

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1109**

Before Special Board of Adjustment No. 1109

BURLINGTON NORTHERN SANTA FE

and

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES**

Introduction

On or about May 12, 1998 the Brotherhood of Maintenance of Way Employees (hereinafter the "BMWE" or the "Organization") initiated a job action against the Burlington Northern Santa Fe Railroad Company (hereinafter the "Burlington" or the "Carrier") as the result of what the Organization characterized as a unilateral change by the Carrier of certain provisions in the parties' collective bargaining agreement. The Carrier characterized the dispute as a "minor dispute", as that term is defined in the provisions of the Railway Labor Act, and sought a temporary restraining and subsequently a preliminary injunction before the United States District Court for the Northern District of Texas. The injunctions were granted, as the Court found that the parties' dispute involved the interpretation or application of collective bargaining agreement provisions.

On June 26, 1998, as a result of the Court's orders, the parties entered into an agreement establishing Special Board of Adjustment No. 1109 (hereinafter the "Board").

The Board convened at the Marriott Courtyard in College Park, Georgia on October 28, 1998. The Board was constituted as follows:

David D. Joynt - Organization Member
Dennis J. Merrell - Carrier Member
Richard R. Kasher - Chairman and Neutral Member

The parties were represented by counsel, who entered their appearances as follows:

Richard S. Edelman, Esquire
O'Donnell, Schwartz & Anderson
For the Organization

Ralph J. Moore, Jr., Esquire
Donald J. Munro, Esquire
Shea & Gardner
For the Carrier

Counsel provided the Board with pre-hearing submissions and reply submissions, and were afforded an opportunity to present oral argument to the Board at the October 28, 1998 hearing.

Background Facts

The incident which gave rise to the parties' dispute involved the disqualification by the Carrier of Employee Jodi Thompson. Ms. Thompson had a seniority date of May 16, 1994 when, as a Sectionperson, she bid upon a foreman's position in Mullen, Nebraska. Ms. Thompson was awarded the position on March 15, 1998, although she did not possess any foreman's seniority at the time that she responded to the bulletin. The reporting date for the foreman's position in Mullen was March 23, 1998. On March 19, 1998 Ms. Thompson was bumped from the foreman's job by a more senior employee; and on that same date the Carrier sent Ms. Thompson a letter which reads in relevant part as follows:

Recently, you were awarded Position #59101P, Job #22, Foreman, District #10 at Mullen, Nebraska, with a reporting date of March 23, 1998. Unfortunately, you were bumped on March 19, 1998, prior to your reporting date by Mr. R.W. Taylor. Since you did not perform service as a Foreman at Mullen, Nebraska as the result of your displacement, you did not qualify and will not be given a Foreman's [seniority] date at this time.

Subsequently, when Ms. Thompson sought to exercise what she believed was her foremen seniority and displace a more junior employee in another foreman's job, her request to displace was

denied as it was alleged that she did not have foreman's seniority.

The BMW challenged the Carrier's action alleging that Rule 4 and established past practice under the parties' 1982 agreement did not permit the Carrier to nullify Ms. Thompson's seniority rights as a foreman, which the BMW asserted were established as of the date she was awarded the foreman's position in Mullen, Nebraska.

Although the parties were able to execute the agreement establishing this Board, they did not agree upon the wording of the Question(s) at issue. The BMW posed the Question(s) at issue as follows:

Question No. 1

Whether Burlington Northern Santa Fe Railway violated Rule 4C of the 1982 Burlington Northern-BMW agreement when it refused to recognize the foreman seniority obtained by Jodi L. Thompson when she was promoted by BNSF under Rule 4B of the agreement to a foreman position after she was displaced from the foreman position by a more senior employee before she reported to the new position? If so, what shall the remedy be?

Question No. 2

Whether Burlington Northern Santa Fe Railway violated the seniority and displacement rules of the 1982 Burlington Northern-BMW agreement when it denied Jodi L. Thompson, who was promoted to the foreman rank at the same time as a less senior sectionman was promoted to the foreman rank, the right to displace the promoted foreman who was junior to her in the sectionman rank? If so, what shall the remedy be?

