

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40944
Docket No. MW-41044
11-3-NRAB-00003-090407**

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**

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. M. Lopez to one of the Group 6 System Tie & Rail Inspector positions for Gang 9089 on Bulletin 284 effective March 27, 2008 and instead assigned junior employe M. J. Kerwood (System File D-0815U-202/1501883).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Lopez shall now ‘. . . be awarded a seniority ranking in Group 6 ahead of M. J. Kerwood. We further request that Claimant be awarded the position of System Tie and Rail Inspector as if he had been properly assigned according to bulletin #284, and compensation equal to the amount he would have been entitled to had he been assigned to perform the previously described duties. That is, Claimant must be allowed the difference in pay between what he is currently assigned to and that of Group 6 System Tie and Rail Inspector for every hour and every day that this violation of our Agreement continues. ***’”**

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 presented by this claim - whether the Carrier violated the Claimant's seniority rights when it promoted a junior employee to the Group 6 Section Tie and Rail Inspector position - is the same as the one raised in Third Division Award 40941. The record on the property contains similar arguments and exhibits as were presented in that case, and its resolution also involves the interpretation of Rule 19.

The facts are also similar. In this case, the Carrier advertised three Group 6 Section Tie and Rail Inspector positions for Gang 9089 in March 2008 in Bulletin No. 284, the same bulletin that was challenged by the Organization in Third Division Award 40943. One assignment was made to an employee with less Track Sub-department seniority than the Claimant. There is no dispute that neither employee had seniority in the classification. The Carrier explained that it determined that the Claimant was not qualified because, in accord with historical practice, it considered previous Foreman or Assistant Foreman seniority as one of the qualifications of the position because it shows that the employee is qualified to supervise the restoration and renewal of track and has familiarity with use of the computer, a skill also required in the Inspector position. It presented evidence of its consistent application of such practice. Because the Claimant had been disqualified from two Foreman, one Assistant Foreman and one Track Inspector position over the course of his employment, and only worked as a Laborer and Sectionman, and the junior employee assigned the position had previous Foreman and Assistant

Foreman seniority and experience, the Carrier concluded that the junior employee was the senior qualified bidder on the position. This claim protests such determination and the Carrier's projection of a Group 8 Foreman seniority date as a qualifying condition for a position the Organization asserts is completely different.

The positions of the parties in this case are the same as those contained in Award 40941 and are incorporated into this Award. A careful review of the record convinces the Board that the rationale set forth in Award 40941 is equally applicable herein, and that this claim must also be denied because the Organization failed to meet its burden of proving that the Claimant was qualified, or that the qualification determination made by the Carrier in this case was arbitrary, unreasonable or capricious.

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 24th day of March 2011.