PUBLIC LAW BOARD NO. 6792

PARTIES TO DISPUTE	)	**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**
	)	
	)	**UNION PACIFIC RAILROAD COMPANY**

I. STATEMENTS OF THE QUESTION

The parties have different views of the statement of the question in this dispute, which are as follows:[1]

A. The Organization

Do existing rules and practices under the January 1, 1973 Agreement (as revised) permit Union Pacific to place DOT certification and/or Commercial Driver's License ("CDL") qualifications on foreman or assistant foreman positions?

B. The Carrier

Do existing rules and practices under the collective bargaining agreement prohibit Union Pacific from requiring foreman and assistant foreman to operate trucks as part of their duties and qualifications and thereby obligate such employees to obtain commercial drivers licenses and/or DOT certification?

[1] Organization Submission at 1; Carrier Submission at 1 (and as amended at the hearing).

II. OPINION OF BOARD

A. The Carrier's Ability To Require That Foremen And Assistant Foremen Obtain CDL And/Or DOT Certification

Notwithstanding how the parties frame the question, the dispute in this case is over the Carrier's ability to require foremen and assistant foremen who may be reasonably required to operate certain vehicles as part of their job duties to obtain a CDL or DOT certification.

In terms of structuring the analysis of the dispute, this is, for all purposes, a contention by the Organization that the Carrier's imposition of such requirements violates existing contract language. The burden is therefore on the Organization to make that showing. We find that the Organization cannot meet that burden.

Generally, a carrier has the basic inherent managerial right to establish qualifications for

positions.[2] Obviously, the Carrier can waive that right. But, if a waiver is going to be found, it should be "clear and unmistakable".[3]

Therefore, unless clearly prohibited by the Agreement, the Carrier has the managerial right to impose reasonable qualifications for the positions of foremen and assistant foremen, including a requirement that they obtain a CDL or DOT certification. *See e.g., Third Division Award 35010*:

> The Carrier has the right to establish qualifications for a job, subject to the requirements being reasonable. In Third Division Award 26295 the Board held:
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> > ... [T]he Carrier retains the right to set the qualifications for a job; and if the Carrier determines at some point that it wants to have only employees who possess valid driver's licenses in the particular position, that determination is fully within its managerial rights, as long as there is a rational basis for it. In this case, it is not unreasonable for the Carrier to want a person who can drive in the Track Foreman's position. Consequently, even if the Claimant had performed the identical job in the past, there is nothing to preclude the Carrier from altering the job qualifications and requiring that any applicant who is to be selected have a valid driver's license. The Organization contends that other employees do the driving for that position; however, this Board finds that there is nothing to preclude the Carrier from changing the past practice and requiring that all people assigned to that position be able to drive.

The Organization points out that the Truck Driver is required to have a CDL to drive the equipment, while the EWE operates the equipment. However, the Carrier points out that the work classification rule of the Agreement provides that "[t]he description of each position title outlined in this Article is intended to cover the primary duties of that position and, in addition it is understood that each title comprehends other work generally recognized as work of that particular classification". The Carrier asserts that it is requiring a CDL for EWEs so that in the event the Driver is absent the equipment can be operated on the road by the EWE. While perhaps subject to debate, we cannot find that the Carrier's reason for requiring EWEs to have a CDL to be lacking in a rational basis. In those circumstances where a Truck Driver is absent and a replacement is not available, having an EWE with a CDL will allow driving the equipment on the road, if necessary, and will therefore allow for further use of the equipment. Requiring an EWE to have a CDL is therefore reasonable. Given that the requirement for an EWE to have a CDL is a reasonable one, our inquiry can go no further.

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[2] *Third Division award 26295* ("... the Carrier retains the right to set the qualifications for a job ....").

[3] *See e.g., Metropolitan Edison Co. v. National Labor Relations Board*, 460 U.S. 693, 708 (1983) holding in an analogous situation that "... the waiver [of a right] must be clear and unmistakable."