The Carrier posed the question(s) at issue as follows:

The Agreement provides that when employees are promoted to a higher rank, seniority shall date from bulletin assignment – provided they are not disqualified within the first thirty calendar days, in which case they earn no seniority date. Employees failing to qualify for a position secured by bulletin will be given notice in writing of reason for disqualification. The Agreement vests the Carrier with the exclusive right to judge an employee's qualification, subject to appeal.

J.L. Thompson was assigned to a bulletined position of Foreman at Mullen, Nebraska on March 15, 1998; but due to displacement by a senior employee, she never actually worked the position. Carrier disqualified Claimant by letter dated March 19, 1998 and she earned no foreman seniority date.

Under these rules, must the Carrier grant a seniority date to an employee who never works a position or who leaves the position before the Carrier can judge qualification within the first thirty calendar days?

A number of contractual provisions were cited to the Board for its consideration, the two most relevant Rules, Rules 4 and 23, provide as follows:

Rule 4. Promotion and Seniority of Promoted Employees

A. "Promotion" is an advancement from a lower rank to a higher rank on a seniority roster.

B. Promotion shall be based on ability and seniority; ability being sufficient, seniority shall prevail, the Company to be the judge, subject to appeal.

C. When employees are promoted to a higher rank, their seniority in such rank will date from their assignment to a regular bulletined position, either temporary or permanent, provided they are not returned to their former positions within the first thirty (30) calendar days on account of lack of ability to perform the work of the position.

This will not include men who have been chosen to fill temporary vacancies which have not been bulletined on account of vacancy of thirty (30) calendar days or less.

D. Two (2) or more employees promoted to the same higher rank on the same date will hold the same relative seniority position therein as they held in the rank from which promoted.

E. An employee qualified for and establishing a seniority date in any rank will thereby establish the same seniority date in all lower ranks on the same seniority roster, in the same sub-department in which he has not already established his seniority.

F. A promoted employee will retain his seniority rights in the rank from which promoted.

Note: The principle of promotion also applies to transfer of employees between rosters in a sub-department, between positions within a rank, or between sub-departments within a seniority district. See Rule 22 C for exception to retention of seniority in transferring between track and B&B sub-departments.

Rule 23. Failure to Qualify

A. Employees awarded bulletined positions, or employees securing positions through exercise of seniority, in a class in which not yet qualified, will not be disqualified for lack of ability to do such work after a period of thirty (30) calendar days thereon. Employees will be given reasonable opportunity in their seniority order to qualify for such work as their seniority may entitle them to, without additional expense to the Company.

Note: "Without additional expense to the Company" is understood to mean that an employee qualifying on a position will be entitled to the rate of pay he was receiving on his immediately previous assignment.

B. An employee failing to qualify for a position secured by bulletin, or in exercise of seniority will be given notice in writing of reason for such disqualification.

C. An employee who considers himself unfairly disqualified may request, and shall thereupon be given, an investigation as to such qualifications pursuant to the provisions of Rule 62.

D. An employee awarded a bulletined position or securing a position through exercise of seniority to a position for which not yet qualified shall if disqualified return to his former position. In the event his

former position has been filled, the employee filling the position shall return to his former position.

If his former position has been abolished or the position was secured by a senior employee through the exercise of seniority in accordance with the provisions of Rule 8E, the disqualified employee will be governed by provisions of Rule 8E.

As will be described in greater detail below when the positions of the parties are articulated, the Organization has contended that the Carrier improperly rescinded Ms. Thompson's seniority as a foreman when she was displaced, and the Carrier has contended that it properly exercised its right to disqualify Ms. Thompson based, in part, upon her lack of experience as a foreman.

Position of the Organization

The Organization contends that the Carrier's interpretation of the parties' agreement is contrary to the language in the agreement, specifically Rule 4B, which states that promotion will be based upon seniority and ability, and that where ability is sufficient, seniority will prevail. The Organization submits that when Ms. Thompson was promoted under Rule 4B the Carrier recognized that she had sufficient ability to perform the job. The Organization points out that the Carrier's primary witness at the injunctive proceedings acknowledged that once an employee

is promoted under Rule 4B there has been an initial determination that the employee has sufficient ability to perform the job. Accordingly, the Organization maintains that Ms. Thompson, or any other similarly-situated promoted employee, is presumed qualified once promoted under Rule 4B.

