PUBLIC LAW BOARD NO. 3460

Award No. 7
Case No. 7

PARTIES TO DISPUTE — Brotherhood of Maintenance of Way Employes
and
Burlington Northern Railroad Company

STATEMENT OF CLAIM — "Claim of the System Committee of the Brotherhood that:

(1) the Carrier violated the effective agreement when failing to observe established seniority and assigned a junior employee as Group 3 Machine Operator instead of claimant, L. E. Lewandowski, when making assignment on Bulletin 229-8.

(2) Claimant L. E. Lewandowski be allowed the difference between what he earned and would have earned had be been assigned to the Group 3 position advertised by Bulletin 229-8."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisidction of the parties and the subject matter.

This matter involves a unique fitness and ability problem. Rule 22 of the agreement provides with respect to bulletined positions as follows:

> "A. Each new position or vacancy bulletined as provided in Rule 21 will be assigned to the senior qualified applicant who holds seniority on the seniority roster from which the position in question is filled and in the rank of that position. In the absence of such applicants, the senior qualified applicant in the next lower rank and in succeeding lower ranks, if necessary, on the same roster will be assigned...."

Rule 23 in pertinent part provides as follows:

> "Rule 23-Failure to Qualify.

A. Employees awarded bulletin positions, or employees securing positions through exercise of seniority, in a class in which not yet qualified, will not be disqualified for lack of ability to do such work after a period of thirty (30) calendar days thereon. Employees will be given reasonable opportunity in their seniority order to qualify for such work as their seniority may entitle them to, without additional expense to the Company...."

The claimant herein has a Group 3 Machine Operator's seniority date of July 3, 1978. By Bulletin No. 2298 dated August 8, 1980, the Carrier advertised a vacancy on a Group 3 machine, a leased Canron electronic tamper. A junior employee, a Mr. Portenier, with a seniority date of October 23, 1978, in Group 3, was awarded the position even though the claimant had bid on the job. The record indicates that the tamper machine in question was a leased piece of equipment provided by the Canron Corporation and as a condition for leasing the machine, Canron Corporation required that the successful applicants to operate the equipment should have demonstrated their knowledge of the operation and maintenance of the machine by attending a special school which Canron offers annually. The claimant was turned down for the position and his bid was not accepted in view of the fact that from Carrier's point of view he was not qualified in the operation of the type of machine because of his failure to take the classes required for those employed assigned to operate the equipment.

Carrier argues that it was well within its contractual and managerial rights to act as it did in this matter. The position was properly awarded to the junior employee who was qualified to operate the particular tamper whereas the claimant herein was not. Carrier notes that it specifically was required by the lessor to have interested employees attend classes in the operation and maintenance of the machine. Carrier insists that it has the right to require employees desiring to operate the machine to attend such classes. There is no rule in the contract prohibiting this requirement by Carrier. Furthermore, the nature of the requirement by the lessor is fully understandable in view of the cost and complexity of the equipment involved. Carrier states that the classes in question have been conducted for many years and this fact is well known to employees on the territory involved in this dispute. Carrier states further that each maintenance season requests are entertained from interested employees who wish to attend the classes. Carrier states further that:

"Quite often the requests exceed the authorized number of employees who can attend. In that case, the employees chosen are those with the most seniority."

The classes are, of course, offered by the Canron Corporation and not by Carrier. It is clear, according to Carrier, that the claimant herein had not attended such classes when he bid on the position contained in Bulletin 229-8. The employee who was awarded the position, however, had attended classes and was knowledgable in the maintenance and operation of the particular equipment. Hence, the junior employee was indeed the senior qualified applicant for the position. Carrier notes further that the claimant having a Senior Group 3 seniority date is insufficient. The Carrier notes that there was no positive showing by the Petitioner that claimant was qualified to operate the particular machine involved. Carrier notes that Rule 22 was not violated in the particular assignment herein since claimant was not the senior qualified applicant. Furthermore, Rule 23 applies to employees awarded bulletin positions, which was not the case herein. Under the circumstances of the particular requirements for the position involved here, Rule 23 does not require the Carrier to award the position only to have to immediately disqualify the claimant and as such is not applicable to this situation.

Carrier maintains that it has the clear right to exercise its discretion in determining the fitness and ability of an employee for a position. In this instance, the claimant was not qualified, according to Carrier, to fill the electromatic tamper assignment. The burden then shifts to the Petitioner in this instance, according to Carrier, to establish that the Carrier acted arbitrarily and capriciously in not assigning claimant to the position. That burden has not been met, according to Carrier. There is no showing, according to Carrier, that Claimant Lewandowski had sufficient fitness and ability to perform the duties involved.

