

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 68

Carrier File No. 7MWA 92-04-02G

Organization File No. C-92-A080-6

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier failed to assign Welder L. D. Gordon to the Guernsey, Wyoming welder position via Award bulletin dated November 30, 1991.

2. As a consequence of the above-stated violation, Welder L. D. Gordon shall be allowed all lost wages based on difference in pay between the Guernsey welder position and his current position and that in addition he be paid for each week he is held from this position the mileage compensation at the current rate for 260 miles, as this is the additional amount of mileage he is forced to drive to his residence in North Platte, Nebraska to his current assignment rather than to the Guernsey welder job. Mr. Gordon is also due overtime pay for the additional travel he is forced to make each weekend in the amount of five hours overtime for each week he is prevented from reporting to the welder position in Guernsey, Wyoming.

FINDINGS

The Claimant was hired on April 4, 1991. On September 30, 1991 he was assigned as the successful bidder to a temporary Welder position at New Castle, Wyoming and worked in that position for nearly two months. On November 18, 1991, the Carrier issued Job

Bulletin No. AL-22, which included a temporary Welder position, reading as follows:

Boutet Welders. Job requires elec arc-thermite welding. Operator must have proper license and health card as required by state. Must be DOT qualified.

It is acknowledged that the position is part of a welding gang consisting of a Welder and a Grinder.

The Claimant bid on the position, but it was not awarded to him. In answer to a claim that the Claimant was the "senior qualified bidder", the Carrier responded on March 6, 1992 that, "Safety rules prohibit the assignment of an employee with less than one year of service to a lead position." Upon further appeal and after conference with the highest designated review officer, the Organization wrote to the Carrier on February 22, 1993 as follows:

In the denial of this claim, the denial of our appeal and in the conference of this claim no actual Safety Rule has been identified. The Carrier has had every opportunity to give specifics during the appeals process and has failed to do so.

In further correspondence exchange some months later, the parties referred to compliance with "FRA [Federal Railroad Administration] regulations" as applicable to the job bulletin here under review. Thus, by some indirection, the Board is brought to the only issue in this dispute. That is, does the Carrier properly apply the conditions involved in FRA Track Safety Standards as a prerequisite to selecting a Welder for an on-track welding gang?

Subpart A-General, Section 213.7(a) of FRA Track Safety Standards reads in pertinent part as follows:

(a) Each track owner to which this part applies shall designate qualified persons to supervise restorations and renewals of track under traffic conditions. Each person designated must have--

(1) At least--

(i) 1 year of supervisory experience in railroad track maintenance; or

(ii) A combination of supervisory experience in track maintenance and training from a course in track maintenance or from a college level education program related to track maintenance; . . .

There is no indication, however, that the claim as handled on the property actually discussed, much less resolved, whether or in what manner this requirement applies to an on-track Welder. The discussion which follows here was the result of the Board's request to the parties to provide further information as to FRA requirements and the position at issue here.

The Carrier argues that the Welder position "supervises restorations and renewals of track under traffic conditions" and thus falls under the above-quoted requirement. The Carrier states that the Claimant's earlier two-month assignment to a Welder position was "in error" and does not require the Carrier to compound the error by a further assignment.

The Organization expresses strong doubt that the FRA-required "supervision" of track "restorations and renewals" applies to the Welder position, contending that it more likely refers to a higher level of track supervision.

The Carrier asserts (a) its belief that the FRA requirement applies to the Welder in a on-track welding gang and (b) its right to determine qualifications for its positions.

The Board concludes that the question of whether the Welder position sought by the Claimant is "supervisory" as defined by the FRA simply was not addressed on the property. The claim was denied on a broader reason, without explanation as to its foundation (no lead position to an employee with less than one year's service). There is no explanation of the so-called "error" in the Claimant's previous assignment to an identical position for two months. As noted by the Organization, the bulletin for the position stated no FRA requirement, although such is done on other positions.

The Board concludes that, on this basis, the Carrier did not provide timely support during the claim handling procedure as to why the Claimant should be denied the Welder position. On this basis the claim will be sustained to the extent only of lost wages based on the difference in pay between the Welder position and the position held by the Claimant for such period as the Claimant would have remained assigned to the Welder position on the basis of his seniority.

As should be obvious, this Award does not determine, one way or the other, as to whether the Welder in an on-track welding gang must or does meet the FRA "supervisory" requirement. That is for the Carrier to assert (and explain, if necessary) in timely manner when and if the question next arises and for the Organization to

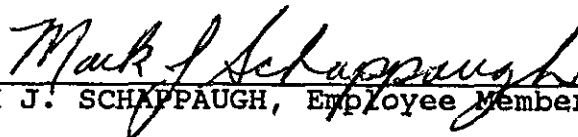
challenge if it disagrees, thus offering the opportunity for on-property resolution of the matter.

A W A R D

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



HERBERT L. MARX, Jr, Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: April 18, 1995