

B-2553

PUBLIC LAW BOARD NO. 5696
AWARD NO. 24
CASE NO. 24

BURLINGTON NORTHERN RAILROAD

PARTIES
TO DISPUTE:

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Carrier, particularly Roadmaster Dyche, allegedly unjustly treated Mr. J. P. Reyes when Mr. Reyes was allegedly not allowed to become DOT qualified, was allegedly not allowed to operate and qualify on machines, was allegedly not allowed to be assigned to foreman or assistant foreman positions, and when Mr. Dyche allegedly directed profanity at Mr. Reyes.

(2) As a consequence of the Carrier's violation referred to above, Claimant shall be allowed to become DOT qualified and to be assigned to work as an assistant foreman and a foreman. In addition, this claim seeks payment for any lost wages.

FINDINGS:

Upon the whole record, after hearing, this 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 jurisdiction of the parties and the
LABOR RELATIONS

OCT 27 1997

FT. WORTH

subject matter.

Claimant is a Trackman with 13 years seniority who began working in the Tulsa Yards under the supervision of Roadmaster Rodney Dyche in late 1993. A series of correspondence in which he claims that he is being denied the opportunity to qualify for a machine operator position, as well as to be assigned to a foreman and assistant foreman position, led to an unfair treatment investigation at the request of the Organization, which was conducted on January 20, 1995. Ten witnesses testified including Roadmaster Dyche and Claimant, and various documents were offered into evidence.

A review of the record reveals that the gravamen of Claimant's allegation of unfair treatment centers around a conversation he held with Dyche on November 28, 1994 after he had been informed by Denver that he had been assigned to an assistant foreman position which he bid on in response to Bulletin No 122-A. At that time he was told by Dyche that he was being denied that position because he was not qualified. According to Claimant, among other things Dyche told him that he wasn't qualified because he needed to pass the Book of Rules test and was not FRA certified. Claimant asked Dyche for more time to study for the FRA qualification and he was given it. Dyche indicated that a foreman was required to inspect tracks and that he needed either one year of supervisory experience or a course in track inspection to be qualified. Claimant testified that Dyche asked him a number of questions about track inspection work that he could not answer and told him that his "fucking time" did not count for anything. Claimant averred that Dyche told him to get his supervisory inspection experience on a steel gang, which caused him emotional distress and discouraged him; Dyche did not recall

suggesting that Claimant go to a tie or steel gang to get his experience.

Claimant also testified that he had asked to be trained on various machines but had been denied that opportunity. Claimant stated that in September, 1994 Dyche would not allow him to operate a machine indicating that Claimant would have to qualify on his own time on the machine and have a valid CDL license to be qualified as a DOT driver. Claimant and other witnesses indicated that Claimant had expressed an interest in qualifying on his own time at safety meetings, but was not allowed to. Dyche testified that Claimant never let him know when he was available or wanted to schedule the weekend work, and had not passed the Book of Rules test at the time which was a requirement to qualify on a machine. The investigation reveals that Claimant was given an opportunity to operate a speed swing machine, but was removed for safety reasons because there were people around at the time.

The record reflects that Claimant had passed prior Rules exams in 1992 when he worked under the Burlington Northern Fort Worth & Denver Federation agreements, whose qualification requirements for various positions were different. A new Rule Book was issued on April 10, 1994 and all employees were given a few hours to study prior to being required to take an exam. Claimant did not pass that exam until he was given it again on December 12, 1994. Claimant passed the open-book FRA test on December 9, 1994.

Claimant took and passed the written test for his CDL license on November 21, 1994. He testified that when he asked Dyche if he could use the company truck to take the driving test he was told that he could only if he bid on and was assigned to a position requiring a DOT qualification.

Dyche testified that he never refused to let Claimant use a company truck for the driving exam, and that employees are routinely permitted to do so after they pass the written test for the CDL license. Dyche stated that Claimant never informed him that he had passed the written part of the test.

