

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38041
Docket No. MW-37150
06-3-02-3-128

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(BNSF Railway Company (former Atchison, Topeka
(and Santa Fe Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (withheld and disqualified from his Welder ‘A’ position and a letter placed in personal file) imposed upon Mr. E. L. Landry, Jr., in connection with charges of alleged violation of Engineering Instructions 15.13 and 15.16 regarding his inability to acquire a CDL license, was without just and sufficient cause and in violation of the Agreement [System File JFSF-01-8/15-01-0004(MW) ATS].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. E. L. Landry, Jr., shall now be reinstated to his Welder ‘A’ position with all seniority unimpaired and compensated for all time lost at the respective straight time and overtime rates of pay for any and all time acquired by the employe working the aforesaid position beginning January 4, 2001 and continuing and the charges shall be removed from his service record.”

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.

As background, the Claimant had 27 years of service combined with the Southern Pacific Transportation Company and the BNSF Railway Company on Trackman and Welder positions. After the Union Pacific purchased the Southern Pacific and as part of that merger, specific trackage from Avondale, Louisiana, to Iowa Junction (described as the Louisiana Purchase) was sold to the BNSF Railway Company. The Claimant had worked on this trackage as a Welder and elected to continue employment with the BNSF as a Welder in 1997. At that time the Claimant had been on medication for 16 years.

The record indicates that the Carrier requested the Claimant to obtain a Commercial Drivers License (CDL) in 1997. The Claimant testified that "they sent me trying to get my CDL and my medical card approximately three or four times that year . . . and Dr. Boyer would not give it to me because of my medical condition." The Claimant testified that he worked the Welder position throughout 1997 without incident. The record also indicates that the Carrier requested the Claimant obtain a CDL in 1998. The Carrier requested it again in 1999. The record indicates that although the Claimant was never medically cleared to obtain a CDL the Carrier continued to fully utilize his services as a Welder.

After three and one-half years of service with the Carrier and without a CDL, the Carrier notified the Claimant by letter dated January 3, 2001, that:

"Effective close of shift Wednesday, January 03, 2001, you are being disqualified from working a Welder A position.

It has been determined that you are unable to acquire a CDL license which does not meet expectations for the requirements for the BNSF for that position."

The Organization argued that the disqualification was unjust. It argues that the Claimant held the seniority and properly performed the position without complaint from the Carrier for more than three years. It maintains that the qualification requirement of the Carrier for the position of Welder to hold a valid CDL was unrelated to the position, because the Claimant performed his welding in a qualified manner and was not a Truck Driver. The Organization points to the fact that the Claimant was disqualified from the exact Welder A position that he had worked for three and one-half years at the exact location, doing the exact same duties without complaint. The Carrier disqualified him even though it was fully aware for years that he could not medically obtain a CDL, certainly since 1997 when he was first employed.

Following the Unjust Treatment Hearing on January 31, 2001, the Carrier upheld the disqualification, due to the Claimant's "inability to acquire a CDL license, which does not meet BNSF requirements for the Welder "A" position." The Carrier does not deny the Organization's arguments or that the Claimant properly performed welding, but clearly argues that the position of Welder requires a CDL. The Carrier proved that the Claimant never qualified at the minimum prerequisite to hold that position. It proved that the Claimant could not legally operate the welding truck assigned to the gang and, therefore, it properly disqualified the Claimant. The Carrier argues that there is no Rule requiring it to maintain the Claimant on a position that he cannot properly perform. The Carrier is not required to make arrangements to work around the Claimant or to provide a chauffeur to get the Claimant to his work. As the Carrier stated, "If the Welder cannot drive the truck, the Carrier's equipment is idled and the Welder may end up doing nothing for the day."

The testimony indicates that in three and one-half years there were only two instances when the Carrier had to redirect forces due to the Claimant's inability to drive. There is no showing in this record that the Carrier was unaware from the very beginning that the Claimant lacked qualifications. In fact, the Carrier knew and failed to act for years.

The Board finds no evidence of record that the CDL is superfluous to working the position. The CDL was not a new requirement added and the Carrier has the right and the authority to set qualifications for positions, as it deems them important to the work of the position. The Board's decision in this case is not to be generalized or interpreted as applicable to other instances.

The Board finds this instant case unusual and unique. It rules in these circumstances only that the Claimant's disqualification was unjust. The record does not demonstrate that the Claimant's seniority rights to the Welder's position should be removed due to the essential need for the CDL, or its much delayed imposition. There was no showing by the Carrier that the Claimant's performance for three and one-half years without the CDL was a clear detriment.

The remedy by the Board is to sustain Part 1 of the claim. Part 2 of the claim is sustained to the extent that the Claimant suffered losses. The Board agrees with the Carrier's on-property argument, that if the Claimant's benefits following disqualification offset any losses claimed, he is due no compensation.

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 21st day of December 2006.