## SPECIAL BOARD OF ADJUSTMENT NO. 1087

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| Parties to Dispute: | ) | |
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| BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, | ) | Case No. 28<br>Award No. 28 |
| | ) | **OPINION AND AWARD** |
| Organization, | ) | |
| | ) | |
| and | ) | |
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| CSXT TRANSPORTATION, INC. | ) | |
| | ) | |
| Carrier, | ) | |
| | ) | |

Hearing Dates: May 24, 2006
Hearing Location: Washington, D.C.
Date of Award: August 4, 2006

MEMBERS OF THE BOARD

Organization Members: R. B. Wehrli and Donald F. Griffin
Carrier Members: Kenneth Gradia and John Hennecke
Neutral Member: John B. LaRocco

### EMPLOYES' STATEMENT OF CLAIM

1. T. E. Pierce: Claim for payment of 77 seasonal guarantee days for the calendar year 2002.

2. E. Keffer Jr.: Claim for payment of 51 seasonal guarantee days for the calendar year 2002.

### CARRIER'S QUESTION AT ISSUE

1. Is the Carrier in violation of Article I, Section 2 (Seasonal Employees) of the amended February 7, 1965 Agreement when it declined compensation to Maintenance of Way Department, Track Department employees Edwin Keffer Jr., and Thomas E. Pierce for days furloughed in 2002 while a Vehicle Operator Position to which they could have displaced was available?

2. If the answer to the above question is in the affirmative, shall the Carrier be required to compensate Keffer and Pierce as provided in Article IV, Section 1 of the amended February 7, 1965 Agreement?

## OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employe within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted according to the 1996 Mediation (National) Agreement and as specified in the National Mediation Board appointment letter dated August 18, 2004; and that all parties were given due notice of the hearing held on this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

This case concerns two Claimants who were in similar, but not identical, situations.

After the Carriers' acquisition of a portion of the former Conrail, the Organization and the Carrier entered into a Single System Schedule Agreement which replaced several property collective bargaining agreements. Rule 1-D of the Single System Agreement established a new system-wide classification of Vehicle Operators which was a classification that had originated on the former Conrail. Rule 1-D states that employees in the Vehicle Operator classification operate all highway or rail-highway vehicles. The Rule lists the following eight vehicles: Boom Truck; Dump Truck; Log Loader; Grapple Trucks; Semi-LowBoy; Buses; Fuel Trucks; and, Six Man Pick up Trucks.

Claimants had their seniority dovetailed into the Vehicle Operator Seniority Roster for the Baltimore Service Lane. Claimant E. Keffer Jr.'s seniority date was August 20, 1973. Claimant T. E. Pierce's seniority date was April 21, 1975. Thus, both Claimants were protected employees under the February 7, 1965 Job Stabilization Agreement as amended by the September 26, 1996 Mediation Agreement. The parties

concur that Claimants are seasonal employees within the scope of Article I, Section 2 of the February 7, 1965 Job Stabilization Agreement, as amended, which reads:

> "Section 2 – Seasonal employees, who had compensated service during each of the years 1995, 1996, and 1997 who otherwise meet the definition of "protected" employees under Section 1 will be offered employment in future years at least equivalent to what they performed in 1997 unless or until retired, discharged for cause, or otherwise removed by natural attrition."

Claimant Keffer established an annual guarantee of two hundred sixty-one (261) days. Claimant Keffer did not work from December 21, 2001 to March 11, 2002. On January 2, 2003 Claimant Keffer initiated a claim for protective benefits covering (fifty-one) 51 days at $17.06 per hour for the 2002 calendar year. The Carrier granted the claim, in part, and denied the claim, in part. The Carrier alleged that Claimant Keffer could have displaced junior employee J. M. Grimm, who had a June 2, 1976 Vehicle Operator seniority date, from Vehicle Operator Position No. 5DF5-073. The Carrier elaborated that had he displaced Grimm, Claimant Keffer would have been able to work an additional forty-seven (47) days in 2002. As a consequence, the Carrier calculated his entitlement to protective benefits as follows: two hundred sixty-one (261) guaranteed days less two hundred four (204) days worked less forty-seven (47) days of work opportunity equals ten (10) days. The Carrier paid Claimant Keffer his guarantee for ten (10) days.