The Organization further contends that Rule 4C supports its position as it provides that "When employees are promoted to a higher rank, their seniority in such rank will date from their assignment to a regular bulletined position, either temporary or permanent, provided they are not returned to their former positions within the first thirty (30) calendar days on account of lack of ability to perform the work of the position."

The Organization argues that this Rule permits the removal of seniority only if the employee shows "lack of ability to perform the work"; and that the phrasing necessarily involves an assessment of the employee's actual performance. The Organization maintains that if there is no assessment of an employee's ability to perform the work then disqualification of that employee is unreasonable and contrary to the stated purposes of Rule 4.

In sum, the Organization argues that the agreement clearly establishes in Rule 4 that seniority accrues as of the date of

assignment and that a promoted employee is entitled to that seniority date unless, based upon actual performance, he/she is found to be unable to perform the work of the position during the first thirty (30) days after the assignment. Rule 4C, in the Organization's opinion, creates a presumption that a promoted employee is qualified, and thus vests that employee with seniority subject to disqualification based upon actual inability to perform. Accordingly, the Organization maintains that the disqualification of Ms. Thompson and the removal of her seniority rights constituted a violation of the parties' agreement.

The Organization rejects the Carrier's argument that Rule 23 justified its disqualification of Ms. Thompson. The Organization maintains that nothing in Rule 23, expressly or by implication, confers upon the Carrier the right, in the first instance before the employee even begins work, to deny that employee his/her seniority which accrued at the time of assignment under Rule 4C. The Organization points out that Rule 23 recognizes that its procedures apply to two groups of employees, those first promoted/transferred to a new job and those who exercise seniority to a job but have not previously completed thirty (30) days of work in that job.

The Organization argues that compliance with Rule 4C as written, insofar as accrual of seniority is concerned, does not mean that the Burlington would lose its ability to disqualify newly-promoted employees under Rules 4C and 23. The Organization maintains that the Carrier has thirty (30) days, albeit those days need not be consecutive, to judge an employee's actual performance, and, if the performance is determined to be deficient, to disqualify that employee.

The Organization also rejects the claim made by the Carrier before the District Court in Texas that its actions were motivated by safety concerns. The BMW submits that it is "second to no one with respect to concern for the safety of track maintenance operations and track workers"; and argues that if the Carrier truly believes that a change in the agreement is necessary for safety reasons, then the appropriate course of action is to negotiate such change with the BMW, and not to act unilaterally. The Organization also points out that there should be no compromise in safety as the BMW has acknowledged that the Carrier retains the right to disqualify an employee that it finds to be insufficiently mindful of safety requirements, recognizing, of course, that such a disqualification would be subject to appeal.

In addition to the language in the agreement, which the BMW asserts supports its position, the Organization contends that past practice under the 1982 agreement establishes that Ms. Thompson and other similarly-situated employees should not have had their seniority to the promoted positions nullified by the Carrier's actions. The Organization points out that it provided a substantial body of evidence establishing that over the years employees were not disqualified before they reported to their promoted positions, and that several hundred employees accrued seniority on the rosters of the positions to which they were promoted prior to their reporting to the promoted positions. The Organization cites instances involving employees who attained such seniority, and relies, in part, upon BMW Exhibit Nos. 12, 13, 14 and 15 in support of this contention.

The Organization submits that the Burlington has never challenged the Organization's past practice evidence, and argues that, before the District Court, the Carrier attempted to suggest that the Organization's evidence of past practice was not significant because it only involved a handful of employees and because the practice was allegedly inconsistent.

The Organization contends that the evidence it presented of numerous employees who accrued seniority on the rosters to which

they were promoted is significant, and maintains that this evidence demonstrates that the parties acted consistently over the years in accordance with the BMW's interpretation regarding the requirements of Rule 4C. The Organization cites several cases from the federal courts which articulate the elements of what constitutes an established "past practice", and argues that in the instant case the BMW has demonstrated that the practice of recognizing a promoted employee's seniority was (1) longstanding, (2) widespread, and (3) known by the parties and acquiesced in by the Carrier by its conduct and lack of objection.

