was within its rights to bypass him, no matter the obviously high caliber of his record. The remaining question is whether he did, in fact, have such experience: he claims that he did, the Carrier contends it has no record of it, offering his People Soft work history as proof. Neither the Organization nor the Claimant presented additional evidence on the property to support the assertion about his experience.

The Organization raised an interesting argument about the Carrier’s obligation under the Agreement to maintain records detailing employees’ experience under merged Carriers. A close reading of the record, however, reveals that this argument was raised for the first time before the Board and not on the property. Lengthy precedent establishes that the Board may only consider arguments and evidence first presented on the property. See, for example, Third Division Awards 22054, 25575, 26257. Therefore, based solely on the precedent established by Award 27 of Public Law Board No. 6302, the claim must be denied.

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 29th day of September 2008.