Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40286
Docket No. MW-40645
09-3-NRAB-00003-080476

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(
(Union Pacific Railroad Company (former Missouri Pacific 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 Machine Operator B. Johnson to the machine operator position at Big Sandy, Texas by Bulletin No. 5728 on February 26, 2007 and instead assigned junior employe P. Tunnell (Carrier's File 1476257 MPR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant B. Johnson shall now be compensated for all wage loss suffered, including overtime, beginning February 26, 2007 and continuing until he is assigned to the aforesaid position."

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.

On February 6, 2006, the Claimant was allowed to exercise his seniority over a junior Machine Operator and bumped onto Surfacing Gang 2298 as a Tamper Operator. After obtaining his position as a Tamper Operator on Gang 2298 and until this dispute arose, the Claimant continued to work on Gang 2298 without questions concerning his qualifications.

A Carrier vehicle assigned to Gang 2298 was a six passenger Chevrolet 3500 pickup truck equipped with a 100 gallon diesel fuel tank which was used to service the Carrier's machines. In February 2007, the Carrier authorized the addition of a 70 gallon diesel fuel tank to the pickup truck assigned to Gang 2298. Following those modifications to the truck, the Claimant's Machine Operator position was rebulletined and required a Class A DOT/CDL with hazmat endorsement. Although he had more than 22 years of experience as a Machine Operator, the Claimant did not have the credentials now required for the tamper. Although the Claimant bid on the position and was the senior bidder, a junior employee with the credentials required by the Carrier was assigned to the Claimant's previously held tamper position.

When Gang 2298's truck was modified, the Carrier determined that it became one which required the operator to have a DOT/CDL and HAZMAT endorsement. Statements from the Carrier's officers show that the truck assigned to the gang fuels and oils the machines each day and when the gang truck is down for repairs, the regular section truck is used and that vehicle requires a CDL license. Further according to the Carrier's officer, small division surfacing gangs must haul their own fuel.

With the modification to the gang truck which required operators to have a DOT/CDL and HAZMAT endorsement, the Carrier determined that the Claimant was no longer qualified to hold his position as a Tamper Operator. "It is well established that in cases of fitness and ability, the Carrier has the management prerogative to judge fitness and ability and the burden shifts to the Organization to demonstrate that the Carrier's decision was arbitrary, capricious, or unreasonable." Third Division Award 36086. In Public Law Board No. 6792, the dispute between the parties was over the Carrier's requirement that Foremen and Assistant Foremen have a CDL because they might be required to operate trucks which require such certification. The Carrier's position was upheld:

> ". . . [I]n the event a foreman or assistant foreman is reasonably required to operate a vehicle which would otherwise require the operator to have a CDL or DOT certification, we cannot say that the

> Carrier's determination to require that individual to have a CDL or DOT certification is an unreasonable one or one lacking a rational basis."

See also, Third Division Award 40204 between the parties where the Carrier placed a CDL and DOT certification requirement on front-end loader positions due to the fact that moving the equipment sometimes required transport with a truck and trailer. The employees in that case lacked those credentials and were prohibited from bidding on or being assigned to those positions. Relying upon Public Law Board No. 6792, the Board found ". . . the Carrier did not act unreasonably in imposing the CDL and DOT requirements for Front-end Loader Operators."

Under the standard of review discussed above, we find no basis to set aside the Carrier's determination that the gang truck had to have a Class A DOT/CDL with hazmat endorsement. The record indicates that driving the truck is something the Claimant could be required to do as part of the Tamper Operator position. Because the Claimant could be required to drive the truck, it was not arbitrary for the Carrier to extend the requirement for having a Class A DOT/CDL with hazmat endorsement to the tamper position held by the Claimant. Therefore, a non-arbitrary reason existed for the Carrier to rebulletin the tamper position with the Class A DOT/CDL with hazmat endorsement requirement.

However, the determination that the Carrier could rebulletin the Claimant's position with a Class A DOT/CDL with hazmat endorsement does not end the dispute. On July 15, 2003, the parties entered into an Agreement addressing employees qualifying for "restricted positions," which included "continuous action tampers." Section 2(f) of that Agreement provides:

> "(f) In initially establishing a restricted position, Carrier will advertise the position. Employees may bid on this position using their appropriate seniority in that class. The position will be advertised sufficiently in advance to allow successful bidders the opportunity to qualify."