Petitioner argues that the claimant here had sufficient ability to operate the tamper inasmuch as he had already qualified as a Group 3 Machine Operator and had operated virtually identical equipment solely owned by the Carrier. It is noted further that there is no provision in the agreement providing for attendance at a school operated by a lessor as is indicated by Carrier in this dispute.

The leasing company, Canron, is not a party to the collective bargaining agreement and Carrier was in error, according to Petitioner, in entering into any such training agreement with an outside party contrary to the collective bargaining agreement. Furthermore, according to the Organization, Carrier has failed to make the Canron classes available to all employees by bulletioning or posting notices. For that reason, among others, the claimant was not given an opportunity to qualify for the assignment as required by Carrier, even if the qualification were correct. In support of its position, the Organization notes that it was only after the instant claim was filed that the claimant was offered an opportunity to attend the Canron school. It is quite clear, according to the Organization, from the correspondence with respect to this claim, that the Carrier did not make the Canron classes available to all employees. The Organization insists that the rules over the years have been consistent in their statement of the principle that promotions will be based on ability and seniority and that when an employee's ability is sufficient for a particular position, seniority shall prevail. In this instance, the only reason for the rejection of the claimant's bid was his failure to have the Canron schooling which is not provided for in the agreement. The work of operating a tamper is advertised as Group 3 Machine Operator work and claimant was qualified in that category.

The fundamental principle which this Board adheres to is that a Carrier has the right to determine employees' qualification for particular positions. This determination can only be challenged when it is demonstrated that the decision was arbitrary and erroneous in order for an organization to prevail in opposition to a Carrier's decision. Furthermore, it must be shown that a claimant has the necessary qualifications in order to properly exercise his seniority for a bid job. It also must be noted, and this has been established in the past, that there is no provision in the agreement which indicates that an employee holding seniority in a class must be presumed to have sufficient qualifications to perform the work of every position in that class (see Second Division Award 7935).

With those principles established, however, this dispute has some unique aspects. First, it is clear that in the bulletin for the position in question Carrier failed to indicate any particular special qualifications for awarding the position of leased Canron tamper operator. The bulletin, in fact, did indicate a specific condition for another job on the list that for a truck driver a valid driver's license was considered to be a requirement. Thus, the Board

can find in examining the record of this dispute no evidence to support the fact that there was indeed a specific qualification of attending a training class as a prerequisite to bidding on the particular job involved.

A second major problem in this entire dispute involved the availability of the training in question. Carrier insists that it was well known among all employees that training was available on an annual basis and that it indeed was required on occasion to select employees on a seniority basis when the number of openings was oversubscribed. The record contains, however, no evidence whatever of the bulletining or otherwise notification of employees of the availability of the particular training program. Furthermore, there is no evidence whatever that claimant herein was aware of the training program. In addition there is no rational approach evidenced in the record as to how employees were selected to attend such programs. While Carrier's principles appear to be quite correct and it certainly had the right to require the training program as a condition for the position, it apparently failed to notify employees of its program and also to afford claimant, in particular, the opportunity to enter such a program prior to the bulletining of the particular position.

On balance, Carrier's defense in this dispute cannot be accepted for a number of reasons. First, it is clear that in the bulletin for the position the particular requirements were not specified, thus employees were not put on notice that they had to be a graduate of the training program provided by Canron in order to accept the position or be considered for the position. Second, there is no indication that the training in question was offered on a broad well-known basis to employees throughout the system so that they could, indeed, qualify for future openings on the particular tamper. It was necessary that such requirement be made generally available to employees for Carrier to maintain its right to pick and choose among those who had or had not taken the program without regard to seniority. Thus, the seniority factor indeed must be important and cannot be ignored provided that the qualification opportunity is made available to all employees. There is no indication herein that this was the case. Word of mouth in general is insufficient for such purposes, particularly since the contract provides no such requirement for bidding. Again it must be noted that the Board does not question Carrier's right to establish requirements for a position, nor to make determinations with respect to fitness and ability, however in this instance the Carrier's judgment was faulty. It erred on the bases noted

above and for the reasons indicated the claim must be sustained.

AWARD

Claim sustained.

ORDER

Carrier will comply with the award herein within thirty (30) days from the date hereof.

I. M. Lieberman, Neutral-Chairman

F. H. Funk, Employee Member

W. Hodynsky, Carrier Member

St. Paul, Minnesota
September 30, 1984