

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45088
Docket No. MW-47235
24-3-NRAB-00003-220206**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(Keolis Commuter Services

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier did not award Mr. W. Gonzalez a drawtender position (Advertisement Numbers 676 and 677) headquartered out of Gloucester, Massachusetts effective July 8, 2020 nor afford him the proper thirty (30) days in which to demonstrate his ability to completely perform the job (System File S-2008K-083/BMWE 17/2021 KLS).

2) As a consequence of the violation referred to in Part (1) above, the Organization requests that Claimant W. Gonzalez’s ‘* Seniority be properly dated on the Drawtender Seniority Roster in accordance with the Collective Bargaining Agreement and he be fully compensated for any lost compensation for the Drawtneder (sic) position. ***’**

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.

Factual Background:

On June 30, 2020, Claimant bid on two Drawtender positions headquartered out of Gloucester, Massachusetts. The Carrier posted awards on July 1, 2020, effective July 8, 2020, but found no qualified bidders. Claimant asserts he should have been awarded position and afforded a thirty-day period to demonstrate his ability to competently perform the job. The resulting claim was processed through the grievance procedure to consideration by the instant Board.

Rule 8 of the parties' Agreement governs this claim. That provision states as follows in pertinent part:

Rule 8 - BULLETIN, ASSIGNMENT AND DISPLACEMENT

1. New positions or vacancies (except short vacancies of thirty (30) days or less) will be on bulletin boards on Wednesday. The bulletin shall include whether or not the position is permanent or temporary and the position title (including the type of equipment primarily operated, where applicable), rate of pay, headquarters, work week, rest days, tour of duty and assigned territory. Employees desiring bulletined positions must file written application with the Carrier official signatory to the bulletin within seven (7) days after the bulletin is posted and positions will be awarded to the senior qualified applicant effective not later than fourteen (14) days after the bulletin is closed. This rule shall not be construed so as to require the placing of employees on their awarded positions when properly qualified employees are not available at the time to fill their places, but physical transfers must be made within ten (10) days after effective date of award. Short vacancies of thirty (30) days or less may be filled by any available qualified employee covered by this Agreement. However, if the employee assigned to a short vacancy under this paragraph is other than the senior employee, he may be displaced by a senior employee on written notice to the supervisory official, provided written notice is made within five (5) days after the position is first filled, or in accordance with paragraphs 3, 4, and 5 of this rule.

2. An employee, after being awarded a bulletined position or permitted to exercise displacement rights, will be allowed thirty (30) calendar days

in which to demonstrate his ability to competently perform the job. An employee who fails to qualify within thirty (30) calendar days may return to his former position without loss of seniority, but will acquire no seniority dating on the position for which he failed to qualify if such position is in a higher classification.

Position of Organization:

The basic facts in this case are not in dispute. The Carrier failed and refused to award Claimant a Drawtender position on Gang V-622, headquartered out of Gloucester, Massachusetts, despite his seniority as established in the Maintenance of Way Department. The Agreement is clear in stating that positions will be awarded to the senior qualified applicant not later than fourteen (14) days after the bulletin closes. The Agreement further provides that an employee will be allowed thirty (30) calendar days in which to demonstrate his ability to competently perform the job. The Carrier further violated the Agreement when it failed to allow Claimant thirty (30) days in which to demonstrate his ability to competently perform the job, as required by Rule 8, Section 2.

Position of Carrier:

The Carrier points out that this position arose in the middle of the pandemic, which created innumerable challenges for management. The Carrier explains that at the time, it was only allowing employees already qualified and in the roster to bid on and be awarded the position of Drawtender. The reason was that the training would have forced employees to work in close proximity with each other, creating an unacceptable risk of viral transmission.

The Carrier emphasizes that in 2020, the entire world was gripped by the newly emerging COVID-19 pandemic. While vaccines are now prevalent and much more is known about COVID-19, including how it spreads and precautions that can be taken, in July 2020 this was not the case. At that time, the Carrier had begun taking a myriad of precautions to address COVID-19 risk to employees and the riding public. For example, at that time, no more than two employees were permitted to ride in a six-man vehicle because placing individuals in close confines was deemed a health risk.

COVID-19 precautions were also addressed relative to the Drawtender position. Training an employee for a Drawtender position requires the employee in training to

work in close contact with an established Drawtender in a confined space for at least three weeks to gain sufficient skill to qualify for the position. The existing Drawtenders were concerned for their health and wellbeing, and made it clear to management that they did not feel safe training another employee in close proximity. As a result, it was determined that the Drawtender position would be posted but only employees currently qualified as Drawtenders would be awarded the position.

Claimant did not suffer any lost seniority because no employee gained any roster rights on the bid; no one who required training was awarded the position.

The Carrier has a broad and well-established right to set policy as to who is qualified for a position. See also MBCR, PLB No. 7007, Case No. 36, 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”). In Third Division Award No. 44692, the Organization made a similar claim that the Carrier was prohibited from a determination that employees with less than one year of experience were unqualified for a transfer to a different department. The Arbitrator found that the Carrier’s exercise of such discretion relative to qualification was not arbitrary, unreasonable, capricious, or otherwise exceeded the Carrier’s discretion. The policy regarding qualification here was similarly reasonable, appropriate and within the Carrier’s well-established discretion.

Analysis:

We are persuaded that management acted within its authority in this case. It is well established that it has the discretion to determine the reasonable qualifications of any position it seeks to fill. It was also reasonable for the Carrier to take safety considerations into account when determining the qualifications needed to perform the Drawtender position, regardless of how transient such considerations might be.

In this case, the requirement that employees not require training for the Drawtender position was reasonable in view of the ongoing pandemic and the inherent dangers of exposing employees to the training process.

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 31st day of October 2023.