Accordingly, the Organization asserts that its position is supported by clear agreement language, and, if the agreement language is considered to be ambiguous, the parties' past practice supports the BMW's position before the Board.

The BMW maintains that the agreement was violated when the Carrier eliminated Ms. Thompson's foreman's seniority. The Organization points out that Ms. Thompson did not work the position after having been promoted under Rule 4B, and thus argues she must be presumed to have possessed sufficient ability for the foreman's job. Therefore, the Organization submits that she could not have been disqualified under Rule 23, and the Rule

4C provision for removal of seniority was plainly inapplicable. The Organization asserts that the Burlington clearly did not determine under Rule 23 that Ms. Thompson was not able to perform the work of the position. The Organization further contends that the probative evidence in the record establishes that Ms. Thompson was qualified to perform the duties of the position, as she had twice acted as foreman under a Rule 19A appointment; and that she was listed as FRA qualified.

The Organization submits that the Burlington violated the agreement when it denied Ms. Thompson the right to displace a promoted foreman, Mr. Fichter, who was promoted to the foreman rank at the same time as Ms. Thompson and who was junior to her on the Sectionman roster. The Organization maintains that Ms. Thompson and Mr. Fichter were promoted to the same rank on the same date, and that under Rule 4 Ms. Thompson, who was senior to Mr. Fichter on the Sectionman roster, should have been viewed as senior to Mr. Fichter as a foreman. The failure to allow Ms. Thompson to displace Mr. Fichter indicates, in the Organization's opinion, why the Carrier's position is contrary to the agreement and perverts the entire seniority scheme regarding promotions and transfers.

Based upon the foregoing facts and arguments, the Organization requests that the Board declare the Carrier's "recent" interpretation of the parties' agreement as being contrary to the agreement insofar as the removal of a promoted employee's seniority is concerned, and further requests that the Board find that the Carrier violated the agreement when it removed Ms. Thompson's foreman seniority. Additionally, the Organization requests that the Board direct the Carrier to compensate Ms. Thompson in an amount equal to the difference between her actual earnings since the contract violation and what she would have earned had the Carrier not violated the agreement.

Position of the Carrier

The Carrier submits that there are two issues before the Board; the threshold question being whether the Carrier may disqualify an employee who was assigned to a higher ranking job before the employee reports to and performs the job, and the second question being whether the Carrier may disqualify an employee if he/she failed to demonstrate ability because of insufficient time on the job. The Carrier contends that both questions must be answered in the affirmative.

The Carrier maintains that it is undisputed that under the 1982 agreement the Carrier has the right to judge the ability of an employee seeking a higher ranking job, and that if an applicant is deemed unqualified that employee will be returned to his/her former position and will not obtain any seniority rights in the higher rank even if the employee was initially assigned to and worked in the new position.

The Carrier points out that the parties disagree as to the manner in which the qualification rules operate in circumstances where an employee spends little or no time in a newly assigned position.

The Carrier argues that it has the right to disqualify an employee at any point in the promotion process, from the time the employee initially bids for the job until the employee has been on the job for thirty (30) calendar days, including the period after assignment but before the employee reports to the job.

The Carrier submits that Rule 4B provides the Carrier with the initial right to "judge" an employee's "ability" as soon as the employee bids for a position of higher rank; and that Rule 23 then provides the Carrier with the right to "disqualify" an employee for lack of ability during the thirty (30) calendar day

period. The Carrier contends that there are no further temporal limitations on the Carrier's right to assess an employee's ability, and that the Organization is seeking to add a restriction that does not exist in the agreement when it argues that the Carrier is prohibited from disqualifying employees prior to their reporting to new jobs.

The Carrier also contends that its position is supported by past practice, which demonstrates that the Burlington has exercised its right to judge an employee's ability prior to his/her reporting to his/her new position; and refers to examples when employees who were assigned to truck drivers' positions were disqualified because they lacked the necessary commercial drivers licenses required for the job. Another example cited by the Carrier involved an employee assigned to a traveling mechanic's job, who was disqualified prior to reporting after it was learned that the individual lacked basic mechanical skills.

