

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40840
Docket No. SG-40668
11-3-NRAB-00003-080535**

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 R. N. Van Winkle, 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 17, 2007, the allowance of \$15.00 per day provided in Rule 36 and the Claimant to be awarded the position of Signal Inspector that should have been awarded to him, account Carrier violated the current Signalmen’s Agreement, particularly Rules 1, 52, 64, 70 and 80, when it failed to allow the Claimant to assume the position of Signal Inspector after he was the senior bidder on the position, and then failed to grant an unjust treatment hearing as provided by Rule 70. Carrier’s File No. 1477021. General Chairman’s File No. N 1 687. BRS File Case No. 14056-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.

This claim protests the Carrier's refusal to place the Claimant on a Signal Inspector position in Zone 1 in March 2007 in favor of a junior, less experienced employee, and its failure to grant the Claimant an Unjust Treatment Hearing concerning his disqualification from this position. The Claimant is a 33-year employee who was working in a Maintenance Foreman position when he bid on the Signal Inspector position in issue. The following Agreement provisions are relevant to this dispute.

"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. . . .

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. . . .

RULE 70 - UNJUST TREATMENT

An employee who considers himself unjustly treated, other than covered by these rules, will have the same right of hearing and appeal as provided in Rule 68 B if written request is made to his immediate supervisor. . . .”

The Organization argues that the Claimant has proven his qualification by working as a Foreman for nine years and as a Signal Inspector prior to that. There was no reason to make him take and pass a qualification examination for this position. Despite this fact, the Organization avers that, against its advice, the Claimant took and passed the Foreman’s exam. It asserts that the Carrier did not present a valid reason for the disqualification, which is its burden, citing Third Division Awards 36404, 19432, 19660, nor any justification for refusing to hold an Unjust Treatment Hearing, to which the Claimant was entitled. See Third Division Awards 35405 and 38056.

The Carrier contends that the Claimant was not entitled to an Unjust Treatment Hearing because his situation is covered by Rule 1 of the Agreement, and Rule 70 only grants that right in the absence of rule coverage, citing Third Division Award 37532. It argues that the Claimant never utilized the agreed upon procedure in Rule 1, Note (a) when he was denied the promotion, but his Manager offered him the opportunity to take a test to show his fitness and ability and he declined to do so the night before the test was scheduled. The Carrier contends that Rule 1 gives it the express right to determine fitness and ability for a Signal Inspector position, citing Third Division Awards 38095, 37633, 30274 and 24193 and relies upon the written statement of Signal Manager Hauser to explain the reason why it determined that the Claimant did not have the fitness and ability to fulfill the Signal Inspector position where a key element was to train and motivate newly assigned, impressionable employees. The Carrier further asserted that such determination was neither arbitrary nor capricious. It states that the Organization failed to establish that the Claimant had qualifications sufficient to allow his seniority to prevail, citing Third Division Awards 31920, 31201 and 21615.

A careful review of the record convinces the Board that the Organization has not met its burden of proving a violation of the cited provisions. The Claimant's situation clearly falls within the parameters of Rule 1, Note (a) which sets forth both the Carrier's ability to be the sole judge of fitness and ability for promotion to the position of Signal Inspector, as well as the procedure to follow to contest the assignment of the bulletined position to a junior employee. Thus, Rule 70 does not entitle the Claimant to an Unjust Treatment Hearing in this case. See Third Division Award 37532. The Organization asserted that the Claimant took and passed the Foreman's examination. The Carrier disagreed, explaining that the Claimant advised his Manager the night before the scheduled exam that he was declining to take it on the advice of the Organization. It noted that the Claimant gave up his Foreman position after being denied this Signal Inspector position, and some time later took and passed the Foreman's exam in order to be eligible for another Foreman position. The Organization never refuted this contention. Therefore, the record contains an irreconcilable dispute of a material fact. Thus, despite the Claimant's years of service and experience, the Organization failed to meet its burden of proving that he was sufficiently qualified for the Signal Inspector position in issue so that his seniority should prevail over the junior employee who passed the required test.

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 11th day of January 2011.