That Agreement was preceded by a Letter of Agreement dated July 9, 2003, wherein the parties set forth their disagreement over whether an employee's holding seniority as a Machine Operator meant that the employee was qualified as a Machine Operator and the parties agreed on other matters concerning the maintenance of a

database of employee qualifications. The parties agreed in that Letter of Agreement as follows:

> "Notwithstanding our respective positions on this matter, it was agreed that an employee's qualifications would be entered into the database. The employee may make application to be trained on equipment that he/she is not qualified upon. If the equipment comes up for bid before the employee has been trained, the employee has bid on the position, and is the senior bidder, he/she will be assigned to the position and will be given full co-operation and assistance in his/her efforts to qualify. It is understood that the request for training must be on record at least 60 days prior to the position coming up for bid. It further is understood that if an employee is not shown in the database as being qualified on a piece of equipment, the employee will not be permitted to displace onto that position."

Relative to these provisions, the Organization argues that the Claimant was not given the opportunity to qualify as required by Section 2(f) of the July 15, 2003 Agreement. The Carrier responded in its August 28, 2007 letter that the ". . . Claimant has not made application to be trained on this tamper or any tamper as the July 9, 2003 Agreement provides."

But the Claimant had been operating the tamper for one year when the Carrier determined that he was unqualified to operate the tamper not because of anything that had to do with the tamper itself or the Claimant, but because the Carrier had recently modified the truck which the Claimant might be required to operate therefore requiring a Class A DOT/CDL with hazmat endorsement for the tamper. The Carrier cannot assert that the ". . . Claimant has not made application to be trained on this tamper or any tamper as the July 9, 2003 Agreement provides" as a basis for denying this claim. At the time this dispute arose, the Claimant had been operating the tamper without any apparent difficulty for approximately one year. Further, the provision of the July 9, 2003 Letter of Agreement relied upon by the Carrier does not appear applicable because the Claimant was not attempting ". . . to displace onto that position" - he already held that position. The Carrier cannot successfully argue that the Claimant had not made application to be trained on equipment he had been operating for a year and at a time when the Carrier changed the qualifications for the equipment and then rebulletined the position based on the new qualifications.

The real question is can the Claimant obtain the required Class A DOT/CDL with hazmat endorsement which the Board has found was reasonably required by the Carrier for the tamper position? There is some question in this proceeding as to whether the Claimant is capable of obtaining those credentials (due to medical reasons) but we have no basis in the record upon which to make any definitive findings in that regard. But what is clear is that under Section 2(f) of the July 15, 2003 Agreement, the Claimant was not given ". . . the opportunity to qualify" - i.e., to obtain the required credentials. If the Claimant is able to get the Class A DOT/CDL with hazmat endorsement, then he should have been awarded the tamper position. If he cannot get those credentials, there is no violation of the Agreement.

This matter is, therefore, remanded to the parties to allow the Claimant to demonstrate that he can obtain the Class A DOT/CDL with hazmat endorsement; otherwise, the claim shall be denied. If the Claimant can get those credentials, he shall be awarded the tamper position. The Carrier advises us that the Claimant lost no pay as a result of being disqualified from the tamper position. We will leave the backpay issue open pending determination of whether the Claimant can obtain the necessary credentials for the position.

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 1st day of March 2010.

CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION

TO

THIRD DIVISION AWARD 40286; DOCKET MW-40645

(Referee Edwin H. Benn)

The Referee got it right when he determined that the Carrier could require the Machine Operator to possess a commercial drivers license (CDL) and DOT medical certification to be able to perform the essential functions of the Machine Operator (Tamper Operator) position. However, the decision becomes confusing from there.

The CDL/DOT requirement was for the Machine Operator to be able to operate a vehicle equipped with fuel tanks to fuel and service his tamper. It did not involve the actual operation of the machine. Thus, when the Referee found that the employee should be given the opportunity to qualify and relied on the Machine Operator Qualification Database, he began mixing apples and oranges. The July 2003 Agreements, referenced in the Award, have nothing to do with either the acquisition of a CDL or the DOT certification for the truck. These Agreements address the actual operation of the on-track tamper.

A CDL is a requirement of the law. The Carrier has numerous programs to assist employees in acquiring a CDL, such as reimbursement for the license, providing a truck to take any necessary tests, etc. Because holding a CDL is required by law, the "opportunity to qualify" provision of the Agreement cited in the Award would not and does not apply. The Carrier cannot be placed in the position of violating the law for the convenience of an individual, and that is why the July 2003 Agreements are wrongly referenced as support for the finding reached in the Award. Employees are expected to be in compliance with the law when filling a position.

For the reasons set forth above, the Carrier Members respectfully concur in part and dissent in part.

Michael D. Phillips
Michael D. Phillips
Carrier Member

Michael C. Lesnik
Michael C. Lesnik
Carrier Member

March 1, 2010