

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30586
Docket No. MW-30179
94-3-91-3-626

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation
((Amtrak) - Northeast Corridor

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it selected two (2) junior employes, Messers. J. Cooper and T. Eckert, to receive special training as brush cutter operators without implementing the procedures set forth in the August 26, 1977 Training Agreement (System File NEC-BMWE-SD-2745 AMT).

(2) The Agreement was further violated when the Carrier failed to assign EWE Operator L. Kauffman to one of two (2) advertised brush cutter operator positions and instead awarded them to Messers. J. Cooper and T. Eckert based on the special training they had received without providing the Claimant with an equal opportunity.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimant shall be allowed '... any wages lost including the incentive rate of pay, and any overtime lost, that could have been earned by Mr. Kauffman as if he was offered the same training and was awarded the 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 waived right of appearance at hearing thereon.

At the relevant time, Claimant was working on the Engineer Work Equipment (EWE) Roster and was headquartered at Thorn, Pennsylvania. J. Cooper and T. Eckert held similar positions and were junior to Claimant in seniority.

The Carrier leased a brush cutter which was modified to conform with track clearance requirements. Cooper and Eckert were familiar with the operation of brush cutting equipment and were sent by the Carrier to its Perryville, Maryland Track Headquarters (which is approximately 60 miles from Thorn) for three days in order become familiar with the modified brush cutter. At Perryville, Cooper and Eckert took instruction on the equipment from Equipment Engineer C. V. Heitz. Claimant was not sent by the Carrier to Perryville. After working with the modified brush cutter at Perryville, Cooper and Eckert became qualified on the equipment.

After the modified brush cutter was ready for service, a position was advertised for bid on February 26, 1990 under number 008-PAO-0129 with a closing of March 5, 1990. Claimant requested an opportunity to qualify on the modified brush cutter. There is a dispute over the nature and duration of Claimant's qualifying period. The Carrier asserts that Claimant was given one week to qualify commencing March 5, 1990 and Claimant's opportunity to qualify terminated after he entangled the boom in the catenary. The Organization asserts (through a statement provided by Claimant which is set forth below) that Claimant actually only had a few hours' opportunity in which to qualify and further asserts that Cooper and Eckert were assigned to train Claimant and did not sufficiently allow Claimant to operate the machinery or properly demonstrate how to operate it. According to the Organization, the hydraulic system malfunctioned causing the entanglement.

The position was awarded to one of the junior employees (the record does not reveal which one). This claim followed.

The record details Claimant's experience in his attempt to qualify on the modified brush cutter. In a statement submitted by Claimant, he described the circumstances surrounding his opportunity to qualify:

"I was not givin [sic] the oppertunity [sic] to qualify on the Brush Cutter the same as Mr. Cooper & Mr. Eckert. When the machine was at Ardmore siding I was sent to qualify on March 5th 1990. Upon arriving at the siding on March 5th no one was there. I had no idea how to run it. I was told by Mr. Reading at my headquarters in Lane, Pa. that I should get no overtime. When I left Ardmore to catch a train no one had showed up. On Tuesday March 6th Mr. Cooper and Mr. Eckert showed up. Both ignored my questions about the machine. The machine did not go out on tuesday. On Wednesday they still ignored my questions about how to run the machine. The machine did not go out on Wednesday. I went out with them but was not allowed to run [the] machine. They still would not show me how to run [the] machine. On Thursday March 8th they were ordered by Mr. Leaman & Mr. Perilli to show me how to run [the] machine. They went through the operation so fast that there was no way anyone could have learned how to run it. There was no way anyone could have learned to run the machine and know how to do the operation without some kind of training. When the machine went out on Thursday Mr. Cooper got off and simply said there it is run it. Mr. Eckert did help some. I run it for about 1 1/2 hrs. As I was coming in to Narberth Station there is a left hand curve, working west on No. 4 track. The hydraulics [sic] on the machine were faulty when raising the right cutter, the hydraulics [sic] stuck for a second, then all of a sudden they (hydraulics) [sic] freed and the right cutter jumped. It went into the wires. It did not cut them completely. I was told to get off the machine. Then I left to get my normal train home. (I stayed long enough to be told to leave. I did not just leave them stuck.) On Friday March 9th, I was told not to get on the machine. Mr. Cooper and Mr. Eckert were trained for three days by Mr. Heights [sic]"

The Carrier asserts that Claimant was given an adequate opportunity to qualify on the modified brush cutter and he was unable to do so. However, aside from those stated conclusions, there is no similar direct evidence comparable to Claimant's statement which can be used to substantiate the Carrier's assertions that Claimant was given an adequate opportunity to qualify on the equipment.

Therefore, the evidence sufficiently shows that junior employees Cooper and Eckert were given three days of instruction on the modified bush cutter under instruction of the Equipment Engineer at the Carrier's Perryville, Maryland Track Headquarters which allowed Cooper and Eckert to become qualified on the equipment and ultimately allowed one of them to receive the position. Given the quality of the evidence before us (i.e., Claimant's statement and the Carrier's unsupported assertions), the evidence further sufficiently shows that Claimant was given a minimal amount of time for qualifying purposes under the "instruction" of the very junior employees with whom he was in competition - Cooper and Eckert. Had Claimant been deemed qualified, Claimant would have been entitled to the job due to his greater seniority.

According to Claimant's statement which has not been refuted by similar competent evidence, we find that Claimant was not given an adequate opportunity to qualify on the modified brush cutter. We recognize that the Carrier has great latitude in making determinations concerning the qualifications of employees. However, given Claimant's unrefuted statement concerning the type of qualification period that he received and the minimal amount of instruction given by the very employees with whom Claimant was in competition for the position and comparing that to the type of qualification period that Cooper and Eckert received under instruction of the Equipment Engineer, we must find that the Carrier's decision in determining that Claimant was not qualified was an arbitrary determination.

In light of the above, whether, as argued by the Organization, Claimant should have been entitled to attend training at Perryville along with Cooper and Eckert under the terms of the August 26, 1977 Training Agreement is moot. The crucial inquiry has been whether the experiences given to the three employees to qualify on the equipment were reasonably equivalent. We have found they were not. Cooper and Eckert received direct instruction from the Equipment Engineer at the Carrier's Track Headquarters. Claimant was given minimal instruction from the recently trained junior employees with whom he was in competition for the job. Compare Third Division Award 26213 where the Carrier "offered training on a similar basis" to senior employees who complained of the lack of training opportunities afforded junior employees which the Board found as "dispositive of one facet of the Claim." The distinguishing factor here is that the training given to Claimant was not "on a similar basis" as that given to junior employees Cooper and Eckert.

With respect to a remedy, Claimant shall be given a new opportunity to qualify on the modified brush cutter. If deemed qualified and if the job in dispute still exists, Claimant shall be placed in that position. With respect to monetary relief, had Claimant been given an equivalent opportunity to qualify for the position as given to Cooper and Eckert, we are unable to say that Claimant would not have qualified for the position. The function of a remedy is to restore the status quo and put the parties back to where they would have been before the violation of the Agreement and further to not allow the party violating the Agreement to benefit from that violation. Therefore, under the circumstances, Claimant shall be made whole for the differential in wages earned by the junior employee who received the job and those wages earned by Claimant for the time that the job existed. In the event the disputed job still exists, the Carrier's liability shall run until such time as Claimant is given an equivalent qualification experience as that received by Cooper and Eckert and it is fairly determined that Claimant is not qualified for the position.

AWARD

Claim sustained in accordance with the Findings.

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 2nd day of December 1994.