

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 42906  
Docket No. MW-42481  
18-3-NRAB-00003-140118

The Third Division consisted of the regular members and in addition Referee Randall M. Kelly when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes Division –  
(IBT Rail Conference  
(  
(BNSF Railway Company (Former Burlington Northern  
(Railroad Company)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to assign Mr. G. Segura to a foreman position on Surfacing Gang TSCX0929 and instead assigned a junior employee R. Cuellar thereto via Award Bulletin G120B-10A with a reporting date of June 11, 2012 (System File C-12-P018-19/10-12-0551 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants G. Segura shall ‘...be paid for all of the straight time hours and overtime hours worked by Mr. R. D. Cuellar on the claimed Foreman position beginning on June 11, 2012 and continuing until the violation ceases, as settlement of this claim.”

**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 G. Segura has established and holds seniority as a track foreman from June 24, 1988 (District 500); nearly 24 years as of the date the incident involved here occurred. The Claimant had sufficient experience with a surfacing gang as a foreman. Employee R. Cuellar has established and holds seniority as foreman from April 15, 1995. There is no dispute that the Claimant is the senior applicant from a qualifying seniority district for the foreman position in question.

The instant dispute involves the Carrier's decision to assign junior employee R. Cuellar to a foreman position on Surfacing Gang TSCX0929 instead of the more senior Claimant.

On May 16, 2012 through May 25, 2012, Bulletin No. G120513 advertised the foreman vacancy on Mobile Surfacing Gang TSCX0929, working within the Chicago, Chillicothe, Barstow, Aurora and Mendota sub lines. The Claimant submitted his bid in accordance with the Agreement and was the senior applicant therefor, however, he was not assigned. Instead, effective August 18, 2012, the Carrier assigned junior Foreman Employee R. Cuellar. The requirements of the job that were listed on Job Bulletin G1205B-10 (Attachment No. 3 to Employees' Exhibit "A-1", Sheet 1) were, "must be BOR, FRA qualified". There is no dispute that the Claimant was both BOR and FRA qualified. Even though the Claimant met the specified requirements listed within the said job bulletin, the Carrier made no effort to assign the Claimant to the TSCX0929 Mobile Surfacing Gang Foreman position. Instead, junior employee R. Cuellar was awarded the job to the exclusion of the Claimant, who possessed significantly greater seniority in the class, based solely on the fact that Mr. Cuellar possessed an unrestricted driver's license.

The Organization objected to this assignment by claim dated June 29, 2012. The Carrier declined that claim, as follows:

"The Organization maintains that BNSF violated the Agreement by awarding Foreman position #52011 to junior employee Ruben Cuellar, instead of Claimant GJ Segura. The Organization's claim states that "...obviously the Claimant should have been awarded the claimed Foreman position instead of Mr. Cuellar". However, the Organization's claim fails to note some key circumstances in this scenario. Mr. Segura has a driver's license that is currently restricted to only driving to and from work. Per BNSF Vehicle Policy, regardless of the type of restriction, no employee is allowed to operate a company vehicle until their license

has the restriction removed. This claim refers to the position of Foreman on the Surfacing Gang, which involves driving a company vehicle every day in the performance of regular duties. Therefore, Mr. Segura is not currently qualified to work the job, so the Foreman position was awarded to the next senior qualified employee. Company Vehicle Policy B. Vehicle Operators Section 2 states clearly "...immediately stop operating company vehicles if their license or permit is suspended, revoked or restricted."

On its face, the Claimant has an appropriate claim for being denied his seniority and the Organization submitted several Awards reinforcing that concept. However, the Claimant was convicted of Driving While Under the Influence and issued a Restricted Driving Permit by the State of Illinois effective April 4, 2012 (just prior to the vacancy in question). The Permit allowed the Claimant to drive to and from work and "authorizes permittee to drive in conjunction with employment related duties within the assigned work hours & radius." The Restricted Driving Permit allowed the Claimant to perform required driving duties in the course of his employment. According to the Carrier, this restriction on his license means that he was not qualified for the Foreman position.

The Organization asserts that the Claimant satisfied the minimum requirements to fill the position and that the Carrier failed to prove otherwise:

"Despite the Carrier's assertion that he failed to meet minimum specified requirements of the job, the crux of this matter boils down to the Carrier's failure to provide evidence to support its decision to refuse the Claimant's assignment to the surfacing gang foreman position involved here. To begin with, the Carrier failed to offer any probative evidence that driving was an essential part of a foreman's duties, or had been considered so. This is particularly important in light of the fact that the record is void of any bonafide evidence to indicate that the Claimant was not fully qualified or capable of performing all the duties of the incumbent to the section foreman position, including the satisfactory ability to operate a motor vehicle. Even if driving was a bonafide requirement of the foreman position (which was not shown in this case), it is obvious that Claimant suffered from no such deficiency with regard to his ability to legally drive as much and whenever, wherever the Carrier demands of him, in the performance of his job-related duties."

