

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 42980
Docket No. MW-42947
18-3-NRAB-00003-150127

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.

(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (BNSF Railway Company (former Burlington Northern
(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. T. Elliott to headquartered NKC B&B Foreman/Inspector Position #72017 and instead assigned junior employe B. Minich thereto beginning on August 29, 2013 and continuing (System File C-14-S092-1/10-14-0033 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Elliott shall:

‘... be awarded and placed on the NKC B&B Bridge Foreman / Inspector position immediately, and his B&B Foreman seniority reflecting such. I am also requesting all hours worked by Mr. Minich both straight and overtime hours be paid to Mr. Elliot at the B&B Foreman rate of pay until Mr. Elliot receives his Foreman Seniority date and placed on that position.

I am also requesting that Mr. Elliot be paid for all the extra mileage he incurred while not being able to go to this position. This is a continuing claim until Mr. Elliot is given his Foremen seniority and the B&B Foreman job.”

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 concerns whether a bulletined position for a Bridge and Building (“B&B”) Foreman/Inspector position was properly awarded. The Claimant established and maintained seniority in the Carrier’s Maintenance of Way and Structures Department, and at the time of this dispute, he had Prior Rights District 4 seniority and was covered by the Agreement.

Some background is important to understand the nature of this dispute. On June 30, 2013, the Claimant was awarded a Bridge Inspector position. This position is a Roster 1, Rank A position within the Bridge or Building Sub-department. On July 23, 2013, the Claimant was disqualified from the Bridge Inspector position. Subsequently, the Organization requested an unjust treatment hearing, pursuant to Rule 62, to determine whether the Carrier’s disqualification was proper. That hearing was held on October 10, 2013, and on December 16, 2013 the Carrier upheld its disqualification of the Claimant. The Organization filed a claim over that holding, asserting that the Carrier improperly assigned the position to another employee. The parties were unable to resolve that claim on the property, and it was referred to the National Railroad Adjustment Board for arbitration. In Third Division Award 42619, issued on June 27, 2017, the Board denied that claim.

On August 22, 2013, less than one month after the Claimant had been disqualified from the Bridge Inspector position and during the pendency of his appeal of that disqualification through the Rule 62 procedure, the Carrier advertised a B&B Foreman/Inspector position within the Kansas City Common Point, which was a Prior Rights District 4 position. The B&B Foreman/Inspector

position is also a Roster 1, Rank A position within the Bridge or Building Sub-department. The Claimant bid on the B&B Foreman/Inspector position, but it was awarded to employee B. L. Minich on August 29, 2013. Employee B. L. Minich did not have District 4 Prior Rights seniority, and his overall seniority date was junior to the Claimant's.

The Organization claims that the failure to award the Claimant the B&B Foreman/Inspector position violated the Agreement. Specifically, the Organization alleges that the Carrier violated Rule 1 Scope, Rule 2 Seniority Rights and Sub-Department Limits, Rule 4 Promotion and Seniority of Promoted Employees, Rule 6 Basic Seniority Districts, Rule 21 Bulletin Procedure, Rule 22 Assignment Procedure, Rule 23 Failure to Qualify, Rule 42 Time Limit on Claims, and Appendices K and NN. As a remedy, the Organization seeks that the Claimant be awarded the B&B Foreman/Inspector position and a seniority date for B&B Foreman, and that he be paid for all straight-time and overtime hours worked by employee B. L. Minich on the claimed B&B Foreman/Inspector Assistant Foreman position until the Claimant is placed in that position, and extra mileage the Claimant incurred while not being able to go into the B&B Foreman/Inspector position.

The Organization's principal argument is that the Claimant should be awarded the B&B Foreman/Inspector position because of the undisputed fact that he had more seniority than employee B. L. Minich. This argument is supported by Rule 22 of the Agreement, which requires that bulletined vacancies be assigned to the most senior qualified applicant. Rule 22 reads in relevant part:

“RULE 22. ASSIGNMENT PROCEDURE

A. Each new position or vacancy bulletined as provided in Rule 21 will be assigned to the senior qualified applicant who holds seniority on the seniority roster from which the position in question is filled and in the rank of that position. In the absence of such applicants, the senior qualified applicant in the next lower rank and in succeeding lower ranks, if necessary, on the same roster will be assigned. Except as otherwise provided in this Agreement, in the absence of qualified applicants from the seniority roster of the position in question, the senior qualified applicant from other seniority rosters in the same sub-department will be assigned.”

The Carrier focuses on the word “qualified” in the phrase “senior qualified applicant,” to argue that it is the Organization’s burden to prove that the Claimant was qualified for the B&B Foreman/Inspector position, and that the Organization did not meet that burden. In effect, the Carrier seems to be arguing that employees have to prove they have the ability to perform the duties of a position before being awarded that position. That argument is not credited, because it is apparent from Rule 22, the disqualification provisions of Rule 23, and arbitration decisions interpreting those rules, that if employees have the bulletined qualifications for the position, they are presumed to be qualified to perform the job subject to disqualification under Rule 23, if the Carrier, in its judgement, determines that they lack the ability to perform the job.

Further, the Carrier argues that when employees are disqualified from a position, they are disqualified from every position in that rank. Under this interpretation, disqualification from one Roster 1, Rank A position would disqualify an employee from every position in that rank. Thus, it follows from the Carrier’s argument that because the Claimant was disqualified from the Bridge Inspector position, he is also disqualified from the B&B Foreman/Inspector position. This reasoning is appealing, as it makes sense that an employee who lacks the ability to be a Bridge Inspector would also lack the ability to be a B&B Foreman/Inspector. However, it runs contrary to the “presumption of qualification, subject to disqualification” assignment and promotion process codified in Rules 22 and 23, and the Carrier did not cite to any Rules or other authority to support its reasoning.

Even if this argument were credited, it still raises the issue of how long such a disqualification would last. Rule 23 does not provide for how long a disqualification lasts or under what conditions it can be overcome; therefore, it could be argued that an employee who is disqualified can immediately bid for the same type of position, and in the absence of a more senior qualified candidate, should again be awarded the position, subject to possible disqualification.

Essentially, this is the posture of this case. Less than one month after being disqualified from a Bridge Inspector position and during the pendency of a challenge to the Carrier’s determination that the Claimant was not qualified to perform in that position, he bid on another bridge inspection position. There is no evidence of a change in the Claimant’s credentials in that short period of time or other reason to believe that the outcome of that bid would be any different. Thus, if

the Claimant were awarded the position and disqualified again, it would be a waste of time for all interested parties. This would be an absurd result, which should be avoided in interpreting agreements.

In sum, the Organization's seniority argument is generally well-reasoned, except that it would lead to an absurd result under the unique facts of this case. In the absence of contract language establishing the duration of a disqualification, it is reasonable that it should at least cover the time when the disqualification is being challenged. During this process, the Carrier may find that the employee is qualified and award the position, or it may confirm that the employee is not qualified.

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 14th day of February 2018.