The Carrier submits that the Organization's past practice argument should be rejected, as merely because the Carrier did not disqualify promoted employees who did not report to the positions they sought does not establish that management waived

its right to disqualify employees under appropriate circumstances.

The Carrier maintains that its interpretation of the disqualification rules leads to a more reasonable result than the interpretation placed upon those rules by the BMW. The Carrier contends that it simply cannot be that the Burlington must allow an obviously unqualified employee to attempt to perform a job before disqualifying that employee. The Carrier asserts that it is not necessary to observe an employee on the job in order to assess whether he/she has the requisite ability to perform the job. As an example, the Carrier submits that an employee who has had no experience or training in welding may be deemed unqualified to work as a welder, even though there has been no on-the-job assessment. The Carrier submits that the same rationale would apply for a employee who bids to a position of crane operator, and argues that it would be foolhardy to allow such an individual, who has never operated a boom crane, to run such machinery in order to determine if the employee lacks the requisite ability.

The Carrier points out that Rules 62 and 40 provide an avenue for redress if an employee believes that he/she has been unfairly disqualified prior to reporting. The Carrier further

points out that these rules, which provide employees with rights of appeal in cases of disqualification, also provide that disputes which have not been resolved on the property may be submitted to arbitration pursuant to Section 3 of the Railway Labor Act. Thus, the Carrier concludes that BMW-represented employees have a remedy if it is determined that they were improperly disqualified.

The Carrier further contends that it has the right to disqualify an employee when it has not had a sufficient opportunity to assess the employee's ability. The Carrier submits that the 1982 agreement does not establish that employees are presumed qualified when they report to a new position. Rather, the Carrier argues that it is the employee's burden to demonstrate that he/she is qualified "in a class in which not yet qualified". The Carrier cites decisions from Burlington/BMW Public Law Boards in support of its position that employees are not qualified merely because they have sufficient seniority to obtain a position.

The Carrier rejects the BMW's contention that insufficient qualifying time cannot be a basis for disqualification, because the thirty (30) day period for qualification after reporting should be calculated on a cumulative basis. The Carrier

maintains that the plain language of Rule 23 describes the period of assessment as "thirty (30) calendar days", and not thirty (30) non-consecutive working days spread over a variety of positions. The Carrier submits that once an employee reports to work Burlington has thirty (30) calendar days in which to judge the individual's ability; and that if such employee leaves a position before the Carrier has had a sufficient opportunity to make its assessment, then the Carrier will be deprived of its right to disqualify an inexperienced, unsafe or untrained employee. In any event, the Carrier submits that if the Organization's "cumulative" theory of qualification is accepted, then as a practical matter the Carrier's right to assess employee qualifications would be vitiated. The Carrier contends that employees who would "jump in and out of jobs in an effort to accumulate seniority dates would thereby circumvent the qualification process altogether". Additionally, the Carrier contends that there would be no practical way to track how long an employee remains subject to qualification under a cumulative days approach, particularly when months or years elapse after an initial assignment. The Carrier argues that the reality is that if employees are not subject to disqualification

when they first report to a new position, they will probably never be disqualified.

The Carrier asserts that accepting the Organization's interpretation regarding the Carrier's right and ability to assess qualifications would result in serious compromises to safety, as unqualified employees would be promoted and thus create safety and productivity problems in the work force.

Turning to the specific case of Ms. Thompson, the Carrier submits that the question concerning her qualifications are not properly before the Board, as her case was not processed through the on-property unjust treatment procedures established by the 1982 agreement. In any event, the Carrier maintains that the BMW cannot meet its burden of demonstrating that Ms. Thompson had the ability to perform the duties of a foreman. The Carrier argues that Ms. Thompson was displaced prior to reporting, and thus it is clear that she did not and could not prove to the Carrier that she was qualified for the job. The Carrier contends that because she did not qualify, she was not entitled to keep her conditional seniority date for that rank.

