

****CORRECTED****

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

**Award No. 40352
Docket No. SG-39839
10-3-NRAB-00003-060668
(06-3-668)**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of M. A. Bitoni, to be placed back on the Signal Foreman’s position, compensated for the differential between the rate of pay he is receiving and the Signal Foreman’s rate of pay for all time, including overtime, starting on September 19, 2005 and continuing until this dispute is resolved, and to remove any reference to this matter from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rules 1 and 70, when it improperly disqualified the Claimant from his Signal Foreman’s position and then refused to grant him an Unjust Treatment Hearing so that the Claimant could have an opportunity to prove his qualifications. Carrier’s File No. 1437296. General Chairman’s File No. UPGCW-70-1156. BRS File Case No. 13680-UP.”

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 time this dispute arose, Claimant M. A. Bitoni bid for and was assigned to the position of Signal Gang Foreman No. 2661. The Claimant was the only bidder for the position. He was assigned to that position as of August 5, 2005. At approximately the same time as his promotion to the Signal Gang Foreman position, the Claimant was told by his Manager that if he wanted to "pre-qualify" he would have to pass the Foreman Qualifying Test. He was sent the study materials on August 10, and on September 6, 2005 he took the test. On September 19, 2005, the Carrier notified the Claimant that he had not passed the test and was disqualified from the Foreman's position.

By letter dated December 3, 2005, the Organization filed a claim on the Claimant's behalf. The Organization contended that the Carrier had violated Rule 1, Note (a) of the Parties' Agreement, in particular where Rule 1, Note (a) states:

"In the event a senior applicant for a bulletined permanent position is not assigned, and the position is assigned to a junior employee, the senior applicant will, upon written request by the General Chairman to an officer designated by the Carrier within ten (10) calendar days of the date of assignment notice, be given a standard practical, oral and written test conducted jointly by the Carrier and the General Chairman to determine if the individual can demonstrate fitness and ability to be assigned to the position."

The Organization pointed out that because there was no senior applicant for the position, the General Chairman did not ask for the "practical, oral, and written test" open to senior employees bypassed for a position in favor of a junior employee.

Accordingly, the Organization insisted, the Carrier had given the Claimant an illegal test, administered solely by the Carrier and in a hostile environment. The Organization further noted that it requested an "Unjust Treatment Hearing" by letter of September 28, but the Claimant's Manager declined to provide such a Hearing in a notice dated October 6, 2005.

The Carrier declined the Organization's claim by letter of January 24, 2006. In that letter the Carrier contended that the Claimant had been given notice that if he wished to be assigned as a Signal Foreman, he would be allowed to "pre-qualify" by taking and passing the "Foreman's Qualifying Test." The Claimant received an inadequate score on the test and was consequently disqualified from the Foreman's position. In addition, the Carrier asserted that the Claimant was assigned in error by NPS to the grieved position, prior to passing the qualifying test. Finally, the Carrier referred the Organization to Rule 1, Note (a) which provides that management will be the judge of fitness and ability.

The Carrier's denial was appealed and the matter was subsequently progressed up to and including conference on the property, after which it remained unresolved. Thus, it is properly before the Board for adjudication.

The Board reviewed the record including correspondence between the Parties and ancillary on-property documentary evidence. The Carrier argued persuasively that the Claimant was assigned to the Signal Foreman's position in error prior to being tested and found qualified (or not). We note that Rule 70 regarding "Unjust Treatment Hearings" concerns matters that are "other than those covered by [the Agreement's] Rules. In this case, Rule 1, Note (a) is clear – management has the right to determine fitness and ability with respect to Signal Foreman positions (among others listed). (See for example Public Law Board No. 6459, Award 10.)

We do not find that the Carrier violated the Agreement when it administered the qualifying test to the Claimant. While we acknowledge that the erroneous assignment of the Claimant to the Foreman's position prior to determining his qualifying test score created some considerable confusion, we do not find that the personnel error rises to the level of an actionable claim. We note that the record indicates that the Claimant was paid as a Foreman while temporarily on the

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position; thus, other than the aforementioned misunderstanding, the Organization has not met the burden of persuasion regarding its position that the Claimant was unfairly harmed by the Carrier's mistake.

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.