Evidence was introduced during the investigation concerning 2 named employees who were permitted to qualify on machines during working hours and who had less seniority than Claimant. It is clear that they had passed their Rules Book test at the time. Dyche explained that this occurred during a period when there were sufficient laborers to cover the required work prior to Claimant's arrival on the gang. Dyche recalled not being able to spare Claimant when he asked due to the heavy workload for laborers at the time. Two employees were also mentioned as having been assigned to a foreman's position without previous experience. The circumstances of such assignments were not made clear during the investigation.

A number of witnesses testified that they felt that Dyche showed favoritism and tried to advance employees he knew or liked with less seniority over others like Claimant. All witnesses indicated that the use of profanity was normal for Dyche and was common talk among the employees at work. A few witnesses also expressed their opinions that Claimant was capable of becoming a machine operator or foreman. The record reflects that Claimant was permitted to rebid the assistant foreman job after he got his Rules and FRA qualifications, and at the time of the investigation had been allowed to work that position.

The Organization contends that Dyche never gave Claimant a chance

to qualify for the stated positions, noting that he is capable of passing the required tests and did so when given a second opportunity. The Organization requests that Claimant be given his foreman seniority back to his original assignment to Bulletin No. 122-A, that he be assigned to the position of assistant foreman track walker and be compensated for all time lost in that position. It also asks that Claimant be allowed to obtain his CDL/DOT qualifications and be given the chance to qualify for a machine operator position.

Carrier argues that the Organization failed to meet its burden of proving unfair treatment since Claimant did not have his Rules Book, DOT or FRA qualifications at the time Dyche turned him down for various requested positions requiring such qualification. It also notes that profanity is commonly used in the work place, and was not directed specifically at Claimant.

A review of the entire record convinces us that the Organization has failed to sustain its burden of proving by substantial evidence that Claimant was unjustly treated in the manner alleged. While there is no doubt that Claimant's perception may well have been that he was being passed over in favor of less senior employees, the record reflects that Claimant did not have equal qualifications to the other named employees at the relevant times since he had not yet passed his Book of Rules or FRA tests or obtained his CDL license. Absent proof that Dyche deliberately delayed giving Claimant a second attempt at passing the Book of Rules test, that Dyche was the proper person to actually administer the test, or that he gave others another chance to take the test prior to Claimant, the Board is unable to conclude that Dyche was responsible for Claimant's failure to qualify for the various positions. The record does indicate that when

Claimant asked for a little more time to pass the FRA test, Dyche afforded him that opportunity, which ultimately resulted in his qualification for the assistant foreman position. There is no proof that when Claimant was actually qualified, he was denied the opportunity to hold a position.

The various Rules cited by Carrier during the investigation lend support to our conclusion. Article 3, Rule 18(3) requires a valid CDL license to qualify for a driver position, and Rule 22(d) requires a Machine Operator to have passed the Book of Rules test. Rule 2 requires that a Machine Operator qualify on the machine on his own time and at his own expense. The record reflects that this rule has been enforced when employee's request such position, which was the case herein, rather than when Carrier deems it necessary to assign someone to a machine operator position. FRA Track Standards Regulation 213.7 establishes the experience requirements for foreman who perform track inspection work. It is clear from the record that at the time of the November 28, 1994 conversation between Dyche and Claimant, he was not machine-qualified, had not passed his Book of Rules or FRA test, and did not possess a CDL license.

This Board notes that it does not sanction favoritism. However, we are unable to conclude that the record in this case supports an allegation of favoritism or unfair treatment of Claimant. Rather, the Board finds that the record supports Carrier's contention that Claimant was not denied a truck to take his driving exam since he had not informed Dyche that he had passed the written portion of the CDL exam. Further, we are unable to find that profanity was directed at Claimant any more than its common usage in the work place in general. Under the circumstances of this case, the Board is of the opinion that the claim must fail for lack of substantial evidence supporting its allegations.

AWARD:

The claim is denied.

Margo R. Newman
Margo R. Newman
Neutral Chairperson

Thomas M. Rohling
Thomas M. Rohling
Carrier Member

E. R. Spears
E. R. Spears
Employee Member

Fort Worth, Texas
October 30, 1997