The Organization cites the fact that the qualifications listed for the TSCX0398 Foreman Position on Job Bulletin No: G1205B-10 (Attachment No. 3 to Employees'

Exhibit A-1) only lists “MUST BE BOR, FRA QUALIFIED.” It does not list a valid driver’s license or Vehicle Operator.

The Organization relies on Third Division Award No. 41784 (Referee Burton D. White, November 25, 2013). In that matter, the Claimant was working as an Assistant Foreman beginning in 1986. Since 2004, as a result of DUI charges, he had a restricted driver’s license. The restrictions included using a Breath Analyzer Ignition Interlock Device except when driving a Carrier vehicle for work purposes. The Carrier was aware of the restrictions because an Assistant Roadmaster provided information to the State concerning his driving duties. In 2009, the Carrier withheld the Claimant from his position on the basis that he did not have “what the company deemed as a viable, unrestricted driver’s license.” The policies cited by the Carrier were created after the Claimant was removed from his position. The Board held:

“The key Carrier argument pertaining to this point [that the Carrier retains the right to set the qualifications for a job] is that the Claimant’s restricted driver’s permit was suddenly deemed not to be “a viable, unrestricted driver’s license” as required by Maintenance of Way Safety Rule S-12.1.1” No reason was offered for this new interpretation. Because the change was made without notice, justification, or reason, the Board must conclude that the Carrier failed to establish a rational basis for the change.

The Board finds that the Organization has proven that the Claimant was qualified under the Carrier’s Rules as they had been interpreted over a considerable period of time. The Board also finds that the Carrier’s abrupt modification of its interpretation of the applicable Rule to end that the Claimant was not qualified to drive was not reasonable.”

The Carrier sees this matter a question of its management rights and ability to set reasonable qualifications.

This case simply asks the question, “Does BNSF have the right to determine the job qualification requirements for its employees?” And if so, does BNSF have the right to keep those employees who fail to possess those requisite qualifications from being awarded a position that require those qualifications? Since the first question must be answered “yes,” then it only stands to reason that the second question must be answered “yes” as well.

The Carrier asserts and the Board agrees that, despite Organization's position in this matter, the Organization has conceded in the past that a foreman is a "working foreman" and can be required to drive a Company vehicle. In particular, see the testimony before the National Mediation Board proceedings in Presidential Emergency Board No. 229. Since the Carrier can require that a foreman drive a Company vehicle, the Carrier can establish qualifications related to that duty.

Simply, the overall principle in allowing BNSF to determine and set job requirements and subsequently disqualify those employees who do not meet those requirements is found in Third Division Award 19328:

**"The Carrier has a duty to the employees and the stockholders to do everything in its power to prevent or reduce accidents.**

And it was in response of that duty that BNSF created Maintenance of Way Safety Rule 12.1.1, which reads in pertinent part as follows: Drivers must notify their supervisor and stop operating vehicles if their license or permit is suspended, revoked, or restricted. (Emphasis added.) Simply, Claimant did not possess the qualifications to work as a foreman, yet chose to bid on a position which he was not qualified to possess. And BNSF properly awarded the disputed foreman position to an applicant who was qualified to hold the position."

The difference between this matter and Third Division Award No. 41784 is that the claimant in the earlier case was already in the position of Foreman with the Carrier's knowledge that he had a restricted license and the Carrier apparently abruptly changed its rules and was not able to provide the Board with sufficient reasons for the change. Here, the Carrier had Rules in effect and applied those rules to the Claimant before he took up the position in question. The Board's concerns that, "the Claimant was qualified under the Carrier's Rules as they had been interpreted over a considerable period of time. The Board also finds that the Carrier's abrupt modification of its interpretation of the applicable Rule to end that the Claimant was not qualified to drive was not reasonable."

In making the determination that the Organization failed to prove the Claim, it must be noted that the Carrier provided sufficient reasons to show that the Rule, as applied, was reasonably adopted in an effort to provide for the safety of employees and the public if a foreman is driving a Company vehicle. It must also be noted that the Rule does not mean that all Foreman are required to have an unrestricted license, only those who can reasonably be expected to drive a Company vehicle on the job. Finally

and naturally, the rule cannot be arbitrarily enforced. Given these caveats, the Board denies the claim in its entirety.

**AWARD**

Claim denied.

**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 14th day of February 2018