In conclusion, the Carrier argues that the BMW seeks to place entitlement to promotions and the seniority rights that accompany such promotions ahead of the Carrier's right to judge

an employee's ability to perform a new job. This approach, in the Carrier's opinion, is "entirely backwards", as it is contrary to the logic and rules agreed to by the parties. Accordingly, the Carrier requests that the Board find that nothing in the 1982 agreement restricts Burlington's right to issue a notice of disqualification to an employee prior to reporting, or to employees who have never demonstrated the ability to perform the job.

Findings and Opinion

In addition to the positions articulated in their submissions and reply submissions, counsel for the parties expanded upon those arguments and raised several new contentions during the course of their oral presentation to the Board. Counsel for the Organization asserted that the Carrier had "improperly muddled the issues by merging Rules 4 and 23"; and thus had sought to eliminate the possibility of an independent evaluation of the import and impact of Rule 4C. Additionally, Counsel for the Organization maintained that the Carrier's primary witness before the District Court had acknowledged that Ms. Thompson was qualified. Counsel for the Organization also argued that, contrary to the Carrier's assertion, there is "no

such thing as conditional seniority". Counsel for the Organization maintained that "promotions are necessarily made to people with little or minimal experience"; and that equity required, in terms of the relative seniority standing between Ms. Thompson and Mr. Fichter, that Ms. Thompson not have had her seniority improperly nullified. Counsel for the Organization acknowledged that the Carrier does have the right to disqualify employees during the thirty (30) day period specified in Rule 4, and pointed out that the BMW has never disputed that right.

Carrier Counsel through use of a "flow chart", which demonstrated the bidding, promotion and qualification periods, argued that there is a clearly defined and continuous process for an employee to obtain a promotion; and that the Organization has sought to "slice out" one part of the process by improperly limiting the Carrier's right to disqualify an employee prior to the employee's physically working the position to which he/she has sought to be promoted. The Carrier also argued that the Organization cannot establish that there is any "presumption of qualification"; and submitted that Rule 23 speaks to employees who failed to qualify, and does not contain any language which would support the BMW's position that an employee is presumptively qualified. Counsel for the Carrier

also contended that the BMW, by arguing that employees who have sought promotion are entitled to a "reasonable opportunity" to qualify for such positions, is attempting to improperly limit the Carrier's right to disqualify employees based upon their inability to perform the job. Additionally, Carrier counsel argued that the term thirty (30) "calendar days" referenced in Rules 4 and 23 cannot be read to mean thirty (30) "working days" as the Organization would have the Board conclude. The Carrier argued that thirty (30) calendar days must be read to mean thirty (30) "consecutive days", and submitted that other sections in the parties' agreement support such a reading. Carrier Counsel contended that if supervision was required to assess an employee's ability over a period where the thirty (30) days were "sliced and diced" that such an assessment would be "no assessment at all". Carrier Counsel contended that it is reasonable to conclude that the term thirty (30) calendar days means thirty (30) consecutive days.

What is clear to the Board from an assessment of the parties' written and oral arguments is that they have approached this dispute from diametrically opposite perspectives. Reflective of this difference in views is the fact that the

parties were unable to agree upon the issues to be decided by the Board.

The BMW views the issues as primarily concerned with the proper interpretation and application of Rule 4, which Rule governs promotions and seniority of promoted employees, while the Carrier views the issues as primarily concerned with the proper interpretation and application of Rule 23, which Rule establishes the manner in which employees will be qualified or disqualified.

While on its face the facts in this case, which arose when Ms. Thompson was disqualified from a position to which she was arguably promoted, appear to establish an inextricable linkage between Rules 4 and 23, it is this Board's opinion that these Rules are properly interpreted and applied, to some extent, independently.

Clearly, Rules 4 and 23 represent two very distinct, competing principles. These principles, in addition to their establishing critical, substantive rights, are invested with substantial "emotional" elements. From a union's and employee's perspective, one cannot imagine rights of greater import than seniority and the ability to advance through a fair and equitable promotion process to jobs which produce increased pay

and benefits. From an employer's perspective, one can identify very few management rights, if any, that are more critical to establishing and maintaining a safe and productive workplace than the right to determine employees' qualifications.

Certainly, while there is some linkage between these two sets of competing rights, the parties here have not, in this Board's opinion, drafted a process which links those rights so that one set supersedes or nullifies the other.

