

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40528
Docket No. SG-39617
10-3-NRAB-00003-060451
(06-3-451)

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 K. L. Hopwood, for compensation for the differential between his current rate of pay and the Signal Inspector's rate of pay for all hours worked after June 7, 2005, the penalty allowance of \$20.00 per day provided in Rule 53 and the Claimant to be awarded the position of Signal Inspector that was originally awarded to him, account Carrier violated the current Signalmen's Agreement, particularly Rules 1, 52, 53, 70 and 80, when it failed to allow the Claimant to assume the position of Signal Inspector after he was the successful bidder on the position, and then failed to grant an unjust treatment hearing as provided by Rule 70. Carrier's File No. 1429837. General Chairman's File No. N 53 567. BRS File Case No. 13622-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.

The central question of this dispute is whether the Carrier violated Rule 1, (Seniority Class One, F) Rule 52 (Assigning Positions) Rule 53 (Assignment to New Positions or Vacancies) Rule 70 (Unjust Treatment) and/or Rule 80 (Loss of Earnings) when it considered the Claimant unqualified for the position of Signal Inspector. The Organization contends that the Claimant was the senior and sole applicant who bid the bulletined position of Signal Inspector at Cedar Rapids, Iowa. The Claimant was assigned the position. Contrary to the Carrier's position that the assignment was in error, it was not. The Claimant was qualified, trained and like all previous Signal Maintainers who had bid and been awarded the Signal Inspector position, was entitled to the job.

The Organization argues that the Carrier's actions under Rule 1 are improper for reasons of applicability. The Claimant took a non-required pre-qualifying exam which is not related to the Signal Inspector position, but for those who wish to be Foreman. Had the Carrier wished to take an action of disqualifying the Claimant, it should have followed Rule 52 and assigned the Claimant to the position as his seniority dictated. In this instance, it misapplied the Agreement Rules and under Rule 53, failed to permit the Claimant to work his assigned position. The Organization tried to remedy the Carrier's violations with an Unjust Treatment Hearing (Rule 70) and provided a list of Signal Inspectors who did not take the Foreman's test. The Organization argues that the Claimant lost income and has been unjustly denied the right to a position he was granted as Signal Inspector.

The Carrier insists that the above stated contentions have no merit. The Claimant not only failed to qualify, but was assigned to the position in error. The

Carrier argued that it determines the qualifications of an employee. In this case, that determination was made prior to the Claimant holding the position and Rule 52 was not applicable because the Claimant lacked sufficient qualifications. Additionally, Rule 53 did not entitle the Claimant to the additional compensation requested in this claim because the Claimant never held the position; never qualified for the position; and was therefore not entitled to lost compensation. The Carrier further argued that its action was proper under Rule 1, Note, and an Unjust Treatment Hearing was not applicable to this grievance.

The Board reviewed the time sequence, procedural arguments and the factual basis for this claim. The on-property record supports the following Board conclusions of fact. The Claimant's records demonstrate that he had worked as a Signaller or Signaller Maintainer for less than eight years. The Claimant had no experience as a Signal Inspector. Furthermore, the Claimant had approached Manager of Signal Projects Grabek about obtaining possible future positions. The Claimant had been informed that he could pre-qualify to prove requisite ability. The Claimant took the Foreman's test and bid on the Signal Inspector's position to which he was "assigned."

In light of the disputed "assignment" the Board reviewed the time line. The record proves that the Claimant followed the early May 2005 advice to demonstrate fitness and ability for the Signal Inspector position by qualifying with the Signal Foreman's examination. The Claimant bid on the Signal Inspector position and simultaneously took the qualifying examination on May 23, 2005. The Claimant would have been assigned the position of Signal Inspector on May 27, 2005. He was not assigned. On May 26, 2005, the record indicates that the Claimant was informed that he had failed the Foreman's examination and was not appointed.

This is not a new dispute to the Board. As far back as Third Division Award 5348, the Board held that in fitness and ability disputes "... the applicant must have such training, experience, and character as to raise a reasonable probability that he would be able to perform all the duties of the position within a reasonable time." In this instance, the Claimant demonstrated no prior experience on the position. The Carrier proved that the Claimant failed the Foreman's examination and further, that this examination is the Carrier's measurement of fitness and ability.

Accordingly, the Board finds no violation in the applicability of Rule 1, Note (a) that, "positions of signal inspector . . . will be bulletined and appointment made with due consideration for seniority, fitness and ability, the management to be the judge." The Rule is specific to the Signal Inspector's position and states that the Carrier has the right to determine such fitness and ability. The Organization's argument that the Claimant was assigned the position is not correct. He was notified prior to assignment that he had failed to qualify. He remained on his old position. Further, Rule 52 clearly states that, "in filling vacancies and new positions, ability being sufficient, seniority will govern." The Carrier determined that the Claimant's ability was not "sufficient." And as to the Organization's argument of the applicability of Rule 53, it pertains only to "successful applicants" which is not on point with this record, inasmuch as the Claimant never occupied the position and any "error" was immaterial herein, because it was immediately corrected. Rule 1, Note (a) Rule 52 and Rule 53 are applicable Rules to determine correct action by the Carrier in this instance. As such, Rule 70, which applies when issues arise which are "other than covered by these rules" is not applicable (See Third Division Awards 37439 and 37532).

The Board reviewed all of the Organization's issues with regard to the Foreman's examination. The Carrier argues on the property that this exam is the standard. To demonstrate fitness and ability for an appointment, the Claimant must score 80%. Manager of Signal Projects Grabek stated that the exam is the mechanism the Carrier uses to determine appropriate knowledge and the Claimant's score was 68 percent. There are allegations, but insufficient proof that this action by the Carrier was improper, or that others who occupied the position without the test had less experience or fitness.

The Board has long held that once the Carrier determines that the Claimant lacks sufficient fitness and ability, the burden shifts to the Organization to establish the Carrier's fault by substantive evidence. There is nothing in this record to prove that the examination was improper, unfair, or discriminatory. Likewise, there is no proof demonstrating that this is not a standardized test or that it is not applicable to the position. The Organization provided no proof that the Claimant, despite failing the exam, was qualified to hold the position of Signal Inspector.

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From our examination of the record, the Organization failed to meet its burden of proof. No cited Rule is found applicable and no Carrier action is shown to be improper. The Carrier's judgment must stand. Accordingly, 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 15th day of June 2010.