

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41598
Docket No. MW-41590
13-3-NRAB-00003-110215

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(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. S. Weller to the system truck driver foreman position, Bulletin 14079 posted January 21, 2010 and instead assigned junior employee J. Frerichs (System File D-1019U-201/1534444).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Weller shall now ‘. . . be allowed compensation for the Carrier’s violation of the Agreement. That is, Claimant shall be allowed a seniority date and ranking ahead of the junior employee Jason Frerichs as a Group 26 truck Driver Foreman. He shall further be compensated the difference in pay between the position he has actually been working and the higher rated System Truck Driver Foreman to which he should have been assigned, for all hours of service including overtime hours worked by the junior employee. Further, Claimant shall be given the materials, test, practical experience to show his abilities to perform the duties of Truck Driver Foreman in accordance with Rule 19(e). This claim is considered as continuing until the violation ceases.’”

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 Organization claims that the Carrier assigned junior employee J. Frerichs to the System Truck Operator Foreman position, which was advertised in Bulletin 14079 effective January 28, 2010. The Claimant has a Track Subdepartment seniority date of July 15, 1996 and a Group 26(d) seniority date of January 1, 1998. Frerichs' Track Subdepartment seniority date is September 16, 1996. The Organization argues that he had no Group 26(d) seniority date. Accordingly, the Carrier improperly ignored the Claimant's seniority and awarded the position to Frerichs.

The Carrier contends that the claim lacks merit because Frerichs was already a qualified System Truck Driver Foreman, as evidenced by the email statement of Manager Pettey. That statement provides:

"When this job was posted for bid, Mr. Frerichs was already qualified as a Truck Gang Foreman and working the same position with Concrete Tie foreman title. When the job was assigned I talked to bulletins & Assignments and to my understanding was assigned this position properly. So I do not agree with this claim."

Both the Carrier and the Organization agree that Rule 19(a) & (b) apply to the instant analysis. The Rule provides:

"Rule 19 – Promotion

- (a) Promotion will be made based on ability, qualification, and capacity for greater responsibility and where these requirements are sufficient, seniority will prevail.
- (b) Positions of foreman and supervisors will be filled by promotion of available qualified employees. Positions of foremen, supervisors, or other positions that are not filled through bulletining to employees

in seniority class will be filled from available qualified employees in the other classes of the seniority group. In the event they are not so filled, they will be filled from available qualified employees in the other groups of the subdepartment. Where ability and qualifications are sufficient, seniority will prevail. Management will be the judge with respect to positions covered by this section.”

Further, Rule 20 (l) provides, in pertinent part:

“Management will retain the right to select employees for service in classes (a) and (b) of Group 26.”

The Organization also argues that the Bulletin Inquiry Screen Printout for this assignment was part of the on-property handling of the claim. That printout clearly shows that all employees who had bid for the job had a notation of “U.” According to the printout, the “U” signifies that the employee is unqualified.

In its Submission, the Carrier addressed the document showing all applicants as unqualified, stating:

“The Carrier also disagrees with the Organization’s assertion that the letter U on the bulletin and assignment sheet has any bearing on whether or not a person is unqualified. The current bulletin and assignment system does not house qualifications within it and the column has no meaning. Qualifications are housed in PeopleSoft (workforce management systems) and fed to iTrack Force. Contrary to the Claimant’s opinion, his interpretation of our systems is incorrect.”

Third Division Award 40994, cited by the Organization, is instructive wherein it states: “Qualifications, fitness and ability to perform a job are determinations to be made by the Carrier, subject only to limited review by the Board as to whether the Carrier was arbitrary in its determination.” The Award is also instructive wherein it states: “In simple terms, by the Carrier’s bid records, the Carrier had two unqualified employees and awarded the position to the junior unqualified employee. We find that arbitrary. Rule 19(a) dictates that if the Carrier is going to award a position as between to unqualified employees, it must do so based on seniority.”

The Carrier’s assertion regarding Frerichs is not supported by the record save for a Manager’s statement that Frerichs was qualified and that he thought the position

had been assigned properly. A mere statement that the employee was qualified and that he thought it had been awarded correctly are so vague and unsupported as to be useless in the instant analysis. The only record of qualifications was supplied by the Organization and that documentary evidence establishes that every employee was unqualified. The Carrier did not refute this document during the on-property claim handling.

The Carrier's argument that the "U" in the Carrier's own document is irrelevant is not persuasive. Assertion is not evidence. The Carrier's assertion of the true and accurate documentation of the qualifications being contained somewhere in "PeopleSoft" is not only vague, but also was not referenced in the on-property correspondence. Given all of the foregoing, the award of the position to Frerichs was arbitrary. Therefore, the claim must be sustained.

AWARD

Claim sustained.

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 April 2013.