

Award No. 14203

Docket No. MW-15303

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
WESTERN MARYLAND RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the agreement, beginning on August 29, 1963, when it assigned and used an applicant junior in seniority to Mr. C. W. Largent to operate an Austin-Western crane.

(2) (a) Mr. C. W. Largent be assigned to the position of Roadway Machine Operator (to operate the Austin-Western crane)

and

(b) Mr. C. W. Largent be reimbursed for the amount of monetary loss suffered as the result of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant has established and holds seniority in the B&B Sub-Department as of March 15, 1955, and in the Chauffeur's class since March 31, 1961.

The Carrier issued a bulletin reading:

"WESTERN MARYLAND RAILWAY COMPANY

(ADVERTISEMENT - New or Vacant Positions) G-37

Hagerstown, Maryland
August 16, 1963

DEPARTMENT - ENGINEERING

BULLETIN - No. 382-D

To Employees Concerned:

Applications will be received in this office up to 8:00 A.M., Tuesday, August 27, 1963, for the following positions:

	Laborer	Chauffeur	Bridgeman
C. W. Largent	3/14/55	3/31/61	4/1/59
M. D. Crosen	1/12/61	3/31/61

Although Mr. Largent was the senior applicant, he was not awarded the position because of color blindness, and it was awarded to Mr. Crosen on August 29, 1963.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are as follows: Bulletin No. 382-D was posted on August 16, 1963, advertising the position of Roadway Machine operator in the Bridges and Building Department with headquarters at Port Covington (Baltimore), Maryland. The position required the operator of an Austin-Western Hydraulic Crane. Applications for this position were received from Claimant, C. W. Largent, and M. D. Crosen, who were employed as Chauffeurs in the B&B Department. Employee Largent had seniority over Crosen, but the job was awarded to Crosen because Largent admittedly suffers from color blindness.

The Organization's submission states on the record that:

" * * * The sole and only issue here involved is the Carrier's refusal to assign the claimant to the subject position because of alleged defective color perception. * * * The claimant's vision is impaired to the extent that he does not possess perfect color perception, but this does not mean that he cannot safely and efficiently perform the duties attendant to the subject position."

The Petitioner's basic contentions may be summarized as follows:

- 1) The Claimant has received a "Safe Driving Certificate" from the Baltimore Safety Council for each year that he has served the Carrier as a chauffeur.

In this connection, the Organization takes the position that " * * * Logic and common sense dictate that, since the claimant has established a most commendable safety record while operating a truck, he could do the same while operating an Austin-Western crane." (See Record — Employees' submission.)

- 2) The fact that the Austin-Western crane can be driven along the track does not make it an on-track machine or provide a valid reason for the Carrier to deprive the claimant of holding a position to which his seniority rights entitle him.
- 3) Petitioner emphasizes in its argument that the Austin-Western crane as advertised in the bulletin was not an on-rail crane nor was it equipped to operate on the rails. It was not equipped with flanged wheels; it was equipped with balloon tires, which permitted it to be run on the railroad tracks, and was frequently used in this service.

Respecting Point 3 supra the Organization contends that a truck can also be run astraddle the rails, but in doing so neither the Austin-Western

crane on pneumatic tires nor like tires on a truck will activate signal equipment. Furthermore, Petitioner underscores the fact that at the time this claim was instituted the machine in question was not equipped to run on the rails. The fact that the Austin-Western is now equipped with retractable flanged wheels is not germane to the case because the validity of the Carrier's position must be tested against the admitted fact that at the time the said claim was filed the machine did not have flanged wheels.

- 4) In conclusion the Organization argues that since it is not disputed that Claimant was required and did pass a color perception test when he received his chauffeur's license from the State of Maryland, and since the Austin-Western had rubber tires like the truck Claimant had been driving, his admitted imperfect color perception did not disqualify him from being a good truck driver; similarly, his vision was sufficiently good to qualify him for the bulletined position which is the subject of the present controversy.

For its part the Carrier argues certain basic contractual principles, viz:

- 1) Seniority rights are matters that exist solely by virtue of the Agreement between the parties.
- 2) No employe has an inherent or fundamental right to preference by virtue of his seniority alone.
- 3) Since the right to assert seniority is limited by the contract between the parties to those who can show "sufficient fitness and ability" this Board has recognized that the Carrier has both the "right" and the "duty" to determine fitness and ability; further, and crucial to the case at bar, the Board will not and should not substitute its judgment for that of a Carrier unless the Carrier's judgment has been shown to have been exercised in an arbitrary and capricious manner.

In this latter connection (Point 3) in order for the Organization to prevail, the burden of proving such contention is on the Organization to show by competent evidence that (a) the Carrier lacked authority for its conduct or that it exercised its authority in an arbitrary manner. Carrier further argues, and cites cases too numerous to mention, that the said Carrier has both a right and a duty to screen its employes carefully because of its special duty to the public to operate its equipment both safely and efficiently in order to assure both the public and its employes that it will discharge its duties with special regard to provide for the safety of its employes and others.

Carrier advances the further proposition that the use of color differentiation and/or vision tests is not an unreasonable or unusual standard in railroading. Carrier cites numerous awards in support of this position and makes special reference to Fourth Division Award 1407.

The Organization makes a persuasive argument but it cannot be said on the state of the record that it has sustained its burden of proving that the Carrier's judgment in denying the job to the Claimant because of his undenied "impaired vision to the extent that he does not possess perfect color

perception" was an arbitrary, unreasonable or capricious exercise of its managerial judgment. It is not for this Board to substitute its judgment for that of the Carrier. There is no proof that the Carrier violated its Agreement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1966.