Other awards have come to the same conclusion.[4]

Therefore, in the event a foreman or assistant foreman is reasonably required to operate a vehicle which would otherwise require the operator to have a CDL or DOT certification, we cannot say that the Carrier's determination to require that individual to have a CDL or DOT certification is an unreasonable one or one lacking a rational basis.

But no matter how rational or reasonable the Carrier's requirement may be, again, if the Agreement prohibits the Carrier from imposing the requirement, the Carrier cannot do so. The focus now turns to the contract language.

Because the Organization has the burden, it must show that *clear* contract language *prohibits* the Carrier from imposing the requirement that a foreman or assistant foreman who may operate certain vehicles as part of that individual's job duties obtain a CDL or DOT certification.[5] We find that clear contract language does not exist which prohibits the Carrier from imposing the qualifications it seeks. There is nothing in the language cited by the Organization which states, to the effect, "only employees in the following foreman or assistant foreman positions shall be required to possess a CDL and/or DOT certification".

Because clear language does not prohibit the Carrier from imposing the CDL or DOT certification requirement for foremen and assistant foremen, we therefore find that the Carrier can require those individuals who may reasonably be required to operate certain vehicles as part of their job duties to possess such license or certification.

The Organization's well-framed arguments do not change the result.

First, the Organization argues that the governing contract language supporting its position is clear.[6] The Organization points to Rules 5, 8, 9 and 10 and argues that those rules classify employees and make reference to various

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[4] *See e.g., Third Division Awards 36992, 36629, 35434, 35310, 33514, 32353, 31257, 31715, 31156, 29851, 26295; SBA 1016, Award 94; SBA 1135, Award 1.*

[5] *Third Division Award 34207:*
The initial question in any contract interpretation dispute is whether clear contract language exists to
[footnote continued]

[continuation of footnote]
resolve the matter. Because the burden is on the Organization, the Organization is therefore obligated to demonstrate clear language to support its claim ....

[6] Organization Submission at 27-35.

classifications of truck and equipment operators or welders and specifically refer to "required licenses".[7] Then, as the Organization points out, Rule 6, which governs "Foreman - All Classifications", makes no reference to licenses. The Organization then concludes:[8]

> Reading the plain language of Rules 5, 6, 8, 9 and 10 in conjunction establishes beyond any question that existing rules do not permit UP to require any foreman classification (foreman or assistant foreman) to obtain a CDL or perform truck driving work as part of their duties. The only exception to these general rules is the Truck Driver Foreman classification which the parties specifically chose to include in the special August 16, 1993 Agreements concerning CDL truck drivers.

The Organization argues that "... when the parties intended employes in particular classifications to perform truck driving work and obtain special licenses necessary to perform that work, they explicitly listed those requirements in the job classification as required by Rule 5."[9]

But, as well-crafted as that argument is, it is a boot-strapping one and ultimately not persuasive. What the Organization is *really* arguing is that we should apply the rule of contract construction which states that that to express one thing is to exclude another.[10] Here, according to the Organization, where the parties intended a requirement for licenses or certifications, they said so. Thus, according to the Organization, where no language is found to require a license, the parties obviously did not intend that to be a requirement.

That is a very good argument. However, the threshold premise for that argument is missing. The rules of contract construction apply *only* when contract language is ambiguous.[11] There is *no* language

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7 *See* Rule 8 (carpenter truck operator, mason truck operator, painter truck operator steel erection truck operator); Rule 9 (track welder-arc weld process, truck operator, section truck operator); and Rule 10 (equipment operator).

8 Organization Submission at 32-33.

9 Organization Submission at 32.

10 Elkouri and Elkouri, *How Arbitration Works* (BNA, 5th ed.), 497 [footnotes omitted]:

> Frequently arbitrators apply the principle that to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others. To expressly state certain exceptions indicates that there are no other exceptions. To expressly include some guarantees in an agreement is to exclude other guarantees.

