

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 32716  
Docket No. MW-32200  
98-3-94-3-626

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

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(Grand Trunk Western Railroad Company (former  
( Detroit, Toledo and Ironton Railroad Company)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when, on February 11, 1993, the Carrier improperly and without written explanation disqualified Mr. D. Brown from his position of welder (Carrier’s File 8365-1-431 DTI).
- (2) As a consequence of the aforesaid violation, the disqualification shall be rescinded, all reference to the disqualification shall be removed from Mr. Brown’s record and he shall be compensated for all wage loss suffered.”

**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.

On October 6, 1992, Carrier gave notice that effective January 4, 1993, all Welders and Welder Helpers would be required to have a Commercial Driver's License (CDL) and be "D" book qualified. Claimant was the only such employee who failed to acquire the required license. On February 12, 1993, Carrier disqualified Claimant from Welder and Welder Helper positions.

The Organization contends that Carrier disciplined Claimant without a Hearing in violation of Rule 34 of the Agreement and that the requirement of a CDL was arbitrary and unreasonable. Carrier denies that any discipline was imposed and defends the CDL requirement as reasonable.

It is clear to the Board that no discipline was imposed. Claimant was disqualified for his failure to meet an objective qualification (possession of a CDL) and was advised that he was not being removed from the seniority roster and that his disqualification would last only until he obtained the required CDL. Accordingly, we turn to the heart of the dispute -- the validity of Carrier's requirement that Welders and Welder Helpers have CDLs.

Throughout the handling on the property, Carrier maintained that the CDL was required by Department of Transportation (DOT) Regulations. The Organization pointed out that DOT Rules required a CDL only if one of three conditions existed: (1) the vehicle had a gross vehicle weight rating of 10,001 pounds or more, (2) it was designed to transport more than 15 passengers, or (3) it was used to transport hazardous materials in a quantity requiring placarding. The Organization further pointed out that the Regulations did not require placarding when the hazardous materials transported weighed less than 1,000 pounds; that the truck assigned to Claimant had a gross vehicle weight rating of 8,600 pounds; and that the hazardous materials Claimant transported (oxygen and acetylene) weighed only 426 pounds. The Organization supplied written statements from eight employees, including two who operated Claimant's vehicle since his disqualification, attesting to their vehicles never having been placarded for carrying hazardous materials.

Carrier never responded, during handling on the property, to the Organization's contention and supporting documentation concerning the absence of any required placarding on Claimant's vehicle. In its Submission to the Board, Carrier states:

“... On a day-to-day basis, welders usually carry one cylinder each of acetylene and oxygen. Both acetylene and oxygen are considered hazardous materials under the federal regulations. However, because the two cylinders weigh less than 1,000 pounds there is no need to placard the vehicle in which they are carried.

There are times when welders must transport more than one or two cylinders of hazardous materials. These occasions arise, for example, when the production gangs move from one supplier's area to another, and the cylinders that are in reserve must be transported along with the cylinders already on the welder's truck to the new location or returned to the local supplier. Because the cylinders carried weigh more than 1,000 pounds, placards must be used. The placards used are the stick-on variety and are usually made available by the suppliers. After the cylinders are delivered, the stick-on placard is removed. Because there are indications that such occasions will increase in the future, all new welder trucks purchased by the Carrier will be placarded with permanent signs that can be displayed as required.”

The information contained in Carrier's Submission contradicts the contention and documentation furnished by the Organization. But there is no indication in the record that Carrier presented any of this material during handling on the property. The posture in which the Board finds this case is identical to Third Division Award 29851, where the Board wrote:

“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 [of the vehicle's weight and the material to be transported] 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.”

Accordingly, the claim must be sustained. Carrier also argues in its Submission that if the claim is sustained, no compensation for wage loss may be ordered because Claimant’s driver’s license had been suspended and he was unable to work as a Welder during the relevant time period. But again, Carrier never raised this issue or presented any evidence in support of this position during handling on the property. Accordingly, we cannot consider such matter raised for the first time before the Board.

**AWARD**

**Claim sustained.**

**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 19th day of August 1998.**