

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44692
Docket No. MW-46158
22-3-NRAB-00003-200201**

**The Third Division consisted of the regular members and in addition Referee
Pilar Vaile when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(Keolis Commuter Services, LLC

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to
award and assign Mr. R. Coppola to multiple trackman positions
on Gang V-404 effective October 15, 2018 (Carrier's File BMW
09/2019 KLS).**
- (2) As a consequence of the violation referred to in Part (1) above, the
Organization request that Claimant R. Coppola's seniority be
properly dated for these trackman positions and listed on the
Trackman Roster in accordance with the 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.

Claimant R. Coppola has established and holds seniority within Carrier's Maintenance of Way and Bridge and Building (B&B) Department. The Claimant was hired on April 30, 2018 as a B&B Mechanic and was working in that capacity at the time of the Carrier violation. Section 3 of Rule 5, Seniority, provides for Maintenance of Way seniority in two separate sub-categories, stating:

3. Seniority is confined to the Sub-Department in which employed.

The Sub-Departments are as follows:

- 1. TRACK**
- 2. BRIDGE AND BUILDING**

Prior to October 9, 2018, the Claimant bid to multiple Trackman positions on Gang V-404. The Trackman position is considered an entry-level position within the Track Department. The Carrier did not award the Claimant any of these positions and all five (5) trackman positions were instead marked by the Carrier as "No Qualified Bidders" (Employee's Exhibit "A-1").

The Organization grieved the failure to assign the Claimant to any of the vacant entry level Track positions he had applied for, and the Carrier's on-property Hearing Officer denied the claim by letter dated on June 17, 2018, stating that

It is Keolis' policy that employees are not allowed to transfer between departments if they have less than one year of employment with Keolis. This is something that is clearly communicated to every new hire employee and discussed with them during the new hire process. As such, Mr. Coppola was not fully qualified to bid on the open Trackman positions.

This rule does not violate the BMW CBA because there is no restriction of seniority. Mr. Coppola was hired to work a position as a B&B Mechanic in the B&B Department for at least his first year of employment, as such, he has maintained his seniority on his respective roster and is allowed to bid any of the posted B&B positions. This was very clearly explained to him during the new hire process.

The Organization responded that the language of the Rule 8 is unambiguous in that the senior qualified applicant shall be assigned the bid within 14 days. Moreover, while Rule 5 provides for confining seniority to the Track and Mechanic

Sub-Departments, nowhere does the Rule prohibit employees from seeking to bid in the other Sub-Department within the first year of employment. It asserted that the Carrier is interfering with the Claimant's seniority movement, by imposing this arbitrary policy.

The policy referred to by the Carrier is not memorialized in writing, and there was therefore no evidence in the record about it. The Carrier argued before the Board that it is implied in the Hearing Officer's decision that by "policy" she was referring to the well-established right of the Carrier to determine the qualifications for a job, even though the Hearing Officer did not use those words exactly.

After the claim was denied, the Assistant General Chairman advanced it to the next step and also provided evidence of a past practice of permitting employees to bid from one Sub-Department into the other within a twelve-month period. These were the Seniority Rosters of the Mechanics and Trackmen, and they showed that between 1995 and 2012, twelve of the current B&B employees were permitted to bid outside of their Sub-Department within a year.

The Organization timely filed a claim under the Railway Labor Act, 45 USC §§ 151, *et seq.*, which was denied on the property and timely referred with or without an agreed upon extension to the National Railroad Adjustment Board for final adjudication.