11 Third Division Award 35457 ("... when language is not clear, the tools of contract construction can be used.").

which is ambiguous which would allow the rules of contract construction to come into play. Indeed, there is no language at all governing CDL and DOT certification requirements for *all* foremen or assistant foremen. Coupled with the inherent managerial prerogative of the Carrier to determine qualifications for positions discussed in the awards cited above — particularly with respect to requirements for CDL and DOT certifications — the Organization cannot selectively pick language in other parts of the Agreement governing other employee classifications as it has done here and then argue that the language is "clear" supporting its position or that the parties would have placed similar requirements in Rule 6 had they intended those licensing and certification requirements to apply. To apply this rule of contract construction, there must first be ambiguous language. The fact is that there is *no* language which serves as a prohibition on the Carrier's managerial prerogative to determine qualifications — here the CDL and DOT certification requirements. Absent ambiguous language, this rule of contract construction does not apply.

Second, the Organization argues that bargaining history supports its position.[12] Bargaining history is another tool used to ascertain the intent of ambiguous language.[13] But again, before this tool of contract construction can be used, there must first be a showing that ambiguous language must be interpreted. And, as discussed above, there is no ambiguous language — indeed, there is no governing language prohibiting the Carrier from establishing these qualifications.

But even if we could consider bargaining history and thus giving the Organization the benefit of the doubt, the Organization's bargaining history argument would not prevail. The parties have offered their perspectives on what occurred during various rounds of bargaining from 1993 through 2001.[14] To say the least, the parties' views of what transpired during those lengthy negotiations, are "different". Briefly

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[12] Organization Submission at 35-38.

[13] *Third Division Award 34024* ("One important tool for ascertaining the parties' intent for ambiguous language is bargaining history.").

[14] Organization Submission at 35-39; Declaration of Vice President R. B. Wehrli. *Compare*, Carrier Rebuttal Submission at 1-16.

stated, the Organization views the focus of the various sets of negotiations as directly related to licensing requirements, while the Carrier views the negotiations as occurring because of "sharp shooting" by employees who would let their licenses expire until a position came up for bid which they desired to work, at which time they would get their licenses renewed, with the result that there were inflated rosters of drivers who did not have licenses.

Obviously, from the divergent views of what occurred during bargaining as shown in this record, we cannot sort out from a credibility standpoint what actually transpired. But the Organization has raised the issue of bargaining history as supportive of its position. Having done so, the Organization has the burden to demonstrate more than it had a good faith belief that the final product of the rounds of bargaining resulted in a conclusion consistent with its position in this case. Instead, the Organization must show that there was a "meeting of the minds" at the bargaining table consistent with its position in this case that the Carrier conceded its managerial prerogative to require all employees who operate certain vehicles to have a CDL or other DOT certification.[15] Given the parties' divergent positions on what transpired during bargaining over the years, we cannot find that the Organization has carried its burden. We have no doubt that the Organization believed it achieved the result it advances in this case. However, the Organization has not sufficiently shown that the Carrier

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[15] *See Gill Studios, Inc.*, 52 LA 506, 510 (Madden, 1969):

> ... [T[here must be clearly established the specific nature of the agreement that was reached, and the presence of mutual acceptance of the terms of that agreement. It is not enough to show that one side believed an agreement had been reached, for mutual acceptance means that it must be proven by supporting evidence that the other side knew it was entering into the same agreement. Furthermore, the burden of proof rests with the party claiming the existence of the agreement.

See also, Ajayem Lumber Midwest, 88 LA 472, 473 (Shanker, 1987) [emphasis added]:

> Even if I were wrong in my decision that the parol evidence rule excludes the evidence presented by the Union to justify its position, the Union still would lose this case. This is because the Union at the hearing simply presented evidence of its own understanding of what they thought they had negotiated with respect to stop payment bonuses. None of the Union's evidence indicated that this understanding was communicated to management during the negotiations; or, if it was, *that management had agreed to it.*

was in agreement with the Organization's belief.

Third, the Organization relies upon a past practice argument to support its position.[16] Past practice is another tool for unscrambling the intent of language — but, as before, to use this rule of construction, there must first be ambiguous language, which is not present in this case.[17] But again giving the Organization the benefit of the doubt, even if we assumed that ambiguous language existed, the Organization's past practice argument is not sufficient to change the result.

