

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35434
Docket No. MW-33020
01-3-96-3-419**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly disqualified Mr. R. Bee from his position as a Class I Machine Operator on January 13, 1995 (System Docket MW-3839).**
- (2) As a consequence of the aforesaid violation, claimant R. Bee shall be reinstated to the Class I Machine Operator position he was improperly disqualified from with seniority and all rights unimpaired and he shall be compensated for all wage loss suffered with proper credits for benefits and vacation purposes.”**

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 Claimant was disqualified from his position operating a burro crane when it was discovered that he did not possess a valid driver's license. The Organization challenged the disqualification on the ground that the license requirement was not reasonably related to the job duties.

The Claimant bid onto the temporary position on October 10, 1994, some three months prior to his disqualification. The bulletin advertising the position did not actually specify the drivers license requirement. Rather, it listed only a code letter "E" that corresponded with a job description contained in a different document that listed the requirement. The Carrier maintains that the requirement was in effect for two years without objection by the Organization. According to the record, however, it appears that the position had not been bulletined for several years. It became vacant due to the disability of the longtime incumbent. There is no evidence that the Organization was aware that the license requirement was established for the position. The Claimant was apparently awarded the position without the Carrier checking his qualifications. He worked the position without incident until the date of his disqualification.

During the handling of this claim on the property, the Organization undertook a parallel effort to challenge the license requirement on all positions where it believed there was no rational basis for it. Interestingly, the record reflects that the Carrier did remove the requirement from the position after the Claimant was disqualified. It appears, however, that the Claimant remained in furloughed status until April 3, 1995 when he assumed a Class II position operating a front-end loader.

According to the record, the burro crane the Claimant operated could travel only on rails and had no capability for highway operation. The Claimant was able to ride to the crane with other crew members or in Carrier furnished transportation.

It is well settled that the Carrier's have the right to establish job qualifications as long as they are reasonably related to the performance of the job. However, where that reasonable basis is not established in the record, the qualifications have been struck down and the claims have been sustained. See Third Division Awards 31715, 32716, 32876, and 32588.

The pivotal in this claim is whether the driver license requirement satisfied that standard of reasonableness. The Carrier justified the requirement on the basis that the crane "... is frequently left in the field at various work sites throughout the week. It is, therefore, reasonable to require the operator to have a driver's license in order to transport

himself to the job site in a company-provided vehicle.” If true, we would concur with the Carrier’s reasoning.

However, the Organization took sharp exception to the Carrier’s rationale. According to the record, the Organization asserted that the crane was used only within the confines of Conway Yard, the Carrier’s largest classification yard, where transportation was always available to the Claimant without his having to drive. Despite the Organization’s assertion, the Carrier provided no evidence that the crane was ever “. . . left in the field at various work sites . . .”

As we noted in Third Division Award 35433, when the existence or nonexistence of an essential fact is in issue, as it is here, the burden of proof must be shouldered by the party asserting the affirmative aspect of the fact (e.g., that the crane was frequently left in the field at various work sites) rather than the party asserting the negative aspect (e.g., that the crane was not left in the field at various work sites.)

Given the foregoing considerations, we must find that the Carrier has not established the reasonableness of its driver license requirement. Accordingly, we must conclude that the Claimant’s disqualification was improper. He is entitled to the remedy requested. Unfortunately, the record contains insufficient information for us to ascertain the dimensions of that remedy. The claim, therefore, is remanded to the parties for that determination.

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 26th day of April, 2001.