

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40606
Docket No. SG-40667
10-3-NRAB-00003-080534**

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 P. M. Gallegos, for compensation for the differential between his current rate of pay and the Signal Inspector’s rate of pay for all hours worked after April 19, 2007, continuing until this dispute is resolved, any mention of this disqualification removed from his personal record 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 and 52, when it failed to allow the Claimant to assume the position of Signal Inspector after he was the successful bidder on the position. Carrier’s File No. 1476447. General Chairman’s File No. N 1 691. BRS File Case No. 13983-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 advertised in Bulletin No. 1095. There is a dispute of fact as to whether the Claimant was actually assigned to the position on April 13, 2007 (as indicated in one of the bulletins) and later verbally disqualified after failing the Foreman's exam on April 19, 2007, as contended by the Organization, or was only told that he was the high bidder and was required to take and pass the Foreman exam prior to being awarded the position, and was determined not to have the fitness and ability to be awarded the position upon failing to pass the exam, as asserted by the Carrier's Manager. In either case, the claim alleges a violation of Rules 1 and 52, the pertinent parts of which appear below. As was the situation in Third Division Award 40585, 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 11633, 12931, 19432 and 19660. It asserts that the Carrier awarded the position to the Claimant and then found him 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 the junior employee improperly assigned to this position after the Claimant was disqualified without it being reposted was not required to take the same Foreman test as the Claimant prior to being awarded the position. It contends that the Carrier has a disparate testing policy and does not apply it consistently.

The Carrier contends that the Organization failed to meet its burden to prove a violation of the Agreement, citing Third Division Awards 26033, 27851 and 27895. 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 argues that all applicants were told that the highest bidder would be required to take and pass the Foreman's exam prior to being awarded the position, the Claimant was the highest bidder and was not assigned the position prior to being given the opportunity to qualify by passing the exam, the Claimant failed the exam

which caused the Manager to determine that he did not have the fitness and ability required for the Signal Inspector position in this case, and the Claimant was never disqualified because he was not found fit to assume the position. The Carrier points to the Memorandum issued on July 12, 2007 as a result of a conference with the Organization setting forth its policy concerning taking the Foreman's exam, which indicates that in the Northern Region (involved in this case) everyone applying for a Rule 1(a) position has to take the Foreman's exam, but that in other locations on the property this is not a requirement, noting that this mixed practice is consistent with a valid exercise of its managerial prerogative, and that the application of the test to the Claimant in this case was in accord with its policy.

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. As noted in Award 40585 the Carrier has the right to administer tests as a valid means of judging an employee's fitness and ability (Third Division Awards 40351 and 40352) and the clear language of Rule 1 Note (a) places the fitness and ability determination in the hands of management. 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 based upon his failure to pass the Foreman's exam. This is true whether he was technically placed into the position pending his taking and passing the exam, or was never actually assigned to the position. The Organization does not dispute that the Claimant did not perform any of the duties of a Signal Inspector, and argues that he should have been given the 30-day period referred to in Rule 52 to establish his qualifications. As noted by the Board in Award 40585 that provision applies to an employee transferring in the exercise of seniority in his own class, not an employee bidding on a promotion, as in the present case.

Although the Organization asserted that the junior employee placed into the position upon the Claimant's disqualification was not required to "take the test," its later appeal clarified that he was not required to take "the same test" as the Claimant. While the Carrier did not specifically address this allegation, the Manager explained that the test questions are computer generated from a group approved by the parties as appropriate for the position. This fact may account for any disparity in the actual test questions. It goes without saying that while the Carrier has the right to choose to utilize a test to determine fitness and ability for a

Rule 1(a) position, it cannot administer its judgment of qualifications in an arbitrary or discriminatory manner, which would be the case if it only applied its Northern Region policy requiring testing to some, and not all, employees. The Organization did not prove that the junior employee was not required to take any Foreman/Signal Inspector test prior to assuming the position. Thus, 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.