

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38040
Docket No. MW-37126
06-3-01-3-692

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to assign Mr. F. B. Lopez to the foreman position on Gang 7202 advertised on Bulletin No. WTS 02573 and instead assigned junior employe A. M. Lara (Carrier's File 1253483 SPW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant F. B. Lopez shall now be correctly assigned as foreman on Gang 7202 and he shall be compensated for any and all lost earnings that he suffered in rate of pay, including overtime, commencing from August 18, 2000 and continuing until he is properly assigned to the aforesaid foreman position.”

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 dispute before the Board is clear on its face. The Claimant was the senior applicant for the position of Foreman. The position was awarded to a junior employee with the Carrier arguing that this was proper due to a required Commercial Driver's License (CDL) or Department of Transportation (DOT) certification to operate vehicles under the Foreman's supervision.

The Organization does not dispute the stated requirement. Bulletin GWTS 02573, which advertised the Foreman position on Gang 7202, was posted on August 4, 2002. It required the qualified applicant to "be DOT qualified." The Claimant did not have a CDL or DOT license. The junior employee met the qualification.

What the Organization disputes is the Carrier's failure to assign the position based on seniority and then provide the Claimant time to qualify. The Organization argues a violation of the Agreement due to the Carrier's refusal to permit the Claimant to exercise his clear seniority to the position. The Claimant was clearly qualified to be Foreman and should have been assigned the position and allowed time under the Agreement to qualify fully. Had he failed to qualify within the required 30 days by obtaining his CDL and DOT license, he could then have been removed under Rule 8(b). By assigning the junior employee commencing August 18, 2000, the Carrier violated the Agreement.

The crux of this dispute is whether the Carrier had the Agreement right to require the Claimant to have the CDL or DOT License prior to assignment to the position of Foreman. The Organization says no. The Carrier says the bulletin stated the successful applicant:

"... 'must be D.O.T. and C.D.L. qualified.' This man is neither D.O.T. nor C.D.L. qualified and, in fact, did not request a D.O.T. packet be mailed to him until 08/23/00. This is in line with Union Pacific Policy."

The Board carefully studied the issue and facts at bar. On the basis of this record and noting the Organization's burden to prove that the Carrier's action violated a Rule, we must conclude that its burden has not been met. The Carrier argued that the license was required in order to perform the duties of the Foreman's position if an assigned Truck Driver were "on vacation, calls in sick or other reasons." There is no rebuttal and it stands as fact.

The Carrier further maintained that the Carrier was mandated by State and Federal Law to assure that those who stood to operate the trucks had the appropriate license. Because the Foreman could be called upon to operate the trucks under his supervision, such a requirement was mandatory. Certainly law supercedes the Agreement and the policy of the Carrier has not been shown to be improper. The Carrier stated that the Claimant "had almost 2 years since the policy went into effect to acquire a CDL and/or DOT license, but failed to do so." The Board finds no rebuttal.

Most importantly, there is no Agreement provision shown by the Organization which the Carrier violated. The Claimant was not qualified as of the date he applied for the position of Foreman. While the Organization argues that the application was for a Foreman's position and not a Truck Driver's position, there is no showing whatsoever that the license requirement is unrelated, irrelevant or a violation of the Carrier's rights under the Agreement. The Organization failed to point to Agreement language that such a requirement violates, or demonstrate that the truck driving is unrelated to the ability and fitness for the position of Foreman. In fact, without proof that the ability to legally drive a truck assigned to the gang to be supervised was unnecessary or unreasonable, the Board must hold that it was entirely reasonable and fully related to fitness.

Accordingly, the Claimant did not have the ability and fitness to hold the Foreman's position, in that he lacked a requirement necessary to the performance of the duties for which he applied. Failure to have a CDL and DOT license meant that he lacked fitness and ability equal to the junior employee. As there is no showing that this requirement for a CDL or DOT license was unrelated to the duties to be performed on this position, because there were no vehicles that required the certifications or because the Foreman's duties would never involve any reasonable need to operate such equipment, the claim must be denied.

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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 21st day of December 2006.