On Position No. 5DF5-073, Grimm operated a Log Loader on Gang 5DF5. Federal Highway Administration Regulations require a Log Loader Operator to hold a Class A Commercial Driver's License (CDL). Claimant Keffer possessed a Class B

CDL.[1] With a Class B CDL, Claimant Keffer could drive some, but not all, of the vehicles enumerated in Rule 1-D. [2]

On the property, Grimm submitted a statement asserting that an employee, who possessed just a Class B CDL, could not displace him. Claimant Keffer submitted a statement attesting that he attempted to operate the Log Loader in December 2001 but he "... could not get the hang of it." The Roadmaster (Claimant Keffer's supervisor) wrote in his statement that Claimant Keffer refused to climb the ladder to the operator's seat because he had a problem with "heights". The Roadmaster further declared that he "disqualified" Claimant Keffer from Position No. 5DF5-073. Aside from that position, the Carrier did not identify any other position to which Claimant could exercise his seniority before his return to active service on March 11, 2002.

On January 6, 2003, Claimant Pierce filed an application for protective benefits covering 77 days during the 2002 calendar year at $17.06 per hour based on a guarantee of two hundred sixty (260) days. Claimant Pierce worked through the end of December 2001 and he returned to service on April 18, 2002. Claimant Pierce worked on one hundred ninety-five (195) days during 2002. The Carrier denied the claim contending that Claimant Pierce could have displaced Grimm from Position No. 5DF5-073. The Carrier explained that had Claimant Pierce displaced Grimm he would have worked an additional seventy-six (76) days so that his total work days would have exceeded the number of days constituting his guarantee.

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**[1] Federal regulations mandate a Class A CDL to operate a vehicle weighing 26,001 lbs. or more and towing a vehicle in excess of 10,000 lbs. A Class B CDL is required to operate a vehicle weighing 26,001 or greater and towing a vehicle not more than 10,000 lbs. A Class C CDL is required to operate a vehicle which transports 16 or more passengers or a vehicle that does fit within the definitions of Class A or Class B.**

**[2] The record does not reflect which vehicles Claimant could lawfully operate.**

Like Claimant Keffer, Claimant Pierce possessed a Class B CDL. Unlike Claimant Keffer, Claimant Pierce did not attempt to operate the Log Loader at the time that he ceased active service in December 2001.

In this case, the Organization seeks fifty-one (51) seasonal guarantee days on behalf of Claimant Keffer and seventy-seven (77) seasonal guarantee days on behalf of Claimant Pierce.

The Carrier relies on Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement which provides:

> "Section 1 –
>
> An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, or failure to accept employment as provided in this Article. A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee. If an employee dismissed for cause is reinstated to service, he will be restored to the status of a protected employee as of the date of his reinstatement."

## II. THE POSITIONS OF THE PARTIES

### A. The Organization's Position

Both Claimants continue to maintain seniority in the Vehicle Operator classification even though neither Claimant is qualified to operate the Log Loader. There is nothing in either the February 7, 1965 Job Stabilization Agreement, as amended, or the System Schedule Agreement that requires Claimants to possess a Class A CDL.

Rule 3, Section 2 of the System Schedule Agreement states:

> "An employee exercising seniority will be permitted, on written request, or may be required to give a

> reasonable, practical demonstration of his qualifications to perform the duties of the position. In the event no agreement occurs on the performance of an employee, he may request a committee to be formed of one (1) Union Representative and one (1) Company Representative to determine qualifications. If determination of the committee is not satisfactory to the employee he may follow the procedures under Rule 24 of this Agreement."

In essence, Rule 3, Section 2 provides that an employee must demonstrate full qualifications for the position to which the employee is exercising seniority. In this case Claimants did not possess a Class A CDL and so, they did not have sufficient qualifications to perform the duties of Position No. 50F5-073. Consequently, they were barred from displacing Grimm. Disqualification from a position does not render a protected employee ineligible for the employee's guarantee under the February 7, 1965 Job Stabilization Agreement. *Special Board of Adjustment No. 605, Award No. 514 (LaRocco)*. With regard to Claimant Keffer, he attempted to learn how to operate the Log Loader job but there is not any evidence showing that he deliberately disqualified himself from the Log Loader Vehicle Operator position. *Public Law Board 48, Award No. 1 (LaRocco)*.

The Carrier illogically contends that Claimants were obligated to become qualified to operate all equipment within the Vehicle Operator Class. Yet, the Carrier knows that all equipment listed in Rules 1-D does not require the same class of license. Nevertheless, the Carrier failed to cite any provision in the February 7, 1965 Job Stabilization Agreement compelling Claimants to enhance their qualifications. *Special Board of Adjustment No. 605, Award No. 303 (Friedman)*. It was futile for Claimants to try to displace junior employee Grimm because they were unqualified pursuant to Federal Regulations.

The Carrier represented that Claimant Keffer occupied a position with the same job number as Grimm's in early 2000. However, when Claimant Keffer held that position he operated a Six Man Pick Up Truck as opposed to a Log Loader. A Pick Up Truck Driver need only possess a Class B CDL. Thus, Claimant Keffer had not previously operated the Log Loader.