There seems to be no disagreement that when an employee is awarded a position which constitutes a "promotion" under Rule 4A, defined as "an advancement from a lower rank to a higher rank on a seniority roster", that that employee immediately acquires seniority in the rank to which promoted. Rule 4C clearly states that employees who are promoted to such higher rank have their seniority "date from their assignment to a regular bulletined position".

Ms. Thompson was promoted to a higher rank when she was awarded the position of foreman at Mullen, Nebraska, and in accordance with the applicable rules just cited she began to accrue foreman's seniority.

While the Carrier has argued that there is no "such thing" as a presumption of qualification, in fact, in this Board's

opinion, when the Carrier awarded Ms. Thompson a position of foreman she was presumptively qualified. Otherwise, how could the Carrier "disqualify" Ms. Thompson if she had not established some right to the job.

This Board's conclusion that Ms. Thompson was presumptively qualified when Carrier management determined to award her the position is buttressed by substantial evidence presented by the Organization that "hundreds" of employees have been similarly "presumptively qualified" for foremen's positions and have "sat" or resided on seniority rosters for those promoted positions, even though they may have not physically worked those positions and/or, if they worked the positions, they did so for less than thirty (30) days.

It is not necessary to determine whether the Organization's evidence constitutes a binding past practice. What the evidence does disclose is that numerous employees who sought promotion to the position of foreman were awarded that higher ranked position and began to accrue seniority in that higher ranked position as of the date of their assignment to a "regular bulletined position", even though they had not begun working the position. At least, insofar as these employees were concerned, there was a presumption of qualification. Such a presumption is not

uncommon in the industrialized/unionized world, and does not, necessarily, truncate or eviscerate the employer's right to determine at some point in the process that the promoted employee should not have been promoted. In fact, that is when Rule 23 comes into play.

The Carrier retains the right at any time to conclude that the employee who was promoted and who began working the position did not possess the requisite "ability" to adequately, safely and/or productively perform the required duties of the job. The BMW does not dispute the Carrier's right to disqualify employees pursuant to the provisions of Rule 23.

The focus of this case, arising primarily upon the facts in the Jodi Thompson disqualification, reduces to the simple question of whether an employee, who has been promoted by the Carrier, may be disqualified without having had the opportunity to perform any work in the position to which he/she was promoted. The Board's answer to this question is a qualified "No".

Based upon our conclusion that the evidence of record establishes that when hundreds of employees in the past have been promoted to foremen's positions on the Burlington they have been presumptively qualified to begin working those positions,

this Board concludes that the "burden of going forward" with reliable, probative evidence that a promoted employee is not qualified rests with the Carrier.

Ordinarily, the only way in which the Carrier can reverse its prior conclusion that an employee who was awarded a higher ranked position is, in fact, unqualified for that position would be based upon objective evidence that the employee is unable to demonstrate during the thirty (30) calendar day period his/her "ability" to perform the required duties and responsibilities of said position.

There are limited exceptions; and the Carrier has focused upon those limited exceptions in its submission and oral argument. Where, for instance, an award to a promoted position has been issued in error, the Carrier may correct that error and retroactively revoke the award through the process of *issuing* a corrected award bulletin. For example, when the position requires the holding of a particular certificate or license, such as a commercial driver's license, and the Carrier mistakenly believed that an employee promoted to the position had such license or certification, then it would be ludicrous to allow that employee to work that position prior to his/her obtaining a necessary prerequisite. Likewise, where a position required a highly-

specialized skill, such as the ability to operate a sophisticated and potentially dangerous piece of machinery such as a crane, then the Carrier has the right to require experience in operating such equipment as a prerequisite for an employee being promoted to such position. If the posting failed through error to make this prerequisite clear, and if the Carrier subsequently determined that an employee who lacked such specialized expertise had been erroneously promoted to the position, then, certainly, the Carrier could retroactively nullify the promotion with the attendant removal of any seniority which might have attached to the promoted position.

