

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40937
Docket No. MW-40994
11-3-NRAB-00003-090305**

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

(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference

PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago and
(North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to assign Mr. C. Bassett to a welder position, Bulletin Number 6272, at Des Moines, Iowa on February 1, 2008 and continuing (System File R-0816C-302/1496699 CNW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Bassett should be assigned to the aforesaid Bulletin Number 6272 and he shall “*** be compensated for all lost wages for the time he was unable to work as a welder, and acquire a welder seniority date of February 1, 2008.”

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 issue raised by this claim is whether the Claimant's bid to the Welder position on Bulletin No. 6272 was properly rejected based upon the absence of listed qualifications including a HAZMAT endorsement. The relevant Agreement provision appears below:

"RULE 16-BULLETINING NEW POSITIONS AND VACANCIES

J. Assignments to new or vacant positions shall be as follows: by assigning the senior qualified applicant of the class in which the vacancy occurs as defined in Rule 7. An employee vacating a position shall not be eligible for assignment to the vacancy created thereby unless there are no other applicants or the position has been filled and is again vacated.

If no such qualified applications are received, then the position shall be filled by assigning the senior qualified applicant of the next lower class, successively, until vacancy is filled."

The Claimant bid on a Welder position in Bulletin GD2S06272 which was posted on January 17 for an effective assignment commencing on January 25, 2008, and listed qualifications including a CDL and HAZMAT endorsement. The Carrier determined that the Claimant was not qualified because he did not have the required endorsement. No assignment was made. The position was reposted in Bulletin GD2S06273 on January 31, 2008, with the same qualifications. The Claimant again was listed as the only bidder, and was found unqualified. However, he was assigned this Bulletin position effective February 8, 2008. There is no dispute that the Claimant had worked in that position from January 7, 2008 (prior to his receiving the bid) until March 7, 2008, when he was displaced by a senior employee. This claim seeks Welder seniority for the Claimant retroactive to February 1, 2008, as well as lost wages for the time he was unable to work as a Welder.

The Organization argues that the Carrier cannot find the Claimant to be unqualified because he had been working on the position for weeks before the bulletin, clearly possessed sufficient fitness and ability to perform the job, and was assigned it after the second posting. The Organization asserts that the position did

not require a CDL or HAZMAT endorsement, which were arbitrarily put on the bulletin and not in line with the Carrier's own CDL policy. Finally the Organization posits that, even if such endorsement was required, because the Claimant was attempting to establish Welder seniority for the first time, Agreement Rules 4 and 15 allow him a 60-day qualification period to prove his fitness, citing Third Division Awards 5348, 8197, 14762, 22357 and 22782. It requests retroactive seniority and reimbursement for all losses associated with the Carrier's failure to grant the Claimant the position on the first bulletin.

The Carrier contends that it has the managerial right to establish qualifications for a position and determine an employee's fitness and ability, pointing out that this position has had the same prerequisite for a HAZMAT endorsement in the past (as mandated by DOT Regulations) without complaint. It asserts that the Organization failed to meet its burden of proving that the job qualifications were unreasonable or were improperly applied to the Claimant who did not have such endorsement, citing Third Division Awards 26033, 27851 and 27895. Because the Claimant received the position and Welder seniority as of February 2, 2008, it submits that the claim is moot. Additionally, the Carrier notes that the Claimant was working on the position at issue during the claim period, so there has been no loss of earnings demonstrated in this case, relying on Third Division Award 19153.

A careful review of the record convinces the Board that the Organization met its burden of establishing a violation of the Claimant's seniority rights in this case. There is no question that the Carrier has the managerial right to set qualifications related to a job and determine an employee's fitness and ability and whether he meets the stated qualifications. The Carrier's argument is based upon its contention that the Claimant was not qualified when he bid on the bulletin because he did not have the HAZMAT endorsement, the Organization did not show the listed qualifications were arbitrary or unreasonable, and that qualified employees are entitled to be given the position even if junior to the Claimant. Had the Carrier given the position to a junior employee who had the stated qualifications, and rejected the Claimant for not having them, then there would have been no violation of the Agreement proven.

However, that is not what happened in this case. After finding the Claimant unqualified from the original posting, the Carrier did not assign a qualified employee. Rather, the Claimant kept working on the position as he had since

January 7, 2008. The Carrier reposted the position on January 31, 2008, the Claimant again bid and was listed as unqualified, but this time he was assigned to the position by bulletin effective February 8, 2008, the date his Welder seniority commenced. The Carrier's assignment of the Claimant to the position as a result of the second bulletin, without his acquiring the qualifications he was missing which led to his failure to receive the original bid, and without any justification or explanation, lends credence to the Organization's position that the Carrier's denial of the original bid was arbitrary. Thus, the Claimant's Welder seniority will be adjusted to reflect February 1, 2008, as requested by the Organization. However, because the Claimant admittedly worked on, and was paid for, the disputed position throughout the claim period, the Organization failed to establish any loss of earnings requiring monetary compensation. The Organization did not contend, or prove, that the Claimant would not have been displaced as of March 8, 2008, had his Welder seniority been February 1 instead February 8, 2008. Accordingly, the claim is partially sustained; the Claimant shall have his Welder seniority date adjusted but shall not receive any monetary remedial relief.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of March 2011.