

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39358
Docket No. MW-38008
08-3-NRAB-00003-030434
(03-3-434)

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 Employees
(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 and refused to assign Truck Driver D. O. Waller to the fuel truck driver position on District 200 Steel Relay Gang RP-11 by Bulletin No. M0103A-05 on March 15, 2001 and instead assigned junior employe C. M. Rath (System File T-D-2294-H/11-01-0202 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. O. Waller shall now be assigned to the fuel truck driver 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 Fuel Truck Driver 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 truck driver’s position. We request that Claimant receive any and all compensation equal to that received by the junior truck driver, 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 D. O. Waller holds seniority as a Truck Driver from April 29, 1981, a position that has required CDL/DOT certification since the mid-1990s. The Carrier asserts that on December 8, 2000, it notified the Claimant that his DOT physical examination would expire on February 25, 2001 and, pursuant to federal regulations, he needed to have a new physical exam in order to maintain his certification. No documentation exists in the record that this notice was sent or received. A second notice was sent to him on February 7, 2001; certified mail shows receipt on February 12. The notice states that "if the documents are not received prior to the expiration date [of your certification], your DOT file will be closed. You will not be allowed to hold any position with DOT certification requirements." The Claimant arranged an appointment with the Carrier's agent, HESC, for February 15. No evidence in the record establishes when he first sought an appointment.

On February 16, the Carrier received a fax from HESC advising that the Claimant's physical exam was pending further medical evaluation. It is undisputed that the Claimant received a packet from HESC on February 23 requesting further information. According to the Organization, that packet contained the following statement: "The requested medical information must be provided within 30 days or you will not be qualified for Commercial Drivers License Medical Card." This document is not in the record. The Claimant's DOT certification expired on February 25.

On March 1, 2001, the Carrier published a bulletin containing a Fuel Truck Driver position on District 200 Mobile Rail Gang RP-11, specifying requirements for CDL/DOT certification, a hazmat endorsement, and a health card. The bulletin was closed on March 10, the cutoff date for accepting applications. At that time, the Claimant was still not DOT certified.

On March 14, HESC received a fax from the Claimant's personal physician with a copy of a letter dated March 5. The fax included a note that stated: "This letter was mailed the first part of March. Patient is wondering about working?" The Organization maintains that the additional medical evidence was provided to HESC on March 5, along with a letter from the Claimant's personal physician. No documentation of such delivery is in the record other than the letter dated March 5 that HESC received on March 14.

On March 15, the Fuel Truck Driver position was awarded to C. M. Rath, with a seniority date of September 25, 1980, as the senior qualified applicant. On March 16, the Claimant's DOT physical examination results were approved and received by the Carrier's Vehicle Services Department. The Carrier updated the Claimant's records indicating DOT certification and showing an exam date of February 15, 2001 and an expiration date of February 15, 2002; the date stamp of the approval is March 19, 2001. The Organization filed a claim on March 26, stating that the Claimant should have been assigned the Fuel Truck Driver position because he is senior to Rath.

According to the Organization, the Claimant was indeed qualified as a Truck Driver before the bulletin closed because he was at all times working as a Fuel Truck Driver and had never been disqualified, despite the lapse of his DOT certification, facts that are not in dispute. Moreover, he followed all Carrier instructions with respect to being re-certified, including a notice he received on February 23 that he would not be certified if he did not return his medical information within 30 days.

A close reading of the record leads the Board to conclude that the Claimant did not meet the posted qualifications for the bulletined Fuel Truck Driver position in early March 2001. It is unrefuted that his medical certification had lapsed on February 25 and that he was not recertified until March 19. There is no evidence that

the Carrier was the cause of any unreasonable delay between February 15, when he had his initial examination, and March 19, when he was certified.

The question of whether the Claimant met the posted qualifications is entirely separate from whether he had been officially disqualified from the Truck Driver position he held at the time. Nothing in the record indicates why the Carrier failed to disqualify him when his medical card lapsed, but such failure, as surprising and perhaps risky as it might be, does not change his status vis à vis the posted qualifications required for the new bid.

Both parties made various assertions that they did not prove. Most notably, there is no proof that the Carrier sent the Claimant a reminder on December 8 or that he received it. Nor is there any proof that the Carrier's request for additional information gave the Claimant 30 days to respond, despite the fact that his certification was expiring in two days.

Be that as it may, the Board believes that the Claimant has a responsibility to monitor his own qualifications. He has obviously been DOT certified for approximately ten years and has presumably had to renew it annually. Knowing the ponderous nature of both the Carrier and the medical system, it was both foolish and risky to schedule a medical exam merely one week prior to the expiration of a federally-required certification. As he learned, such lack of due diligence could jeopardize his livelihood, and in this case, it did. It is well-established that the Carrier has the right to set qualifications and that DOT certification is necessary for these Truck Driver positions. Employees are responsible to maintain them. Absent a showing of unreasonable delay on the Carrier's part with respect to processing the Claimant's submission of medical data, the claim must be denied.

AWARD

Claim denied.

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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 21st day of October 2008.