The Organization argues that it established a *prima facie* case with: a description of the violation; supporting documentation, including seniority rosters the show B&B employees have long been allowed to bid outside of their initial Sub-Department within the first year. *See, e.g.,* Third Div. Award No. 40788, *BMWD – IBT Rail Conference and BNSF Railway Co. (former Burlington Northern Railroad Co. (Knapp 2010); see also* Org. Ex. A-5, Att. Nos. 1-2. Because it has presented a *prima facie* claim, the burden shifted to the Carrier to offer evidence in support of its averments. It asserts that the Organization "was sufficiently specific about the disputed work...not only to put the Carrier on notice, but also for it to be able to research its own records in order to respond to and raise a dispute if the facts alleged by the Organization are incorrect." *See* Award 3-40788. However, the Carrier has not met that burden here, because it relies on "mere assertions".

The Organization also asserts that the long-established purpose of rules regarding seniority is to allow an opportunity to demonstrate ability to perform the subject work. For instance, many Third Division Awards have determined that a

Carrier must provide a reasonable opportunity to qualify even to employees that do not possess the abilities the Carrier has determined are to fill a position. As such, it asserts, the Carrier is attempting to “read into” the contract “something that is not there.” *See Third Div. Award 18423, Bhd. of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees AND Duluth, Missabe and Iron Range Railway Co. (O’Brien 1971).*

In response, the Carrier asserts that it does not deem new employees qualified to change departments within their first year, which is intended by management to illustrate their skills, and enable the Carrier to evaluate their full qualifications for future transfer requests. Moreover, the Carrier argues that the well settled management prerogative to determine job qualifications has been upheld and affirmed in a slew of NARB Awards; and that neither the Organization, nor this NRAB may usurp that judgment. Lastly, the Carrier argues that the Board may not consider the evidence submitted by the General Chair as part of the post-denial conferral process.

Upon full consideration of the record, the Board concludes that the Organization has failed to meet its ultimate burden of proof because it failed to establish that the job qualification the Carrier set for transfers of new hires (one year of employment in the position first hired into) was arbitrary, unreasonable, capricious, or otherwise exceeded the Carrier’s discretion.

As a threshold matter, the Board rejects the Carrier’s argument that the Claimant’s signed statement is not admissible because it was provided after the claim had been denied. The post-denial conferral is a standard part of the established and regular processing leading up to the filing of an appeal before the NRAB, and materials are often added at that point. Moreover, the NRAB has held that such materials are not “outside the handling of the claims in the usual manner”, and it routinely considers such matters as part of the “on-property handling”, provided that the issues are not enlarged upon significantly, no one is misled, the Carrier is able to prepare an adequate defense, and there is no prejudice. *See Third Div. Award No. 24757, Bhd. of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and Chicago and Illinois Midland Railway Co. (Sirefam 1984); Third Div. Award No. 36517, Bhd. of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and Chicago and Illinois Midland Railway Co. (Sirefam 1984); and Third Div. Award No. 37576, Bhd. of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and Chicago and Illinois Midland Railway Co. (Sirefam 1984).*

Here, the post-denial evidence does not run afoul of any of those conditions. Nonetheless, the Board observes that the Organization's evidence of a past practice is quite stale. It was six years old at the time in question, and even predates the Carrier's assumption of the Contract by two years. As such, the Organization's evidence fails to substantially counter the Carrier's claim that it has an established policy of requiring one year of employment before allowing a Maintenance of Way employee to transfer to another sub-department. Nor is there any claim made or evidence offered that this policy would constitute an abuse of the Carrier's discretion. On its face, the policy does not sound unreasonable. As the Parties are well aware, the Carrier's discretion is broad and well-established in the regard, and the Board routinely rejects similar niggling complaints. *See, e.g.,* PLB No. 7007, Case No. 36, *BMEW and Mass. Bay Commuter Railroad* at 3 (Meyers 2011) (noting that "[i]t is fundamental that the Carrier has the right to set the job skill requirements when it assigns work to employees", and that "[t]he carrier has the right to determine who is qualified to perform the job"); and PLB No. 7007, Case No. 48, *BMEW and Mass. Bay Commuter Railroad* (Meyers 2011) (rejecting the Organization's assertion that qualification in CSX Rules qualification was not necessary)

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 28th day of January 2022.