In conclusion, Article II, Section 1 obligates a protected employee to exercise his seniority in accord with existing rules and agreements. Both Claimants exercised their seniority in accord with existing rules, laws and agreements. The Schedule Rules plus Federal Regulations rendered Claimants unqualified to displace junior employee Grimm. Thus, Claimant Pierce is entitled to an additional guarantee of seventy-seven (77) seasonal days and Claimant Keffer is entitled to an additional guarantee of fifty-one (51) seasonal days.

B. The Carrier's Position

Claimants Keffer and Pierce voluntarily failed to acquire the appropriate CDL. The Vehicle Operator classification requires workers to possess a CDL. More specifically, Schedule Rule 39 mandates that the Carrier assist an employee in obtaining a CDL and to reimburse the employee for all monies an employee spends to acquire the CDL. Schedule Rule 39, Section 1, Subsections (a) through (d) provides:

> (a) Upon presentation of proof of expenditures, CSXT shall reimburse employees for all fees necessary to obtain CDL License for the first application. Once the CDL is obtained, subsequent additional endorsements required to maintain the license requirements will also be reimbursed.
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> (b) Employees shall be permitted the use of an appropriate CSXT vehicle to take CDL test provided that written request for the use of such vehicle is made to the

> Engineer of Maintenance of Track no less than five (5) working days prior to the CDL test.
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> (c) Failure of CSXT to provide a vehicle for CDL qualification upon proper written request shall result in the employee being CDL qualified for the purpose of job assignments until the next available CDL test for which CSXT provides a vehicle for testing purposes.
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> (d) No employee shall be denied assignment to a position based upon CSXT's failure to provide FHWA certification. [3]

Claimant Pierce did not take any steps to acquire a Class A CDL. Claimant Keffer tried to operate the Log Loader but he failed to take advantage of the opportunities afforded by Rule 39, Section 3, to obtain a Class A CDL. Claimants failure to obtain and maintain a valid CDL meant that they deliberately placed themselves in a position where they voluntarily refrained from exercising their seniority to an available position. Under Article II, Section 1, of the February 7, 1965 Job Stabilization Agreement, as amended, Claimants could have forfeited their protected status but, in this case, the Carrier merely offset the additional days Claimants would have worked from their guarantees. If a protected employee does not, by the employee's volition, acquire a CDL, so that the employee is disqualified him from a position to which the employee seniority to displace, the employee is not entitled to protective benefits under the February 7, 1965 Job Stabilization Agreement. *Special Board of Adjustment No. 605, Award No. 418 (Lieberman)*. Claimants cannot intentionally refrain from exerting reasonable efforts to become qualified for the Log Loader when they know that there is no other position available to them in the exercise of their seniority. *Public Law Board No. 48, Award No. 1 (LaRocco)*.

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[3] **Schedule Rule 39, Section 2 folded the CDL pay differential into the Vehicle Operator pay rate.**

Claimant Keffer may have allowed his CDL to lapse. Claimant Keffer apparently held Position No. 5DF5-073 from January 18, 2000 to March 5, 2000. Holding the position previously was inconsistent with Claimant Keffer's declaration that he could not get the "hang" of operating the Log Loader.

The Carrier properly computed both Claimants entitlements to protective benefits.

III. DISCUSSION

At the time Claimants Keffer and Pierce had the opportunity to displace junior employee Grimm from Position No. 5DF5-073, neither Claimant was qualified to operate the Log Loader inasmuch they did not possess Class A CDLs. Without Class A CDLs, Claimants could not lawfully operate the Log Loader. In addition, Schedule Rule 3, Section 2 prohibited Claimants from displacing Grimm because they could not possibly demonstrate that they were qualified for Position No. 5DF5-073 inasmuch as they lacked Class A CDLs.

Lacking qualifications for an available position is not among the events enumerated in Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended. *Special Board of Adjustment No. 605, Award No. 514 (LaRocco).* Furthermore, in *Special Board of Adjustment No. 605, Award No. 303 (Friedman)*, the Board ruled that a protected employee did not lose protective status when the protected employee could not displace to an available agent's job because the protected employee was not bondable, that is, the protected employee was unqualified to perform the duties of an Agent. The Board observed that the agent's job required a bond and Claimant had, in the past, been refused a surety bond. The Board characterized the protected employee's inability to obtain a bond as an involuntarily action. The Board noted that the

result might have been different if the protected employee was bondable and voluntarily choose not to become bonded. The Board did not elaborate on whether the employee, if he was bondable, had a duty to obtain the bond in anticipation of someday displacing to an Agent's position. Also Article II, Section 1 did not contemplate that a disqualification following a displacement would cause a cessation of an employee's protected status. *In Special Board of Adjustment No. 605, Award No. 194 (Rohman)*, a protected employee displaced to an available Record Clerk position but was then disqualified and was furloughed. The employee did not lose his protected status. In *Special Board of Adjustment No. 605, Award No. 418 (Lieberman)*, the Board suggested that a protected employee should possess a motor vehicle operator's license to displace to available position. However, *Award No. 418* is distinguishable from the facts herein because the Board specifically found that other positions were available to the protected employee therein aside from the position requiring a license.

