

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40505
Docket No. MW-40101
10-3-NRAB-00003-070287
(07-3-287)**

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to assign Mr. S. Miller to the East Galesburg section foreman, Job No. 52006, position on Bulletin Award No. G0508B-16A dated August 31, 2005 and when it subsequently assigned said position to junior employe J. Sebben [System File C-05-A080-2/10-05-0282(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now issue a correction to show Claimant S. Miller as ‘*** being assigned on August 31, 2005, to Job No. 52006, Section Foreman East Galesburg Section, the Claimant be paid the Foreman rate of pay beginning September 10, 2005, the Claimant be paid all overtime worked by the East Galesburg Section Foreman position, beginning September 10, 2005, and continuing until this violation is corrected.’”**

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.

Immediately prior to this dispute, the Claimant was a Track Inspector. He held a Commercial Driver's License ("CDL") which he last obtained in 2004.

During non-work hours sometime in June 2005, the Claimant was arrested for driving under the influence of alcohol ("DUI"). Under applicable Illinois law, his State driver's license was summarily suspended. On July 30, he obtained a temporary driving permit valid from July 30 to September 30. The permit stated:

**"PURPOSE: EMPLOYMENT/MEDICAL AND ALCOHOL/DRUG
TREATMENT**

**RESTRICTED TO OPERATE A MOTOR VEHICLE AS DETAILED
IN ATTACHED COURT ORDER #574753"**

On August 1, the Claimant provided this permit to Manager of Vehicle Services S. Sims and was told he was "good to go." Thereafter, he performed his previous duties without restriction. The record does not disclose the contents of Court Order No. 574753.

Meanwhile, Dr. S. Clark in the Carrier's Medical Department learned of the Claimant's situation and suspended his DOT Commercial Motor Vehicle Certificate ("CMVC")(sometimes also called "DOT Qualification") at least until he was evaluated by the Employee Assistance Program ("EAP"). A CMVC differs from a state issued CDL. It is an employer issued fitness for duty document that an employer may revoke or temporarily suspend provided it complies with the Federal Motor Carrier Safety Administration's Medical Criteria of Drivers.

On August 16 the Carrier bulletined an East Galesburg Section Foreman position (Job 52006) that required, among other things, a CDL and CMVC. The bid closed on August 25. The Claimant held appropriate seniority and was the only bidder. His bid was rejected on August 31 because of the hold placed on his CMVC credentials by the Medical Department. On September 1, the same Section Foreman position again was bulletined with a September 12 closing date. The position was awarded J. Sebben, effective September 15.

The court dismissed the Claimant's DUI charges on September 14 on procedural grounds related to the arresting officer's failure to give certain warnings before the Claimant's DUI tests were administered. After the acquittal, the Claimant's previous driver's license was reinstated in full and the Carrier reinstated his CMVC. Also, any instructions to seek EAP evaluation were withdrawn. On or about November 23, 2005, the Claimant successfully bid a Foreman position and worked as a Foreman thereafter.

Citing Rules 2, 5, 20, 21 and 22, the Organization grieved on October 4 because the Claimant was denied the original Foreman vacancy. It reasons (1) the Claimant was denied rights as the senior qualified bidder at the time the first bid closed and (2) the Carrier acted arbitrarily by rescinding the Claimant's driving certification without medical or other reason.

The Carrier states: (1) the Claimant was not qualified for the bid because he did not have the required CDL and CMVC at the time of the contested bid (2) the Claimant's temporary license only allowed him to drive to and from work (3) Illinois law does not permit someone on a temporary license to have a valid CDL (4) a CMVC may be reviewed and suspended by the Medical Department based on a DUI arrest (5) dismissal of charges against the Claimant for procedural reasons does not show whether he, in fact, was driving under the influence and (6) the CMVC could have been reinstated had the Claimant reported to EAP.

According to Dr. Clark, she learned of the Claimant's situation in late July and concluded (1) the scope of his temporary driving permit allowed him "to drive to and from work" and (2) the Claimant was undergoing court ordered treatment "for the most recent event." Dr. Clark's written statement references review of the Claimant's "entire chart;" a discrepancy in his health history, mandated observed alcohol treatment and the "past 1.5 violation event."

The record contains no detailed description or supporting evidence about the documents and/or other vague matters referenced by Dr. Clark. Therefore, they can receive no weight. Moreover, it appears the Claimant's DUI arrest was the sole proximate reason his bid was refused and the additional proffered rationales were no more than makeweights. Otherwise, there is no explanation why the other undocumented factors cited to support his license suspension suddenly and simply became non-factors after his court acquittal.

The evidence indicates unsubstantiated, and apparently erroneous, Carrier assumptions about the scope of the Claimant's restricted driver's license and court ordered treatment. Nothing establishes that the "employment" limitation allowed only driving to and from work and prohibited it during work time for employment related purposes. There is no evidence the Claimant was ordered to undergo any court ordered treatment. No citation is made to any law or regulation providing an existing CDL is suspended or limited upon issuance of a temporary driving permit like the Claimant's.

The Claimant's DUI arrest, without an admission or adjudication of guilt, is no more than an accusation. Whether the court dismissal resulted from procedural or substantive reasons, the presumption of the Claimant's innocence remains intact. His arrest initially may have provided reasonable suspicion that allowed the Carrier to be proactive until the question was resolved. However, because the Carrier's suspicions ultimately proved unfounded, it must pay for the results of its mistake. Accordingly, the Claimant prevails on the merits.

To make him whole, the Claimant's record shall reflect service as a Foreman beginning September 1, 2005. He shall be paid an amount equal to the pay earned by Sebben (including overtime) minus the amount the Claimant earned (including overtime) from September 15 through November 25, 2005.

AWARD

Claim sustained in accordance with the Findings.

Form 1
Page 5

Award No. 40505
Docket No. MW-40101
10-3-NRAB-00003-070287
(07-3-287)

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 15th day of June 2010.