

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 41

Case No. 41

STATEMENT OF CLAIM

1. The Carrier violated the current Agreement when it did not allow Mr. C. J. Rodriguez to exercise his seniority over a junior Welder's Helper.

2. The Carrier will now be required to compensate Claimant eight (8) hours straight time rate Monday through Friday, and one-half time rate for all overtime hours worked by the junior Welder's Helper, commencing January 22, 1991, and continuing until violation ceases in accordance with Agreement Rule 27.

FINDINGS

Upon being released for duty after being on sick leave, the Claimant sought to exercise seniority over a junior Welder's Helper. The Carrier refused to permit the displacement, based on the Claimant's having not passed a Book of Rules test and, because of his inability to read or write English, his lack of capacity to do so.

In support of its position, the Carrier cites Operations Department Circular No. OD-14, which states in pertinent part:

All scheduled Maintenance of Way employees (except laborers) will be required to pass biennial examination on Rules of the Maintenance of Way, applicable Safety Rules and General Rules, and other rules and instructions that apply to their craft.

The Organization points out that the Claimant has held seniority as Welder Helper since April 8, 1985, and also holds seniority as Trackman, Assistant Welder, GP 3 Machine Operator, and GP 4 Machine Operator. The Organization also argues that "Helper" should be considered in the same category as "Laborer" in reference to Book of Rules test, but there is clearly no support for this view in Circular No. OD-14.

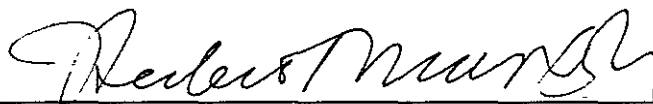
The Carrier, however, raised no dispute as to the Claimant's existing seniority standings at the time of seeking the displacement, except to point out that the Claimant may have worked in "very large gangs". While this may be true, the Claimant's existing seniority as Welder Helper (and other classifications) is not questioned. Given this circumstance, the Referee finds no basis to prohibit the Claimant from making a displacement to which his recognized seniority entitles him.

It may well be that the Carrier, under Circular No. OD-14, may require the Claimant (and others similarly situated) to take and pass a Book of Rules test as a condition of maintaining his position, just as is done with all other employees, other than Laborers. This, however, was apparently not done during the years of the Claimant's prior service. There is no basis to prohibit the

Claimant's exercise of seniority in anticipation of such an examination. The claim must therefore be sustained, except that wage payment shall be limited to the difference between that claimed and the Claimant's actual earnings, and compensation for lost overtime shall be at straight time rather than the overtime rate.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to place this Award into effect within 30 days of the date of this Award.

A handwritten signature in cursive script, reading "Herbert Marx, Jr.", is written over a horizontal line.

HERBERT L. MARX, Jr., Neutral Referee

NEW YORK, NY

DATED: JUL 27 1992