

**NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION**

Award No. 5061
Docket No. 5026
98-4-96-4-23

The Fourth Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(The American Railway & Airway Supervisors
(Association: A Division of TCU

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

“It is the Claim and Request of Petitioning Organization that:

1. Carrier has violated the Agreement, and in particular Rules 1(c) and 4, when they failed to award the advertized position of Foreman II on Bulletin ARSA #44. to Mr. R. L. Elliot. On January 7, 1995 the position was awarded to Mr. J. W. McGill, a junior employee on the ARASA Foreman II Seniority Roster.

2. Because of this violative action, Carrier be required to place Mr. Elliot on the position as advertized.”

FINDINGS:

The Fourth 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 Carrier awarded a bulletined position to a junior employee over Claimant because it believed that Claimant was neither competent to handle the position nor could he learn the necessary skills to handle the job in 20 days as provided for in Rule 4 of the Agreement.

The relevant Rules state, in pertinent part:

"RULE 1

SENIORITY

* * *

(c) . . . Bulletined positions will be awarded to the senior applicant within 5 working days of the close of the bulletin period.

* * *

RULE 4

FAILURE TO QUALIFY

(a) Supervisors, after being awarded bulletined positions or permitted to exercise displacement rights, will be allowed 20 working days in which to demonstrate their ability to competently perform the job. . . .

(b) Supervisors may be removed from positions at any time during the 20 day qualifying period if it becomes apparent that they do not possess the necessary ability and fitness to permit them to qualify. . . .

(c) Supervisors will be given full cooperation of their superiors and other employees in their efforts to qualify for positions."

The Organization argues that the above Rules required that Claimant be awarded the position on the basis of his seniority and that he be given time to demonstrate that he could perform the job. The Carrier asserts that without a showing that Claimant would be able to demonstrate his qualifications within the 20 day qualifying period, the

Carrier could award the position to the junior employee who was clearly qualified to perform the job.

Under the clear language of the negotiated Rules, the Organization is correct.

Rule 1 plainly states that "Bulletined positions will be awarded to the senior applicant." Minimum qualifications or potential ability to qualify are not mentioned in that Rule. As agreed by the parties, the sole factor for awarding a bulletined position is seniority. "[W]ill be awarded to the senior applicant" is mandatory language. Under the plain language of the Rules, ability of an employee to qualify comes into play under Rule 4(a) after the position is awarded on the basis of seniority. "Supervisors, after being awarded bulletined positions . . . will be allowed 20 working days in which to demonstrate their ability to competently perform the job" [emphasis added]. Therefore, by clear language, the parties agreed that seniority drives the awarding of a bulletined position under Rule 1 and ability comes into play under Rule 4 as the employee is given the opportunity to demonstrate qualifications.

The Carrier's interpretation effectively places the determination of skill and ability before the bulletined position is awarded. If such were the intent of the parties, they could have easily so provided in Rule 1 by adding language that seniority would prevail if the employee possessed minimal qualifications. However, the parties did not do so. As negotiated, under Rule 1 seniority is not one of several factors for consideration. Instead, the parties clearly agreed in Rule 1 that seniority is the only factor for awarding a bulletined position. The parties must be kept to that bargain. This Board does not have the authority to add language to Rule 1 requiring consideration of qualifications as part of the initial awarding of a bulletined position.

The Carrier's traditional right to determine fitness and ability of employees to qualify for a job is not undermined by our conclusion. That right is preserved in Article 4(a) and (b) as the employee awarded the bulletined position on the basis of seniority thereafter attempts to demonstrate his/her qualifications for that position, which determination is ultimately made by the Carrier. Nor does the structured language mean that an employee who, in the Carrier's opinion, could never demonstrate qualifications during the 20 day qualifying period must be kept in the position for the full 20 day period. Rule 4(b) states that "Supervisors may be removed from positions at any time during the 20 day qualifying period if it becomes apparent that they do not possess the necessary ability and fitness to permit them to qualify" [emphasis added].

Rule 4 clearly preserves the Carrier's managerial options to evaluate whether the employee can ultimately qualify for the position. Here, if Claimant was as unqualified as the Carrier asserts, under Rule 4(b) his tenure in the position would have been very short lived. However, the manner in which the parties clearly structured the language shows that the exercise of that managerial prerogative occurs after seniority places the employee in a position to demonstrate qualifications, and not before.

The parties have presented conflicting Awards on the property concerning the issue in this case. Fourth Division Award 4929 supports the Organization's interpretation:

"Rule 1(c) is clear and unambiguous. It states the senior applicant will be awarded the position. It does not state the senior qualified applicant, as the Carrier wants this board to interpret the Rule."

Fourth Division Awards 4955 and 4956 support the Carrier's interpretation. See Award 4955:

"The burden of proof that the Carrier violated the Agreement has not been met. There is no evidence of record that seniority prevails in light of circumstances wherein there is no showing that the senior employee could even possibly attain the position qualifications with all the cooperation of supervisors within 20 working days. Rule 4 applies after being awarded bulletined positions. Bulletined positions have minimum qualifications. There is no evidence that the Carrier set the qualifications to breach seniority."

While Awards 4955 and 4956 were decided four months after Award 4929, we do not find those Awards "overruled" Award 4929. Awards 4955 and 4956 did not mention Award 4929 and apparently did not consider whether Award 4929 had any precedential value as a prior Award on the property. We view the lines of authority represented by these three Awards as being in conflict and therefore not binding upon us one way or the other. Given the clear language of the Rules and the above discussion, we believe the better reasoned Award is Award 4929.

Fourth Division Award 4895 is not applicable. That Award involved a displacement and not the filling of a bulletined position. The focus of that case was on

Rule 4's qualification requirements. That Award did not discuss Rule 1's seniority requirements for awarding bulletined jobs. In Fourth Division Award 5064 the issue of displacements as opposed to filling bulletined positions is addressed.

The claim shall therefore be sustained. Claimant shall be placed in the bulletined job and will be given the opportunity "to demonstrate [his] ability to competently perform the job." No other relief was sought in the claim and none shall be required.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Dated at Chicago, Illinois, this 21st day of October 1998.