

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32618
Docket No. MW-32222
98-3-95-3-23

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Houston Belt & Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly disqualified Mr. F. Phillips from his position as a machine operator on November 7, 1993 (System File H-10-93).**
- (2) The Agreement was violated when the Carrier failed to permit Machine Operator J. T. Lightfoot to displace junior employe F. Phillips on Tamper No. 133 on October 24, 1993 (System File H-9-93).**
- (3) As a consequence of the violation referred to in Part (1) above, the disqualification shall be rescinded and removed from Mr. F. Phillips' record and he shall be compensated for all wage loss suffered beginning November 7, 1993 and continuing until the violation ceases.**
- (4) As a consequence of the violation referred to in Part (2) above, Mr. J. T. Lightfoot shall be compensated for all wage loss suffered beginning October 24, 1993 and continuing until the violation ceases."**

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.

By bulletin dated October 1, 1991, the Carrier informed its Maintenance of Way Department employees, including Claimants, that effective January 1, 1992, the Department of Transportation (DOT) would require a commercial driver's license (CDL) for positions involving the operation of vehicles in excess of 10,000 pounds, and a Hazardous Material (HAZMAT) license for vehicles transporting hazardous materials. To facilitate issuance of those licenses, Carrier offered various forms of assistance, including voluntary, four-hour, bilingual training classes; time off with pay for test-taking; use of Carrier vehicles; and reimbursement for the licenses themselves. On December 10, 1991, it issued a second notice on the same subject, and announced, among other things, the scheduling of three dates for administering the exam without loss of pay.

Nineteen covered employees, including Claimant Phillips, secured their CDL licenses in accordance with the Carrier's program, and during February 1993, personnel and equipment were realigned in recognition of the newly obtained credentials. In that process, responsibility for driving the fuel truck, which required a CDL with a HAZMAT endorsement, was assigned to Tamper Operator #133 and that position was bulletined on February 23, 1993. On March 17, 1993, it was awarded in error to Claimant Phillips, who had neither tested for nor passed the physical exam required by both the bulletin and federal law for issuance of the HAZMAT endorsement. Despite his lack of qualifications, Phillips held Tamper Operator #133 position through the summer and into the fall of 1993.

On approximately July 30, 1993, Claimant Lightfoot attempted to displace incumbent Phillips from his job in accordance with his seniority under the Agreement. That effort was rejected based on Lightfoot's lack of both the CDL and the HAZMAT endorsement. Lightfoot challenged Carrier's action, and was subsequently given a second opportunity to bump on condition that he secure the required license within a

mutually agreeable time period. He failed to do so, and ultimately exercised his seniority onto a position for which qualified.

On October 7, 1993, Carrier discovered its error in awarding Phillips the Tamper Operator #133 position for which he was unqualified and advised him that he would be allowed eight days to secure the appropriate HAZMAT endorsement. When Phillips did not act within that period, he was disqualified from the position by letter dated November 7, 1993. Thereafter, he was given a further 30 days to obtain the endorsement, but elected not to do so. As with Lightfoot, Phillips eventually exercised his seniority elsewhere.

While those events were unfolding with Phillips, Claimant Lightfoot again attempted to displace him from the position in dispute on October 24, 1993. That effort to bump was again rejected by Carrier for the same reasons assigned in July. Claimants Phillips and Lightfoot then filed the instant claims, which have been consolidated by mutual agreement for resolution by this Board.

The Organization takes the position that the Carrier was arbitrary in determining that Tamper Position #133 required a CDL and HAZMAT endorsement. It argues that Carrier's "assumption" was based upon its belief that the incumbent would be required to drive a fuel truck to and from the site where the tamper was positioned. But, the Organization contends, the Carrier never established that such activity would be required of that position, since there was already a Truck Driver assigned to drive the fuel truck. The Organization relies in main part upon Rule 6:

**"RULE 6
PROMOTION**

- (A) Promotions shall be based on ability, merit, fitness and seniority. Ability, merit and fitness being sufficient, seniority shall prevail, the management to be the judge, subject to appeal. This shall also apply in transferring employees to fill vacancies or new positions. Employees working nights, who may desire day work, shall be given preference when vacancies occur, according to their seniority rank."

From the foregoing, the Organization asserts that "employees who have established seniority in the class of a position to be assigned are clearly entitled to be

assigned thereto." Here, Carrier attempted to circumvent the intent of Rule 6 by adding spurious job qualification requirements which were not reasonably related to the duties of the position.

After giving each numerous opportunities to secure credentials at its expense, Carrier disqualified Claimant Phillips from holding and Claimant Lightfoot from bumping onto the position at issue because they failed to secure a required endorsement and a required license, respectively. Carrier maintains that by assigning the operation of a fuel truck to Tamper Operator #133, it gave the incumbent transportation to the work site and provided a source of fuel for the machinery in Gang # 62.

A review of substantial Third Division precedent on these issues suggests that Carrier has the well-established right to both assign equipment and to set the qualifications required to occupy a bid assignment. In the instant matter, the job qualification aspect of the debate is resolved conclusively by federal law requiring both the CDL and HAZMAT endorsement for fuel Truck Drivers. Thus, the sole question to be determined by this Board is whether the Carrier acted arbitrarily in insisting upon CDL and HAZMAT certifications for Position #133 when it already had an occupied position of fuel Truck Driver in place who held those same qualifications.

The Organization correctly points out that the authority of Carrier management to judge an applicant's qualifications is not an absolute one, and that its job specifications must be at least reasonably related to the real world duties of the assignment. There is abundant and weighty precedent in this Division expressing the view that, while the Board is normally disinclined to interfere with Carrier discretion in this area, it will and must do so when faced with arbitrary judgments in order to avert destruction or dilution of valuable seniority rights protected by the Agreement. That said, when those principles are applied to the facts of these claims, we reach a conclusion exactly opposite to that of the Organization, but one that runs in harness with prior authority.

The Agreement itself does not ascribe agreed upon duties or qualifications to the Machine Operator position - it lists a job and a rate of pay. Thus, Carrier retains the right to add or to subtract job duties, within a range of reasonableness, without the concurrence of the Organization. The assignment of incidental truck driving functions to Position #133 for the reasons attributed by the Carrier appear on this record to be a sensible and efficient use of manpower and equipment, not proscribed by the Agreement,

and by no means arbitrary. Since the prerogatives of the Carrier to determine necessary job content are not limited by the Agreement, the Board cannot disturb them without a compelling showing of abuse. We find that Carrier has adequately connected the qualifications it required with the job duties it thought to be essential, and find nothing in the Organization's argument here to persuade us why this explanation does not qualify as a justification.

Our judgment in this instance is fortified by several additional factors. First, both Claimants here had ample time, opportunity, and cooperation from their employer to obtain the disputed qualifications, and in that sense the problem they complain of is to a degree one of their own making. Second, in the case of Claimant Phillips, no satisfactory argument was advanced why his claim is not additionally barred by RULE 5, which provides in part as follows: "An error in bulletins or assignments will not be the basis for progressing a monetary claim." And lastly, as to Claimant Lightfoot, a similar hurdle remains uncleared. RULE 11 specifically provides in part: "Employees affected either by position being abolished or being displaced will displace junior employees of their own rank or class, *if qualified*." (Emphasis supplied.)

As we find no violation of the Agreement, the claim must be denied.

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 23rd day of June 1998.