

****CORRECTED****

**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40347
Docket No. MW-40757
10-3-NRAB-00003-090030**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company**

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 Mr. K. Christensen to the extra gang foreman position on System Bulletin Number 305A dated September 21, 2006 and when it assigned junior employee F. Staples to said position on System Bulletin Number 305B dated October 2, 2006 (System File C-06-290-061/8-00219-143).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now correct System Bulletin Number 305A to show Claimant K. Christensen as the assignee and, beginning September 21, 2006 and continuing, the Claimant shall ‘. . . now be reimbursed at the Extra Gang Foreman pro rata [rate] of pay and have all overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.’”**

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 protests the Carrier's failure to assign the Claimant to System Bulletin (SB) No. 305 - the temporary position of Extra Gang Foreman on a surfacing crew - and its assignment of junior employee Staples to the position. The bulletin was first posted on September 5 and it was determined that there were no qualified bidders on September 21, 2006. Both the Claimant and Staples had bid on the position, which listed the prerequisites as "must be respirator fitted and GCOR qualified and have a valid driver's license." On October 2, 2006 a correction was issued awarding Staples the position. The Claimant was determined not to be qualified under Rule 8(b) while Staples was found qualified because he had attended the Surface Training Program (STP) in the Spring of 2006 and was experienced in all aspects of the surfacing program, while the Claimant had not received the training. Such training requirement was not listed on SB No. 305, but had been listed on SB No. 39 (which was the same Foreman position previously awarded to Dusterhoft, whose leaving created the vacancy advertised in SB No. 305), as well as SB No. 24, (High Production Tamper Operator (HPTO) awarded to Staples), No. 38, No. 40, No. 41 (all HPTO positions) and No. 42 (Extra Gang Foreman position), all bulletined in February 2006 and awarded on March 9 with the requirement of attending Tamper School from March 13 - 16, 2006. The Claimant had unsuccessfully bid on SB No. 38, No. 39, No. 40 and No. 41. By agreement of the parties, the Carrier was permitted to post these new positions early and award them by seniority with the requirement that the SPT be conducted for successful

applicants prior to the start of the season and that applicants agree to remain on the position until completion of the season.

The Claimant had been awarded SB No. 244 on September 20, 2005, a position requiring that he be respirator fitted and have a valid driver's license, and SB No. 124 on April 16, 2006, a position that required both respirator fitting and GCOR qualification, which he was working at the time that he bid on the position in issue in this dispute. The correspondence on the property reflects the Carrier's position that the Organization was obliged to show that the Claimant met all qualifications of the position, and had not produced any evidence of such, and the Organization's contention that the Claimant met all qualifications advertised in the bulletin and that the Carrier has not shown otherwise. The record contained internal Carrier emails indicating that the reason that the Claimant was not awarded the position was because he did not have STP, not for lack of any of the other listed prerequisites. The Carrier indicated that the Claimant and the Organization were aware that this position required SPT from all of the original postings, the Claimant had the opportunity to bid on these positions and receive the required training at that time, and the fact that it was inadvertently omitted from SB No. 305 does not change the fact that such training was required to take over a Foreman position on a gang that was already up and running.

The Organization argues that under Rules 4 and 11, the Claimant was the senior qualified applicant in the next succeeding lower group and had preference over Staples (citing Third Division Awards 2716, 6136, 20120, and 39322). It notes that he had all of the qualifications listed in SB No. 305, and Rule 10(c) requires the Carrier to list special qualification in its bulletins (relying on Third Division Awards 2994, 20310, and 24480). The Organization notes that the Claimant was denied the position under Rule 8, not Rule 9, and that an ability determination under Rule 8 is not the same as a determination of qualification under Rule 9, which may be challenged in an Unjust Treatment Hearing (citing Third Division Awards 14762 and 11279). It asserts that the reason for the denial was clear - the Claimant's lack of STP, and the issue of the Claimant's possession of the other three listed qualifications did not arise until Labor Relations became involved years after the original decision. The Organization maintains that the Carrier's determination to deny the Claimant the position was arbitrary because it did not offer him the same opportunity to take the training as it did with others previously put on the job

(relying on Public Law Board No. 3460, Award 7) and that the Claimant should have been awarded the position with 30 days to qualify.

