

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 70

Carrier File No. 7MWA 92-06-02E

Organization File No. C-92-A080-8

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned junior employee S. R. Hill, instead of Mr. R. J. Larsen, to the grinder operator position headquartered at Crawford, Nebraska per Award Bulletin AL-04A dated February 29, 1992.

2. As a consequence of the above-stated violation, Claimant R. J. Larsen shall be assigned to the grinder operator position at Crawford, Nebraska. In addition he shall "be made whole for all lost wages and that all expenses incurred be paid in full until this violation of the agreement is corrected. In addition, Mr. Larsen is to be paid at the overtime rate for all additional time he is forced to travel from Crawford to Alliance each day, and any additional travel and expense he is forced to incur while this violation continues, including all mileage, lodging and meal expense he incurs. This claim is a continuing claim for wage and expenses until such time as this assignment correction is made."

FINDINGS

The Claimant established seniority as a Grinder Operator on September 27, 1985. He suffers from a form of epilepsy, but this has not prevented his performance of work as a Grinder Operator.

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Fort Worth, Texas

During the Spring of 1991, the Claimant exercised seniority to acquire the Grinder Operator position headquartered at Crawford, Nebraska. This was a temporary position as part of a two-person welding gang consisting of a Welder and a Grinder Operator.

The Welder assigned to this gang was required to possess a Department of Transportation ("DOT") driver's license in order to perform driving duties for the welding gang. According to the Organization, the Claimant performed his Grinder Operator duties for nearly a year without the DOT license (and without being called upon to drive the gang's vehicle).

In February 1992, the Carrier again bulletined the Grinder Operator position on a permanent basis. When bulletined, the position included the additional requirement that the applicant be "DOT qualified". The Carrier assigned a DOT-qualified junior employee to the permanent position, on the basis that the Claimant did not carry this qualification. The Carrier's Medical Examiner noted, after an examination in March 1992, that the Claimant was "not approved under DOT as a truck driver but approved for all other duties". This finding was apparently based on the Claimant's epilepsy condition which, however, had not previously interfered with his qualification as a Grinder Operator.

The Carrier defended its position on the basis that the Grinder Operator may be required to operate the welding vehicle, apparently assuming the otherwise qualified Welder might be unable or unavailable to do so. The Carrier stands on its right to determine qualifications for its positions and on its own require-

ment to comply with Federal law as to DOT qualification for its vehicle operators.

The Organization argues that the Claimant has extended experience as a Grinder Operator and had not previously been hindered in not being qualified to drive. The Organization further questions the Carrier's unnecessary requirement as to the Grinder Operator, contending it is the Welder who does the driving. As a result, the Organization argues that the Claimant was improperly denied the benefits of his seniority and was required to accept a less desirable position at a distant location.

There can be no question that the Carrier must meet DOT requirements as to vehicle operation. In addition, the Carrier clearly retains the authority to determine position qualifications in reasonable fashion. Here, the Claimant's inability to become DOT-qualified is based on a medical finding, presumably as to the latent epilepsy condition. Despite this, the Claimant has performed Grinder Operator duties over an extended period, including on the assignment here under review. There is no showing that in this instance job performance would be impaired or DOT regulations ignored if the welding crew had continued to rely on vehicle operation by other than the Claimant.

The Carrier has not demonstrated that the Claimant's seniority rights should be ignored for the sake of an arbitrary imposition of a requirement not previously in effect. As a remedy, however, the Board is without authority to go beyond calling for making up the difference in pay between the rate the Claimant would have received

as Grinder Operator if awarded the bulletined position and that he received as Sectionman. This shall apply until the Claimant is permitted to exercise his seniority on the position in question (or for such lesser period as his seniority would have entitled him to the position).

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.*

HERBERT L. MARX, Jr, Chairman and Neutral Member

*Mark J. Schappaugh*

MARK J. SCHAPPAUGH, Employee Member

*D.J. Merrell - A Dismissal. Written Dismissal to follow*

D.J. MERRELL, Carrier Member

NEW YORK, NY

DATED: *July 10, 1995*