However, in the instant case there is no showing that any of the specialized circumstances and/or requirements were present. Ms. Thompson, on the face of her qualifications and experience as a Sectionperson, was properly determined by the Carrier to be presumptively qualified for the position when she was promoted to the foremen's roster. But for her having been displaced by a senior employee, there is no evidentiary reason for this Board to conclude that she would not have begun work at Mullen, Nebraska as a foreman. The Carrier's rights to determine Ms. Thompson's ability to perform the job would have then been triggered, and if she could not have demonstrated

within thirty (30) calendar days of working the position that she had the requisite ability to hold the position, then the Carrier could have exercised its rights to disqualify her under Rule 23.

Ms. Thompson was disqualified by the Carrier by letter dated March 19, 1998 and the reason(s) given was as follows:

Recently, you were awarded Position #59101P, Job #22, Foreman, District #10 at Mullen, Nebraska, with a reporting date of March 23, 1998. Unfortunately, you were bumped on March 19, 1998, prior to your reporting date by Mr. R.W. Taylor. Since you did not perform service as a Foreman at Mullen, Nebraska as the result of your displacement, you did not qualify and will not be given a Foreman's [seniority] date at this time.

What difference was there in Ms. Thompson's "ability" to perform the job of foreman at Mullen, Nebraska on March 19, 1998, the date she was purportedly "disqualified", and March 18, 1998, the day before she was displaced when she was presumably qualified. The answer is there was no difference. An intervening event which had no relevance to the Carrier's initial determination that Ms. Thompson should be awarded the position of foreman and the Carrier's subsequent determination that she should be disqualified from the foreman's position cannot support an evidentiary basis for a conclusion that she did not have the ability to assume the job on March 23, 1998 to which her seniority had initially entitled her.

The Board will also take arbitral notice of the fact that the "natural line of progression" in the maintenance of way craft or class leads from sectionperson or machine operator to foreman. The "foreman" is not a member of management or a "subordinate official", as that term is defined in the Railway Labor Act. A maintenance of way foreman occupies a position more akin to the job of "lead person" or "crew chief". Employees in the maintenance of way craft or class have historically promoted from a sectionman's or trackman's position to the foreman's position.

The question of whether the thirty (30) day qualification period must be consecutive days, as the Carrier contends, or can be working days, as the Organization contends, was not joined in the questions at issue cited at pages 4 and 5 above and appended to the agreement establishing this Board. While the evidence of record appears to support a finding that on the Burlington the thirty (30) day qualification period has stretched over thirty (30) working days and was not confined to a "consecutive" thirty (30) day qualification period, and thus arguably constitutes a binding past practice of these parties, this Board will resist the temptation to decide that question.

We do conclude, however, that the questions posed by the Organization are the questions to be decided, and that Question No. 1 should be answered in the affirmative. That is, the Burlington Northern Santa Fe Railway violated Rule 4C of the 1982 Burlington Northern-BMWE agreement when it refused to recognize the foreman seniority obtained by Jodi L. Thompson when she was promoted by BNSF under Rule 4B of the agreement to a foreman position after she was displaced from the foreman position by a more senior employee before she reported to the new position; and that Ms. Thompson, who was promoted to the foreman rank at the same time as a less senior sectionman was promoted to the foreman rank, should have been provided with the right to displace the promoted foreman who was junior to her.


As a remedy, this Board will direct the Carrier to retroactively reinstate Ms. Thompson's foreman seniority as of the date she was awarded the foreman's position at Mullen, Nebraska, and to afford her the opportunity to obtain a foreman's position through the exercise of that seniority.

Additionally, the parties shall review applicable records to determine whether Ms. Thompson could have held a foreman's position had her seniority not been improperly rescinded and to determine the difference and compensate her for the difference

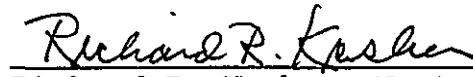
in wages she would have received had she been allowed to begin working the position.

This decision by the Board does not nullify the Carrier's right to determine under Rule 23, after Ms. Thompson begins working as a foreman, whether she possesses the requisite ability to properly perform that job.

Award: The position of the Organization is sustained in accordance with the above findings. This Award was signed this 30th day January of 1999.


Dennis J. Merrell
Carrier Member


David D. Joynt
Organization Member


Richard R. Kasher, Neutral Member

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B. M. W. E.