In addition to the precedent set by *Awards Nos. 194, 303 and 514 of Special Board of Adjustment No. 605*, the express language in Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement tends to support the Organization's position herein. Article II, Section 1 provides that a protected employee shall cease to be protected in case of the employee's "... failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements ..." On this property, Schedule Rule 3, Section 2 required Claimants to be fully qualified for the Log Loader position before exercising their seniority to displace Grimm. Thus, Claimants could not exercise their seniority for the Log Loader position under existing rules and so they complied with Article II,

Section 1. Stated differently, existing rules and agreements prevented Claimants from exercising their seniority to Position No. 5DF5-073.

The Carrier contends that Claimant Keffer held Position No. 5DF5-073 for approximately a two month period in early 2000. The Organization retorts that, at the time, the position covered a different piece of equipment. Regardless of whether Claimant Keffer had been qualified for the position in 2000, the evidence is indisputable that, as of December 2001, Claimant lacked the qualifications to displace to Position No. 5DF5-073 because he did not possess a Class A CDL.

While disqualification is not among the events expressly referred to in Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement, *Award No. 1 of Public Law Board No. 4848 (LaRocco)* recognized that both parties could manipulate job qualifications to undermine the spirit and intent of a job stabilization arrangement. If disqualification was presumptively construed as an employee's failure to exercise seniority under Article II, Section 1, the Carrier could wrongfully disqualify an employee and then strip the employee of protective status. Similarly, if an employee knows there is no other job available to him in the exercise of the employee's seniority, the employee may be tempted to intentionally demonstrate a lack of qualification for the available position in order to collect protective benefits. *Award No. 1 of Public Law Board No. 4848 (LaRocco)* held that the parties are forbidden from engaging in either type of manipulation and, concomitantly, they must apply the protective arrangement in good faith.

In this case, the record does not contain any reliable evidence that either Claimant deliberately sabotaged their chances to be qualified for the Log Loader position. To

reiterate, Claimants were lawfully disqualified from the position because they did not possess a Class A CDL. Moreover, Claimant Keffer tried to operate the Log Loader in December 2001 but he could not occupy the boom due to an apparent, but not fully explained, difficulty with "heights". Nevertheless, the Roadmaster accepted Claimant's inability to operate the equipment since the Roadmaster disqualified Claimant from the job. The Roadmaster did not give any hint that he believed that Claimant Keffer intentionally pursued a course of conduct to insure that he would not be qualified for the job. Similarly, there is not any evidence that Claimants or the Roadmaster invoked Rule 39 at the time that Claimants could have displaced junior employee Grimm. More importantly, the record does not reflect how long it would have taken Claimants to obtain Class A CDLs. By the time they acquired Class A CDLs, the window of time to displace Grimm may have elapsed. More importantly, there is not any evidence that Claimants were under a duty to obtain Class A CDLs in anticipation that they would need the Class A CDLs to displace Grimm. Claimants worked in the Vehicle Operator classification without a Class A CDL for a lengthy time period (as long as three (3) years). The Carrier never challenged Claimants' capacity to maintain Vehicle Operator seniority. Therefore, we need not address whether the Carrier could have compelled Claimants to obtain Class A CDLs or whether such a requirement must first be negotiated between the parties. Stated differently, we are not interpreting Rules 1-D and 39 with regard to any mandate that Claimants hold Class A CDLs. Our decision is confined to interpreting the February 7, 1965 Job Stabilization Agreement, as amended.

In conclusion, Claimants could not remain in active service even though they had fully exercised their seniority in accord with existing rules and agreements. Therefore,

Claimants were entitled to their seasonal guarantees covering the days they could not work in the early part of 2002.

## AWARD AND ORDER

1. The Claim of T. E. Pierce is sustained.

2. The Claim of E. Keffer, Jr. is sustained.

3. The Answer to the Carrier's First Question at issue is Yes.

4. The Answer to the Carrier's Second Question at issue is Yes.

DATED: August 4, 2006

R. B. Wehrli
Organization Member

Kenneth Gradia
Carrier Member

Donald F. Griffin
Organization Member

John Hennecke
Carrier Member

John B. LaRocco
Neutral Member