

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35310
Docket No. MW-34565
01-3-98-3-227**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc. (former Louisville and
(Nashville 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 assign Rank 2 employe J. B. Groom to the foreman position on Gang 6NAG headquartered at Dickson, Tennessee on January 30, 1997 [System File 5(10) (97) /12(97-1156) LNR].
- (2) As a consequence of the afore-stated violation, Mr. J. B. Groom shall be awarded the foreman position on Gang 6NAG with Rank 1 seniority dating from February 1, 1997 and he shall be compensated the difference in pay between the foreman and trackman rate commencing on that date.”

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.

The facts which led to this claim are largely not disputed. J. B. Groom (Claimant) has been employed in the Carrier's Track Department since January 1978. Commencing June 4, 1984, the Claimant established seniority as an Assistant Foreman (Rank 2), however, at the time this issue arose, the Claimant was working as a Trackman.

In a January 10, 1997 bulletin, the Carrier advertised the positions of Trackman and Track Foreman to be assigned to Force 6NAG, "The Weekend Gang," headquartered at Dickson, Tennessee. Included in the portion of the Bulletin titled: "Remarks," the Carrier specified that:

"Position previously went no bid. Rest days Thursday and Friday. Duties: Normal to the position. Successful applicant on Foreman must be FRA and Operating Rules Qualified and have valid CDL."

The Claimant properly filed his application, applying for both the Trackman and Track Foreman positions, the latter being the Claimant's "first choice." On January 30, 1997, the Carrier issued Bulletin No. LNND-0001 stating that there were "no successful bidders" for the Force 6NAG Foreman's position. On that same date, by Bulletin No. LNND-0002, the Claimant was awarded the Force 6NAG Trackman position.

On February 27, 1997, the Organization submitted a claim alleging the Carrier had violated Rules 5 - SENIORITY RANK, 9 - SENIORITY RANK, 16 - ASSIGNMENTS and 24 - PROMOTIONS when it "refused" to accept the Claimant's bid on the Foreman position.

The Carrier, relying upon Rule 24 - PROMOTIONS, denied the claim contending that the Claimant, who lacked the requisite CDL, did not meet even the minimum qualifications of the position.

In response to the Carrier's denial, the Organization noted that:

"There is not a truck assigned to Gang 6NAG on which the claimant bid. This gang has been using the Roadmaster's hy-rail truck on weekends

which does not require a CDL license to drive. The only other truck available for this gang to use is Gang 5MB2's section truck, which weighs less than 26 thousand pounds and does not require a CDL to drive under Tennessee law. Furthermore, it is currently being operated by a Foreman who does not have a CDL license."

In that connection, the Organization enclosed a copy of a letter, dated August 25, 1994, in which Director Labor Relations J. B. Allred and former General Chairman N. J. Marquar "agreed" that the truck, rather than the position, was the determining factor for requiring a CDL, and that only the Department of Transportation could place such a requirement on a position.

Finally, the Organization noted that when the Claimant informed the Carrier that he was "willing" to get the requisite CDL if he was awarded the position, the Carrier refused the Claimant's offer. However, shortly after declining the Claimant's bid, the Carrier temporarily assigned the Claimant to work the Gang 6NAG Foreman's position in dispute.

For its part, the Carrier maintained that it has the right to determine job requirements unless restricted by the Agreement, and that the Organization "seeks to extend to Mr. Grooms, who does not possess rank 1 seniority, a distinct advantage without consideration of the absence of requisite qualifications." The Carrier went on to note that the Claimant had been working as a Rank 2, Assistant Foreman since June 4, 1984, and since that time, he had not taken any actions to become CDL qualified.

With respect to the August 25, 1994 letter cited by the Organization, the Carrier contended that the letter "does not constitute an agreement or indication of mutually accepted interpretation, but rather is a 'protest' which was improperly filed and apparently was never progressed."

In that connection, the Carrier pointed to the language contained in Rule 24 which states:

"24(c) Employees bidding on positions of foreman . . . , as a promotion and having a recommendation from the foreman or foremen under whom they have worked, shall be required to pass a written examination on the

prescribed form. The recommendation shall be furnished prior to or at the time the bid is filed.”

The Carrier noted that the Claimant offered no such Foreman recommendation(s), and maintained that because the Claimant had neither the ability (a CDL) or a recommendation from a Foreman for whom he had worked, the Carrier was not required, by Agreement, to give the Claimant a written examination or allow him to qualify for the job.

