

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44552
Docket No. MW-45926
22-3-NRAB-00003-200516

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

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
**(Canadian Pacific Railway (Former Dakota, Minnesota &
(Eastern Railroad Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior employe T. Wilde to fill a Machine Operator B vacancy in Austin, Minnesota on November 19, 2018 and on November 26, 2018 in Wells, Minnesota instead of assigning employe D. Brown thereto (System File B-1909D-201/2019-006266 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Brown shall now ‘... be compensated for all loss of seniority, subsequent income differential, benefit level adjustment From November 19, 2018 to December 13, 2018. Damages from loss of seniority, placed on the appropriate seniority rosters with November 19, 2018 seniority date. Vacation accrual and Any further damage until the Claim is resolved.’ (Emphasis in original).”**

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 Claimant holds seniority over junior employee T. Wilde. On January 8, 2019 the Organization presented a claim asserting the Carrier violated the Agreement by assigning junior employee Wilde to fill a Machine Operator B vacancy in Austin, Minnesota on November 19, 2018 and on November 26, 2018 in Wells, Minnesota instead of assigning the Claimant, the senior employee. In addition to the Claimant being the senior employee, he possessed sufficient fitness and ability under Rule 9.9(a). The Carrier's violation of Rule 9 deprived the Claimant of straight time and overtime worked by the junior employee.

In its claim denial dated March 8, 2019 the Carrier stated that the Claimant had not completed his one hundred twenty (120) day new hire probationary position. Therefore, the Carrier did not fill the Machine Operator B position with the Claimant.

This claim is before the Board following its proper and timely presentation at all stages of appeal, up to and including the Carrier's highest designated officer, culminating with a conference where the parties discussed their positions advanced during on-property handling. In rendering this award, the Board confined itself to the record developed by the parties.

According to the Organization, there is no dispute that the Claimant held superior seniority over a junior employee and possessed sufficient fitness and ability to perform the work of Machine Operator B as he was assigned to that position on December 13, 2018 without additional training or discussion with management.

BMWE asserts that the Carrier's defenses are meritless. Initially CP asserted the Claimant was not assigned to the position because he had not completed his one-hundred twenty (120) day new-hire probationary period. This assertion was abandoned by the Carrier when the Organization pointed out that the junior employee was in his new-hire probationary period when CP assigned him as Machine Operator B. Furthermore, the Carrier has a practice of assigning new-hire employees to positions, such as track inspector, during their probationary period.

As for CP's defense that the Claimant was not qualified at the time of bid because he did not hold a commercial driver's license (CDL), the Claimant was the

qualified applicant because he was the senior employee bidding on the position. Rule 9.9(a) states that “[t]he selection of applicants for advertised positions will be based on seniority provided fitness and ability are sufficient[.]” This wording has been interpreted and applied in Third Division Awards 4026, 8197 and 21353, among others, to mean “sufficient” fitness and ability for a position does not require or equate to fully qualified in every aspect of an advertised position. Sufficient qualification is established with training, experience and character showing a reasonable probability that the employee can perform all the duties within a reasonable time. In this regard, Rule 9.9(g) states that “[e]mployees who are assigned will be given up to thirty (30) calendar days to obtain qualifications for the position.”

According to the Carrier, the Organization’s reliance on Rule 9.9 is incomplete. The rule states that “selection of applicants for advertised positions will be based on seniority provided fitness and ability are sufficient[.]” The Claimant was not qualified for the position at the time of his bid because he had not obtained a CDL. After he obtained a CDL he was awarded a Machine Operator B position on December 13, 2018. The Carrier’s long-standing practice requires an applicant to hold a CDL at the time of bidding for a position that requires the license. In accordance with on-property Third Division Award 43361, since the Claimant was not assigned to the Machine Operator B position, he was not the employee “who regularly perform[s] the work” (Rule 15.1), thus, he was ineligible for overtime opportunities.

The Board finds without merit CP’s defense of the one-hundred twenty (120) day new-hire probationary period. The junior employee was in his probationary period when the Carrier assigned him to the Machine Operator B position. The Carrier abandoned this defense after its claim denial and opted to rely on the CDL defense.

Awards submitted by the Organization show that the same or nearly the same wording in Rule 9.9(a) has been interpreted to mean that the absence or lack of full qualifications in every aspect of a position is not disqualifying given an employee’s ability to demonstrate and obtain qualifications. Moreover, Rule 9-9(g) provides an employee such as the Claimant up to thirty (30) calendar days to obtain qualifications, e.g., CDL. The Claimant’s receipt of the awarded position on December 13, 2018 shows demonstrated ability to be qualified within the 30-day window. The Carrier’s asserted practice to require the CDL is not diminished by the 30-day window in Rule 9.9(g) - - a provision CP did not address. The primacy of the contract prevails over an asserted practice.

Given the Board's findings on Rule 9.9(a) and (g), the Carrier's award of the Machine Operator B position to a junior employee instead of the Claimant, the senior employee, violated the Agreement as alleged. Accordingly, this claim will be sustained with the requested remedy granted.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 8th day of October 2021.