The Carrier contends that the Organization did not meet its burden of proving that the Claimant met all of the qualifications for the position, that mere statements are insufficient (citing Third Division Awards 10637, and 10601) and that absent such showing the claim must fail (relying on Third Division Awards 39887, 36992, 29219, 28600, and 29218). The Carrier contends that the Organization must show that the Claimant possesses sufficient ability under Rule 8 to be considered for a demonstration of such ability under Rule 9, and that Rule 8(c) only entitles the Claimant to consideration, which he was given and found not to possess sufficient ability or minimal requirements. The Carrier stresses its right to set the minimum qualifications for a position and make fitness determinations, which here included the requirement of STP for a Foreman of a surfacing crew that was up and running and all had obtained the necessary training before the job started - training which it asserts was available to the Claimant had he been a successful bidder on the initial jobs. The Carrier admits that it was an oversight not to put the STP requirement on SB No. 305, but argues that such omission does not negate the fact that the training was needed to have the ability to perform the job. It also contends that the Organization's attempt at relying on Rule 10 at this late date is an improper amendment of the claim, and that it was well aware of the training requirement for positions on this crew from the initial postings. The Carrier asserts that the Organization is estopped from questioning the STP requirement because it did not challenge its determination of the Claimant's lack of qualification in an Unjust Treatment Hearing (citing Third Division Award 35019). Finally, the Carrier argues that the claim is excessive, and any damages must be limited to the difference in pay rate (relying on Third Division Award 31456).

As noted in numerous Awards including Third Division Award 29218, the Carrier has the right to judge employee fitness, ability and qualification for a job and the Organization must establish that such judgment was arbitrary, unreasonable, or capricious in order for it to be set aside. A careful review of the record convinces the Board that the Organization failed to sustain its burden of proving that the Carrier violated the Agreement in failing to promote the Claimant to the position set forth in SB No. 305 or that its decision was arbitrary.

The record clearly shows that the reason for the determination that the Claimant did not have sufficient ability was his lack of STP. Although the Carrier said that the Organization never proved that the Claimant had the other three listed qualifications, the fact remains that the requirements of respirator fitted, GCOR qualified and possession of a valid driver's license are contained within the two prior bulletins awarded to the Claimant (SB No. 244 and SB No. 124). Because the internal emails make clear that these other requirements were not the reason why the Claimant was not awarded the position, the Organization's failure to furnish specific proof of them does not defeat the claim.

The question in this case was whether it was arbitrary for the Carrier to determine that the Claimant's lack of STP caused him not to have the ability and qualification for the position advertised in SB No. 305. It is clear that at the beginning of the season all successful bidders on positions on this extra gang surfacing crew were required to have, and were given, the training. The Carrier established that by agreement with the Organization it posted positions subject to attending the training, which was a requirement of those positions before the start up of the season. Whether the Claimant could have gotten SB No. 24 over Staples had he bid on it and received the training in March 2006 (a fact disputed by the Organization) the Claimant did bid on other positions on this gang, which he was unable to secure through his seniority. He was given the same opportunity as other employees to obtain training if he had been the successful bidder, because the understanding was to train successful bidders, and they were to stay on the job for the entire season. Unfortunately, he was not the successful bidder on any of the postings he bid on. The Organization knew that the temporary vacancy advertised in SB No. 305 arose when Dusterhoft left the Foreman position prior to the end of the season in September, when the surfacing crew was up and running. Regardless of the fact that the training requirement was inadvertently omitted from SB No. 305 where it should have been listed under Rule 10(c) it was not arbitrary for the Carrier to determine that such training was necessary for the position of Extra Gang Foreman on a surfacing program already in progress, or that the Claimant, who held no rank in that position and admittedly did not have the training, did not possess the ability to perform the job at the time of the posting.

The claim was initially filed specifically citing Rules 3, 4, 7, 8 and 11 and was pursued under the theory that the Claimant had preference for the bid over Staples

under Rule 11(a). The Organization's belated reliance upon the requirement in Rule 10 to list special qualifications in the bulletin (the record evidence supports a technical violation of that provision) does not change the fact that the Carrier's determination that training was necessary in this situation was neither arbitrary nor unreasonable. This is especially true where it was clear that SB No. 305 was a reposting of the same position previously posted in SB No. 39 with the training requirement listed (which the Claimant bid on) and that all bulletins for the positions on this gang contained the same training requirement. The record supports the conclusion that the Claimant and the Organization were aware that pre-season training was a requirement of a position on this gang and that it was given in March 2006 to all successful bidders. Thus, this case is distinguishable from Public Law Board No. 3460, Award 7 where the employee was not notified of the training program and the qualification opportunity was not made available to all employees. For all of these reasons, the claim is denied.

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 1st day of March 2010.