

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41804
Docket No. MW-41462
14-3-NRAB-00003-110015**

The Third Division consisted of the regular members and in addition Referee Brian Clauss 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 Carrier violated the Agreement when it failed and refused to assign Mr. C. Grigsby to a Group 6 Tie and Rail Inspector position on Gang 8953 as posted on System Bulletin# 383 and instead assigned said position to junior employee V. D. Held on July 24, 2009 (System File D-0915U-201/1524133).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Grigsby shall now ‘. . . be awarded a seniority ranking in Group 6 ahead of V. D. Held. 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 #383, 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. This is seniority and compensation that Claimant would have received absent the violation of our Collective Bargaining Agreement.”

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 V. D. Held to the Group 6 System Tie and Rail Inspector position posted in Bulletin No. 383 effective July 24, 2009 despite the Claimant having superior seniority. The Claimant's Track Subdepartment seniority date is March 25, 1997; V. D. Held's Track Subdepartment seniority date is later. The Organization claims that neither employee had seniority as a Group 6 System Tie and Rail Inspector. The Organization asserts that the Carrier arbitrarily selected the junior employee and now seeks to offer an inapplicable argument about qualifications. The Carrier never articulated what sufficient qualifications were for the position and cannot now rely on arbitrary and nonexistent "qualifications" to justify its violation of the Agreement. The Claimant was the senior employee in the Track Subdepartment and should have been awarded the position.

RULE 20 – BULLETINING POSITIONS - VACANCIES provides:

“(e) When no bids are received from employees retaining seniority in the class, the vacancy or new position will be filled in the following order:

(1) in accordance with the provisions of Rule 19(b);”

Rule 19 – PROMOTION provides:

- “(a) Promotion will be made based on ability, qualifications, and capacity for greater responsibility and where these requirements are sufficient, seniority will prevail.**
- (b) Positions of foremen 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 Carrier counters that the position in question was assigned in accordance with Rule 19. The Carrier considered the fact that both employees, while not possessing Group 6 System Tie and Rail Inspector seniority, held Track 8 Foreman seniority. V. D. Held had a Track 8 seniority date of April 18, 2002, whereas the Claimant’s was October 20, 2005. The Carrier has historically considered Foreman seniority for Track Inspector positions. The Carrier also cites to Third Division Awards 21493 and 30274 in support of its contention that it has the right to determine qualifications, fitness and ability, as well as Third Division Awards 36289 and 36976, which rejected claims similar to the instant claim.

The burden of proof is on the Organization to establish a violation of the parties’ Agreement. As the Board has stated on many prior occasions, qualifications, as well as 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 arbitrarily made its determination.

A review of the record evidence in the instant case reveals that employee V. D. Held had Foreman seniority, and that seniority was one of the criteria that the Carrier considered when determining whether both employees were qualified for the position. Based upon the record evidence, the Organization failed to show that the Carrier's decision was arbitrary and/or a violation of the parties' Agreement. Accordingly, the claim must be 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 February 2014.