

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35737
Docket No. MW-33427
01-3-96-3-823**

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

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow Mr. R. B. Muilenburg to displace onto a vacant welder helper position on Gang 6754, Hinkle, Oregon, on February 13, 1995 (System File N-190/950440).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be compensated at the appropriate welder helper rate of pay for all wage loss suffered beginning February 13, 1995 and continuing until the violation ceases and ‘*** welders helper seniority date should not be frozen as of February 10, 1995, according to the provision of Memorandum of Agreement between the Brotherhood of Maintenance of Way Employes and the Union Pacific Railroad Company effective August 16, 1993, Section 10.’”**

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 facts out of which this claim arose are for the most part uncontested. In September 1993, the Claimant bid and was assigned a Welder Helper position, subject to his obtaining a DOT commercial driver's license (CDL), which was a bona fide qualification of that position. After the Claimant failed two attempts to pass the test for a CDL, he was removed from the Welder Helper position. After the Organization intervened on his behalf, however, the Carrier informed the Claimant on May 4, 1994, that he was reinstated on the Welder Helper seniority roster with a notation of "disqualified" and would be allowed to fill a Welder Helper position after obtaining a CDL. Thereafter, during his assignment as a Sectionman on the Kent Section, the Claimant eventually passed his final test requirement for obtaining his DOT CDL on or about December 23, 1994, but continued to work the Sectionman position.

In accordance with DOT regulations, the Carrier does not consider an employee otherwise meeting the qualifications of a position requiring a DOT certification fully "qualified" until the Health Services Department (Carrier's Medical Director) determines that the individual is medically qualified to operate a vehicle requiring a CDL. Although he had secured a Commercial Drivers License on December 23, 1994, the Claimant did not take the required medical examination until February 3, 1995, just one week before he was displaced from his Sectionman job on Friday, February 10, 1995. On that same date, the Claimant presented a copy of his Commercial Drivers License and the DOT Medical Examination test results to the Manager of Track Maintenance in Seattle, Washington, for mailing to the Carrier's Manager DOT in Omaha, Nebraska.

On Monday, February 13, 1995, the Claimant attempted to displace onto a Welder Helper position, but Manager of Track Maintenance Flynn would not allow him to do so because, as of that date, the roster continued to show him as "disqualified" and because of concerns about the Claimant's medical qualification due to his diagnosed condition of "Attention Deficit Disorder" and his use of prescription drug Ritalin for that disorder. Notwithstanding, following a review of the Claimant's medical information, he was advised by letter dated Friday, February 17, 1995, that the medical

information had been reviewed and he was considered medically qualified to drive a truck.

When the Claimant was not allowed to displace onto the Welder Helper position on February 10, 1995, he displaced onto a Sectionman position which he worked until March 2, 1995 at which time he bid and was assigned as a Sectionman Truck Driver. However, the truck he was assigned to was a Hyrail vehicle (a truck which can operate on both the highway and the rail), which meant he was required to successfully pass a Rules examination to meet one of the qualifications of the position. When the Claimant failed to successfully pass the Rules examination, he was disqualified from working the position of Section Truck Driver at Wallula or any other position which requires Rules certification. The Claimant then displaced back to a Sectionman position and worked that until June 1995, when the Carrier's Medical Director and the Claimant's own physician concurred that for safety reasons he could not work around live tracks unless another coworker or Supervisor was in the immediate vicinity, close enough for the Claimant to hear verbal instructions. Apparently the Carrier concluded that the nature of the work on either the labor gang or a welding gang (which normally consists of a welder and welder helper) would not allow a reasonable accommodation of that restriction and the Claimant has not been allowed to occupy any position since that time.

Confining our review to the question presented by this claim, we find neither factual nor contractual support that the Carrier violated the Claimant's seniority rights when it did not allow him to displace to a Welder Helper position on Monday, February 13, 1995. Through the Claimant's own inactivity or lack of action, as of Monday, February 13, 1995 when he attempted to displace, his record did not reflect full qualification on the CDL aspect of the Welder Helper position. In the circumstances presented, the Carrier correctly applied Rule 22 (e) of the Agreement which states in pertinent part: "When forces are reduced or positions are abolished, seniority shall govern and employes affected thereby may displace junior employes in any seniority class in which seniority and qualifications are held." [No opinion is expressed or implied concerning the subsequent disqualification from the Section Truck Driver position due to failure to pass Rules examinations or the eventual medical disqualification of June 1995].

Form 1
Page 4

Award No. 35737
Docket No. MW-33427
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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 24th day of October, 2001.