

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40204
Docket No. MW-38485
09-3-NRAB-00003-040457
(04-3-457)**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(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 properly bulletin a roadway equipment operator position (front end loader) on Gang 9038 and when it improperly issued a bulletin for that position with a requirement for the operator to have a commercial driver's license and Department of Transportation certification, thereby preventing qualified System Group 20 employees from bidding and being assigned thereto and prohibiting such employees from exercising their seniority to said position (System File D-0320-02/1375882).**
- (2) As a consequence of the violation referred to in Part (1) above, ‘. . . all Eastern District Group 19 and System Gang Group 20 Roadway Equipment Operators claiming they must be allowed compensation equal to the amount they would have been allowed absent the violation of the Agreement. This compensation and this claim must continue until this machine is appropriately bulletined in accordance with the terms of our Current Working Agreement. Further, any Group 19 or 20 employee which is deprived of displacing on this position because they do not possess the CDL and DOT Certification because of the alleged lack of qualifications associated with this claim must**

be allowed the appropriate compensation for the loss of work opportunity. Since this is an ongoing violation that is occurring each and every day this claim must be considered retroactive sixty (60) days pursuant to the terms of Rule 49 of our Agreement.””

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.

In the instant case, the Carrier bulletined and assigned a Front-end Loader position on Gang 9038, with the requirement of a Class A Commercial Driver's License and a Department of Transportation Certification. The position was assigned on January 16, 2003. On July 31, 2003, the Organization filed the instant claim alleging that the Carrier failed and/or refused to properly bulletin the position of Front-end Loader. According to the Organization, the Claimants, all fully qualified on Eastern District Group 19 and System Group 20, were prevented from bidding on or being assigned to this position and were also prohibited from properly exercising their seniority to said position because they did not possess CDLs and DOT Certification. According to the Carrier, this requirement was placed on the bulletin because a Front-end Loader Operator cannot always "road" his machine to the new work location and at times is required to move it with a truck and trailer.

The Organization contends that the Carrier violated the Agreement when it added the new requirement that the Operator of a Front-end Loader have a CDL

with DOT Certification. It contends that this is a continuing violation. As a remedy, it asks that the Claimants be made whole for any loss, retroactive to 60-days prior to the filing of the claim.

Conversely, the Carrier first contends that the claim was filed in an untimely manner. Because the assignment occurred on January 16, 2003, the Organization's claim should have been filed within 60 days of that date, or by March 16, 2003. However, the claim was not filed until July 31, 2003. Even if it were to be considered a continuing violation, the Carrier contends that the burden is on the Organization to prove that the Carrier acted improperly. It contends that it acted reasonably in imposing the CDL and DOT requirements. It contends that it is unnecessary to employ a separate driver qualified to operate a truck and trailer to transport a front-end loader and stand idly by for several days until such time that the front-end loader needs to be moved again. It further contends that the Organization failed to refute the Carrier's position that the Operator of the Front-end Loader is at times required to move the machine by truck to a new work location. The rationale for the CDL and DOT Certification requirements in this case is no different from other cases in which Foremen or other employees may reasonably be expected to drive a truck as part of their duties. The CDL and DOT requirements are reasonable in this case.

After a review of the record evidence and the positions of the parties, the Board concludes that the Organization failed to meet its burden of proof. We find that the Carrier did not act unreasonably in imposing the CDL and DOT requirements for Front-end Loader Operators. See Public Law Board No. 6792. "Generally, a carrier has the basic inherent managerial right to establish qualifications for positions. Obviously, the Carrier can waive that right. But, if a waiver is going to be found, it should be 'clear and unmistakable.'" In view of the foregoing, the Board need not rule on the Carrier's procedural argument.

AWARD

Claim denied.

Form 1
Page 4

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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 2009.