

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35316
Docket No. MW-33698
01-3-97-3-158

The Third Division consisted of the regular members and in addition Referee Donald W. Cohen when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier abolished the vehicle operator position headquartered at Massena, New York (held by Vehicle Operator G. Sochia), and immediately readvertised the position in Bulletin No. 285 with the requirement ‘ . . . MUST POSSESS VALID CANADIAN WORKING PAPERS.’, failed and refused to obtain or assist Mr. Sochia in obtaining such papers and thereby denied and deprived him of his seniority rights (System Docket MW-4172).
- (2) As a consequence of the violation referred to in Part (1) above, and the discriminatory treatment of Vehicle Operator G. Sochia, the Claimant shall be compensated for all wage loss suffered beginning June 29, 1995 and continuing until the violation ceases, with benefits and all other rights unimpaired and the Carrier shall be required to obtain the necessary work permits required by the Canadian Government, as has been the practice on this property.”

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.

The Claimant holds seniority as a vehicle operator on the Massena Subdivision of the Mohawk Division, dating from March 28, 1977. In 1994, the Claimant obtained the vehicle operator position (boom truck) headquartered in Massena, New York. At such time he was required to perform work in Canada and the Carrier obtained the necessary papers, on an "as needed" basis. In the fall of 1994 the Claimant suffered an on-duty injury and was placed on medical leave. As a result, a junior Vehicle Operator, Fiacco, was awarded the position. In April 1995 the Carrier assisted the junior employee in obtaining Canadian working papers allowing him to work in Canada over an extended period of time. In May 1995 the Claimant returned to limited duty and displaced the junior employee on June 19, 1995.

Upon the Claimant's return to work he was given a five-day notice of job abolishment. The job was immediately re-advertised via Bulletin No. 285, with the same job requirements plus an added requirement that the successful applicant must possess valid Canadian working papers. He was unable to obtain such papers because the Canadian Government would only issue one authorization for the position, and that was held by Fiacco.

On June 22, 1995, the Organization filed a claim on behalf of the Claimant, stating in part, that "the Company is violating Rule 3, Section 1, Rule 4, Rule 40 of our Agreement, and all others that apply." In addition, the Organization requested that Fiacco's name be removed from the list of eligible employees and that the Claimant's name be substituted. The Organization also requested that the Carrier obtain work permits for the Claimant. Finally, the Organization made claim for all monetary loss.

The Carrier's position is that the Board has no jurisdiction to rule on Canadian law. In addition, it points out that the Organization amended its position by adding additional Rule violations and also was not entitled to claim backpay from June 22, but rather was limited to the period from August 26, 1995.

The Organization has made clear that it is not seeking an interpretation of Canadian law and the Board is cognizant of the fact that it is not entitled to do so. While there is much in the record relating to Canadian regulations and their various restrictions, nothing

has been submitted setting forth the provisions in question. Notwithstanding, it appears understood between the parties that Canadian regulations allow for only one eligible employee in the position at issue.

The Carrier also argues that the Organization amended its claim to add Rules 4 and 37. The June 22 letter from the Organization clearly raises Rule 4, and at the Hearing the Organization dropped its contention that Rule 37 applied.

Under the provisions of Rule 3, seniority is the controlling factor, provided qualification is sufficient. In this case the Claimant possesses the necessary qualifications for the job with the exception of the requirement that he hold a Canadian permit. If the disqualifying factor occurred as a result of a condition within the control the Claimant, the Carrier would prevail. In this case, however, there was nothing that the Claimant could do to obtain a permit, in view of the fact that such was already held by a less senior employee.

The issue now becomes whether the Carrier had conditions within its control that would have permitted the Claimant to qualify for the job. In this regard, the Organization contends that the Carrier did not cooperate with the Claimant in seeking to obtain a permit and did not properly advise the Canadian government of the circumstances of the case. The record is inadequate at this juncture to properly ascertain the actions of the Carrier in this regard. There is, however, another aspect of the case, relating to the circumstances under which there may be a change or transfer of the permit to another employee. In a letter dated June 4, 1996, directed to the Organization, the Carrier states: "Once issued to a particular individual, the permit was not subject to change or transfer to another employee, except for the reasons of sickness, injury, disability, or legal impediment."

The conditions set forth by Canada, raise a myriad of possibilities. If the incumbent had died, there is a presumption that a new permit would be issued to the successful applicant. An interpretation of the terms "disability or legal impediment" was not explored. The Organization submitted Third Division Award 33939, which while not conclusive, sets forth the proposition that while a Carrier has the right to set standards, it must demonstrate a reasonable basis for doubt about an employee's qualifications. In that case the Carrier scheduled a test to occur after the displacement deadline had expired. The Board found that this was improper.

The Carrier had within its control, the conditions under which the Claimant could have obtained a permit. This could have been accomplished by requiring Fiacco to

surrender the permit that he held, in which event there would have been no apparent reason for the Claimant not to have qualified for the permit. This would be consistent with an interpretation of the phrase "disability or legal impediment" because the Claimant had a clear right to the position, absent the requirement of a Canadian permit.

This case is remanded to the parties for the purpose of determining the procedure by which the Claimant may obtain the necessary permit to qualify him for the work in question. The Carrier shall cooperate with the Organization and the Claimant with regard to the steps required. Should the Claimant obtain the necessary permit and qualify for the position, the parties shall then consult for the purpose of determining the appropriate monetary compensation.

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 16th day of February, 2001.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

INTERPRETATION NO. 1 TO AWARD NO. 35316

DOCKET NO. MW-33698

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employees)

NAME OF CARRIER: (Consolidated Rail Corporation)

At issue is an interpretation of the following findings:

“This case is remanded to the parties for the purpose of determining the procedure by which the Claimant may obtain the necessary permit to qualify him for the work in question. The Carrier shall cooperate with the Organization and the Claimant with regard to the steps required. Should the Claimant obtain the necessary permit and qualify for the position, the parties shall then consult for the purpose of determining the appropriate monetary compensation.”

Perhaps unknown to the parties, and certainly to the neutral, the Claimant was placed on disability status on June 1, 1999. Under these circumstances, there was no possibility of him being returned to the job that he was claiming. The parties are restricted to interpreting the Award, and because the Claimant did not obtain the necessary permit and qualify for the position, he is not entitled to any backpay or further action upon his claim.

The Board, after consideration of the facts set forth in the Request for Interpretation determines that the Claimant is not entitled to any relief under the provisions of the Award.

Referee Donald W. Cohen who sat with the Division as a neutral member when Award 35316 was adopted, also participated with the Division in making this Interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 24th day of May 2005.