

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39357
Docket No. MW-38007
08-3-NRAB-00003-030433
(03-3-433)

The Third Division consisted of the regular members and in addition Referee Susan R. Brown when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to assign Mr. T. J. Goehring to the foreman position on District 200 Steel Relay Gang RP-11 by Bulletin No. M0103A-05 on March 15, 2001 and instead assigned junior employe R. M. King (System File T-D-2290-H/11-01-0198 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. J. Goehring shall now be assigned to the foreman position on the aforesaid bulletin and he shall “*** be made whole for any and all losses, including future right of displacement or bidding rights, difference in rates of pay between that of Steel Relay Gang Foreman and the rates of pay he receives, and reimbursement for loss of any and all overtime opportunity beginning on March 15, 2001 and continuing until Claimant is assigned thereto. We are also requesting that Claimant receive the per diem meal allowances of \$21.25 for each calendar day until Claimant is assigned to his desired foreman’s position. We request that Claimant receive any and all compensation, equal to that received by the junior foreman, including overtime and the 5% incentive gang bonus.”**

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.

Claimant T. J. Goering has worked as a Rank A Foreman at least since 1983. In September 2000, when the Carrier announced that henceforth Foremen would be required to hold CDL/DOT certifications, the Claimant was already qualified.

In October 2000, the Carrier issued the following announcement:

“Effective October 1, 2000, any Foreman or B&B Foreman responsible for a crew, which also consists of a Truck Driver, will be required to possess the same qualifications that the Truck Driver possesses. Any time one of the Foreman positions becomes vacant on account of the incumbent bidding off, the vacated position will be bulletined with the necessary qualifications added. . . .

Any of these positions which do not become vacant and bulletined through regular means between October 1, 2000 and December 31, 2000, will be abolished and rebulletined on January 1, 2001. If you are currently assigned to one of these positions, you must first secure the necessary qualifications in order to secure the assignment.”

There is no dispute that the Claimant was aware of this notice.

On December 10, 2000, about a dozen bulletins were posted for crews for the 2001 season. All the crews had Truck Drivers who needed a hazmat endorsement and Bus Drivers who required a passenger endorsement; the Foremen positions, however,

required only the hazmat endorsement in addition to the CDL/DOT certification. The hazmat endorsement requires only a written test and the Claimant obtained the endorsement prior to the closing of the bulletins. The tentative starting date of these crews was April 2, 2001.

On March 1, 2001, a crew that the Claimant was interested in, Steel Gang RP-11, was bulletined. This crew also contained Fuel Truck Drivers and Bus Drivers; the Foreman for this crew was required to hold both hazmat and passenger endorsements. The start date for these crews was also April 2, but the Foreman and others were required to report on March 19.

The procedure to obtain a passenger endorsement requires a written test and a road test with a passenger vehicle certified by the employer as the type that the individual would be required to operate. The state in this case, South Dakota, schedules such road tests only by advance appointment. The Claimant was unable to get an appointment for a driving test until after March 10, the closing date of the bulletin, at least in part because no vehicle of the proper type was available until then. He received his endorsement on March 13.

As per the Agreement, the March 1 bulletin closed on March 10. On March 12, the Carrier awarded the Foreman position to an employee junior to the Claimant. On March 13, the Claimant received his passenger endorsement. On March 15, the Carrier rescinded the initial assignment as an error, and awarded it to R. M. King, also junior to the Claimant and without Foreman seniority.

Prior precedent establishes the right of the Carrier to set qualifications for a position as long as those qualifications are reasonably related to the position and are not arbitrary. The Organization here raises a question about whether a passenger endorsement is reasonably related to this particular Foreman position, but it is not necessary for us to reach that issue. On the record before the Board, it is clear that the Claimant himself made no objection to the requirement of the endorsement, but immediately set out to obtain it for himself, consistent with his earlier behavior when other new qualifications were imposed.

The troubling aspect of these events is that even with his best efforts, he was unable to meet the Carrier's new requirement in a timely fashion. Moreover, the Carrier was a participant in the procedure necessary for obtaining that endorsement.

Because the schedule allowed the Claimant no possibility of meeting the Carrier's newly-established requirements, its actions constituted a fundamental denial of the Claimant's seniority rights.

The Carrier appears to argue that the Claimant should have known that this requirement was going to be imposed, but the record establishes otherwise. Bulletins posted in December 2000 for a starting date after that of the bulletin in question, for crews that also included a Bus Driver, did not require a passenger endorsement for the Foremen, despite the notice posted in October. There is absolutely no way the Claimant could reasonably have anticipated that subsequent crews with similar makeups, similar duties, and similar licensing requirements would require different qualifications for the Foremen. The Claimant is clearly not lackadaisical about remaining qualified according to the Carrier's demands and yet here he was denied his right to exercise his seniority because of an arbitrary deadline that was literally impossible for him to meet. The Carrier further compounded this error by refusing to assign him to the position after he was fully qualified when the position was again vacant because of an unrelated Carrier error. These actions were arbitrary and a violation of the Claimant's rights. Under the specific circumstances recited here, the Claimant is entitled to the relief sought, except for the per diem allowance which is intended as assistance towards expenses incurred on the job and are not wages.

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 October 2008.