

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29851
Docket No. MW-29559
93-3-90-3-502

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employees
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned junior employe D. M. Esquivel instead of Mr. J. L. Garcia to the B&B carpenter position advertised on Bulletin No. GKIV00112 (Carrier's File 890717 MPR).

(2) As a consequence of the aforesaid violation, the assignment of Mr. D. M. Esquivel shall be cancelled and Mr. J. L. Garcia shall be assigned to the B&B carpenter position in question."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Background pertinent to the instant dispute involves the Commercial Motor Vehicle Safety Act of 1986. This act required that the Department of Transportation (DOT) enunciate rules to promote the safe operation of commercial vehicles. Promulgated regulations required that operators of commercial vehicles be certified, and further, the regulations defined a commercial vehicle as one fitting certain criteria. Criteria pertinent to

this dispute read as follows:

"Commercial motor vehicle (CMV)' means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle

(a) Has a gross combination weight rating of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds; or

(b) Has a gross vehicle weight rating of 26,001 or more pounds; or

(c) Is designed to transport 16 or more passengers, including the driver; or

(d) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR Part 172, Subpart F)."

On May 19, 1989, Carrier advertised, for telephone bidding, the expected vacancy to be created by the retirement of an employee holding a position of Carpenter. In the written bulletin, a new requirement had been added to the qualifications imposed by the Carrier. Carrier stipulated that the incumbent would require DOT certification. Prior to this time, the Carrier had never required its Carpenters to be DOT certified.

Claimant has seniority as a Bridge and Building (B&B) Carpenter dating February 8, 1988. The employee awarded the position, holds seniority as a Carpenter Helper dating April 1, 1988, and although he had not established any seniority as a B&B Carpenter, he was awarded the position due to DOT certification previously attained.

The Organization refers to Rules 1, 2, 10, and 11 which read as follows:

"SENIORITY DATUM:

Rule 1. (a) Except as otherwise provided, seniority of an employee shall date from the date and time he begins compensated service in the class in which employed.

(b) Men employed, or employees promoted to a position of higher rank shall not establish a seniority date until assigned thereto following bulletining of vacancy as provided in Rule 11. The Seniority date established for the newly hired employee pursuant to the provisions of this paragraph shall apply to all lower ranks of the same class.

(c) Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad.

* * *

SENIORITY RIGHTS:

Rule 2. (a) Except as otherwise provided in these rules, seniority rights of employees to new positions or vacancies (sic), or in the exercise of their seniority, will be confined to the seniority district as they are constituted on the effective date of this Agreement.

* * *

PROMOTION:

Rule 10. (a) Promotions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail, the management to be the judge subject to appeal.

* * *

(d) Employees entitled to promotion shall be given consideration before hiring new men.

Employees declining promotion shall not lose their seniority.

Employees accepting promotion and failing to qualify within thirty (30) days, may return to their former positions without loss of seniority."

According to the Organization, this dispute involves the Carrier's attempt to "circumvent the clear and unambiguous" seniority and assignment provisions of the Agreement, and Claimant was entitled, by virtue of his seniority, to perform the work of the position. Further, the Organization contends that the Carrier was unable to prove that the additional DOT certification qualification was based on rational and necessary requirements in order to successfully perform the duties of the position. The Organization concluded by stating that the Carrier had only designated a few DOT positions in order to "foster the illusion of compliance" with DOT regulations.

Carrier's sole contention on the property was that DOT is Federal law which supersedes the collective bargaining agreement,

therefore, Claimant's protest was inappropriate. Further, in a letter dated March 26, 1990, Carrier stated that "with the enforcement of the DOT safety standards in 1986, and the Carrier being required to comply with the provisions of the Federal laws, it certainly has no choice but to designate a few positions in order to be in compliance." In its Submission to the Board, Carrier also offers documents de novo attesting to the weight of the truck which had been in contention, the types of material the truck in question would transport, and procedural objections in relation to the Organization's handling of the Claim.

There is no dispute concerning the facts presented. The Carrier imposed a new qualification on a carpenter's position which the Organization deemed unnecessary and subsequently protested. The Organization carried the burden of proving the requirement extraneous. The burden then shifted to the Carrier to prove the qualification was a bona fide necessity.

From evidence Carrier produced on the property, Carrier did not carry that burden. If Carrier had produced such evidence on the property, rather than de novo, this case may have been decided differently. However, it is well established that a party may not introduce arguments for the first time before this Board. Such tactics circumvent the Railway Labor Act's emphasis on resolving issues on the property and are flatly barred by Board Circular No. 1.

For the foregoing reasons, this claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.