Finally, the Carrier does not dispute that it did, on the weekends of February 1, 2, 8 and 9, 1997, temporarily assign the Claimant to work the Foreman position in dispute. Soon thereafter, the position was “properly awarded” to a CDL qualified bidder, according to the Carrier.

The question presented in this claim is whether the Carrier was required to promote Rank 2 Claimant Grooms to a bid assignment when, at the outset, he did not meet one of three listed job requirements.

A review of numerous Third Division Awards on this issue endorses the Carrier’s well-established right to set the qualifications required to occupy a bid assignment. See, for example, Third Division Awards 23551, 19596 and 16458. In these particular circumstances, the Rules cited by the Organization do not restrict the Carrier’s right to determine job qualifications for any position, nor do the Rules cited require the Carrier to award a position to an employee who does not satisfy the job qualifications set forth in a job bulletin.

Further, the Board has consistently ruled that, in the majority of circumstances, the Carrier is the sole judge of an employee’s fitness and ability for a position. (For example, see Third Division Awards 22462, 22029 and 20878). In this case, the Carrier determined that the Gang 6NAG Foreman position would require an active CDL, which the Claimant did not possess. There is no dispute that said requirement was clearly set forth in the January 16, 1997 Bulletin, which stated that: “Successful applicant on Foreman must be FRA and Operating Rules qualified and have a valid CDL.” The Carrier cannot, and should not be held accountable or liable for the Claimant’s failure to obtain the requisite CDL prior to placing a bid on a position requiring same.

The Carrier's exercise of managerial discretion to temporarily appoint the Claimant to the Foreman's position, even though he lacked the CDL, does not constitute a waiver of its rights to insist that the applicant for the permanent appointment possess all of the posted job qualifications

On the basis of a careful review of the record evidence, we are not persuaded that the Carrier violated the Agreement when it refused the Claimant's bid to the Foreman's position on Gang 6NAG. Therefore, the claim must be denied.

AWARD

Claim denied.

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 24th day of January, 2001.

LABOR MEMBER'S DISSENT
TO
AWARD 35310, DOCKET MW-34565
(Referee Murphy)

The Majority clearly erred when it rendered its decision in this case and a dissent is therefore required.

This docket involved the Carrier advertising a foreman position with the requirement that the successful applicant possess a Commercial Driver's License (CDL). It was clearly pointed out during the handling of this dispute on the property that no vehicle available for use by the gang met the requirements necessary for a CDL. The Carrier never disputed the fact that such was the case. Nevertheless, the Majority ignored the facts of this case, the precedent provided to it by the Organization and accepted the Carrier's unsupported version of events. In Award **32876**, involving these same parties which was presented during the panel discussion, the Board held:

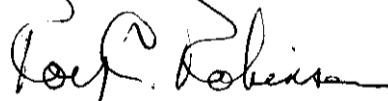
"The record convinces us that the possibility of assigning boom truck driving on occasion in the future to the Tie Handler Operator position bulletined herein is an insufficient basis upon which to disqualify Claimant under the circumstances in this case. Carrier was aware that Claimant was going to obtain his CDL in the near future, and had his permit at the time of the bid, as well as the fact that there were other Mechanics on the gang who could have been assigned the truck driving work, at least in the interim. While there is no doubt that Carrier may wish to have employees cross-qualified to give it the maximum amount of flexibility in assignments, it has not sustained its burden of showing that possession of a CDL license at the time of the award of the position was reasonably related to the normal job duties of a Tie Handler Operator and was a sufficient basis upon which to overlook Claimant's seniority rights to the Class A Operator job in issue. This finding is based upon the record on the property which shows that Carrier's

Labor Member's Dissent
Award 35310
Page Two

"position was supported mostly by bare assertions, while the facts relied upon by the Organization were never contested. See Third Division Award 19432."

The fact of this case, while not identical to the facts in the above-cited award, clearly showed that there was no vehicle available for use by the gang in question that required a CDL. Hence, the Majority erred when it denied this claim based on the Carrier's arbitrary decision to require the successful applicant to possess a CDL. This award is palpably erroneous and I, therefore, dissent.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Roy C. Robinson".

Roy C. Robinson
Labor Member