

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31715
Docket No. MW-31371
96-3-93-3-217**

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company (former
(Fort Worth and Denver Railway Company)**

STATEMENT OF CLAIM:

- “(1) The Agreement was violated when the Carrier failed and refused to allow Assistant Foreman M. A. Mireles to displace a junior assistant foreman at Amarillo, Texas on April 6, 1992 (System File F-92-09/9MWD 92-06-17 FWD).**
- (2) As a consequence of the violation referred to in Part (1) above, Assistant Foreman M. A. Mireles shall be ‘***compensated at the current Assistant Foreman’s rate of pay, eight (8) hours a day commencing April 6, 1992 and that claimant be compensated at the time and one-half rate of pay at the Assistant Foreman’s rate of pay for all overtime worked by the Amarillo Section Assistant foreman subsequent to April 6, 1992.’”**

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.

On February 12, 1992, Claimant was awarded a Machine Operator's position that he had bid on, vacating the Assistant Foreman's position at Amarillo, Texas, the very same position Claimant attempted to return to on April 6, 1992.

As of April 1, 1992, it became law that those driving certain vehicles of certain weight must obtain a Commercial Driver's License (hereinafter referred to simply as a CDL). Carrier refused the April displacement because Claimant lacked the CDL, thus giving rise to this claim.

In the on-property handling, the Organization stated Claimant did occupy the Assistant Foreman's position at Amarillo, Texas, and stated Claimant's qualifications had not changed between February and April, the only change being Carrier's requirement of a CDL.

In Third Division Award 26295, the Board stated as follows:

"...Carrier retains the right to set the qualifications for a job; and if the Carrier determines at some point that it wants to have only employees who possess valid driver's licenses in the particular position, that determination is fully within its managerial rights, as long as there is a rational basis for it..." (Underscoring added)

The Carrier has never, during the on-property handling, established "a rational basis" for the CDL. It never stated what vehicle Claimant may be required to drive, how frequently or even when. It merely repeated its position that Claimant did not have a CDL, a requirement of the job.

In sustaining Award 70 of Public Law Board No. 4768, the Board found that:

"...The Carrier has not demonstrated that Claimant's seniority rights should be ignored for the sake of an arbitrary imposition of a requirement not previously in effect...."

Had the Carrier made known to the Organization that which it sets forth in its Submission to this Board, the outcome would have been different, but basing this decision solely upon the on-property handling, ignoring all that is new in the Submission, it is this Board's finding that the claim must be sustained. The Carrier's defense lacked the necessary evidence to overcome the Organizations prima facie case.

The Carrier did challenge the Organization regarding the money claimed when it stated in its letter of July 15, 1992, that:

"...Based upon the facts of this case and the agreement provisions you cite in support of your position, it is evident you have failed to substantiate that the claimant is due the monetary consideration you seek...."

In the on-property handling, Claimant alleged that after he was denied the right to displace as an Assistant Foreman at Amarillo, Texas, he was denied the right to displace as a Trackman. This portion of the claim was abandoned before this Board. Thus, Claimant may have reverted to the furloughed list momentarily, but subsequently was permitted to exercise seniority. Under the circumstances, the claim will be sustained, but only to the extent of paying Claimant the difference between what he would have earned as the Assistant Foreman commencing April 6, 1992, and what he has earned.

AWARD

Claim sustained in accordance with the Findings.

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 Third Division**

Dated at Chicago, Illinois, this 25th day of September 1996.