

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40585  
Docket No. SG-40549  
10-3-NRAB-00003-080391**

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

**(Brotherhood of Railroad Signalmen  
PARTIES TO DISPUTE: (  
(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 E. Chavez, for compensation for the differential between his current rate of pay and the Signal Inspector’s rate of pay for all hours worked after Carrier failed to award him the Signal Inspector’s position on Bulletin 1792 until he is awarded the position of Signal Inspector, account Carrier violated the current Signalmen’s Agreement, particularly Rule 52, when it failed to allow the Claimant to assume the position of Signal Inspector after he was the senior applicant. Carrier’s File No. 1471330. General Chairman’s File No. N 53 656. BRS File Case No. 13978-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 Claimant, a Signal Maintainer, bid on a Signal Inspector position in Bulletin No. 1792, and was not awarded the position due to the Carrier's determination that he did not possess the required fitness and ability to perform the job, based, in part, on the fact that he failed the Foreman/Signal Inspector exam for the second time. The claim alleges a violation of Rules 1 and 52, the pertinent parts of which appear below. The issue presented is whether the Carrier is permitted to judge an applicant's fitness and ability for a Signal Inspector position by using the Foreman's test as a mechanism of assessment.

#### **"RULE 1 - SENIORITY CLASS ONE**

NOTE: (a) Positions of signal inspector . . . will be bulletined and appointments made with due consideration for seniority, fitness and ability, the management to be the judge. 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 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. . . .

(b) Employees who are interested in working as Foremen will be permitted to take the Foreman test and pre-qualify for assignment as a Foreman. . . .

#### **RULE 52 - ASSIGNING POSITIONS**

In filling vacancies and new positions, ability being sufficient, seniority will govern. An employee transferred in the exercise of seniority rights in his own class and failing to qualify within thirty (30) working days may exercise his seniority to a vacancy. . . ."

The Organization argues that the exercise of the Carrier's prerogative to determine qualifications cannot be arbitrary, as it was here, and there must be specific reasons enunciated for a disqualification, citing Third Division Awards 19660, 19432, 12931 and 11633. It asserts that the Carrier pre-determined the Claimant not to be qualified before allowing him the opportunity to prove his ability with the 30-day qualification period provided for by Rule 52, which is clear and must be applied as written, relying on Third Division Award 10888 and Second Division Award 6581. The Organization notes that other Signal Inspectors were not required to take the Foreman test prior to being awarded the position, and that such requirement in this case was arbitrary and unreasonable.

The Carrier contends that the Organization failed to meet its burden to prove a violation of the Agreement, citing Third Division Awards 27895, 27851 and 26033. It relies upon the clear language of Rule 1 Note (a) indicating that management is the judge of an employee's fitness and ability, as well as Board precedent that it has the right to determine reasonable qualifications for a position and if an employee possesses the fitness and ability for it, including Public Law Board No. 6459, Award 10 and Third Division Award 40351. The Carrier asserts that Rule 1 Note (b) accords first time applicants for positions the opportunity to test and pre-qualify. It points to the fact that the Claimant was a first time applicant for this position, had never performed it, had limited railroad experience performing related tasks, and took and failed the Foreman's test twice, as supporting evidence of the validity of its determination that the Claimant did not have the fitness and ability required for the Signal Inspector position in this case, citing Third Division Award 40352.

A careful review of the record convinces the Board that the Organization failed to meet its burden to prove a violation of the Agreement in this case. Board precedent establishes that the Carrier has the right to administer tests as a valid means of judging an employee's fitness and ability. See, Third Division Awards 40352 and 40351. The clear language of Rule 1 Note (a) places the fitness and ability determination in the hands of management. Rule 1 Note (b) accords first time applicants for the cited positions an opportunity to pre-qualify. The Claimant was permitted that opportunity on two occasions and failed to pass the Foreman's test. Thus, it cannot be said that the Carrier acted arbitrarily in determining that the Claimant did not possess the fitness and ability for the Signal Inspector position, which he had no experience performing. Rule 52 provides that seniority will govern

where ability is sufficient. Here, the Carrier validly determined that the Claimant did not possess such ability. Additionally, the 30-day qualification period referred to in Rule 52 applies to an employee transferring in the exercise of seniority in his own class. That was not the situation in this case, because the Claimant was bidding on a promotion, not transferring within his own class. The Organization did not show that the employees who were not required to take a Signal Inspector test prior to assuming the position were similarly situated to the Claimant. 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 27th day of August 2010.