The Organization asserts that following the execution of the August 16, 1993 Agreements, when the Carrier bulletined truck driver positions it specifically made reference to any CDL qualifications and when it bulletined any other position (including foremen positions other than truck driver foremen), the bulletins made no reference to CDL qualifications.[18] Further, according to the Organization, when the Carrier attempted to require several foremen to perform truck driving work that required a CDL, the Organization protested and the Carrier thereafter refrained from bulletining any foremen or assistant foremen positions with a CDL qualification requirement.[19] In response, the Carrier counters the Organization's past practice argument asserting that it always maintained that that it had the right to require foremen and assistant foremen to have a CDL or other DOT certification and its reasons for bulletining the positions in the way it did were because of a strike threat by the Organization for asserted unilateral changes and a desire to have the matter finally resolved.[20] According to the Carrier, "... the Carrier agreed to hold off on applying it [CDL and DOT certification requirements] to the Foremen and Assistant Foremen on the territory of this particular BMWE General Chairman until the

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16 Organization Submission at 39-40.

17 *Third Division Award 22214* ("Relative to the contention of the Carrier concerning past practice, we must note that Rule 6 is clear and unambiguous and even if past practice had been established, it does not nullify the clear requirements of Rule 6").

18 Organization Submission at 39; Wehrli Declaration at ¶¶ 17-19.

19 Organization Submission at 40; Wehrli Declaration at ¶¶ 20-27, 35-36.

20 Carrier Submission at 3-4; Carrier Rebuttal Submission at 17.

issue of qualifications being placed on bulletins could be resolved."[21]

"To be a past practice, the conditions in dispute must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties."[22] Where the evidence shows that part of the reason for the Carrier acting as it did with respect to bulletining positions and refraining to place the CDL and DOT certification requirements in the bulletins was because of a strike threat by the Organization or that the Carrier desired to hold off implementing the requirements until the dispute was resolved, the Organization has not shown that the asserted practice was "accepted by both parties." Past practice has not been shown.

Finally, the Organization contends that the result of the Carrier's interpretation will lead to absurd and nonsensical results in that foremen and assistant foremen not covered by the various agreements for whom the Carrier seeks to impose CDL or DOT certification requirements would lose benefits given to other employees who must get licenses and the foremen and assistant foremen "... would be required to train on their own and bear all licensing costs, all without any increase in pay."[23]

Again putting the ambiguous language requirement aside, "[o]ne of the rules of contract construction is to interpret language to avoid illogical results."[24] The Carrier countered the Organization's loss of benefits argument by showing that employees, including foremen and assistant foremen are given assistance in acquiring CDLs and DOT certifications along with other benefits to meet those requirements.[25] There is nothing to show that those foremen and assistant foremen who may now be required to obtain CDLs or DOT certifications will not be treated in the same fashion.

We therefore conclude that the Carrier can require foremen and assistant foremen who may reasonably be required to operate

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[21] Carrier Submission at 4-5.

[22] *Second Division Award 13681.*

[23] Organization Submission at 40-41.

[24] *Third Division Award 35934.*

[25] Carrier Rebuttal Submission at 18-19 and statements referenced therein.

certain vehicles as part of their job duties to obtain a CDL or DOT certification.

B. The Scope Of Our Decision

We must emphasize the limitation upon the scope of our conclusion in this case. We have found that the Carrier can require foremen and assistant foremen who may reasonably be required to operate certain vehicles as part of their job duties to obtain a CDL or other DOT certification. The Carrier is a vast, wide-ranging system and it may well be that there are foremen or assistant foremen positions which do not reasonably require the operation of vehicles that otherwise would necessitate the operator to have a CDL or other DOT certification. This decision obviously does not apply to those individuals. Disputes in that regard will have to be addressed through the orderly claims handling procedures. However, for those foremen and assistant foreman whose positions may reasonably require them to operate such vehicles, the Carrier can make the holding of a CDL or other DOT certification part of the qualifications for those positions. Further, should the Carrier now choose to require foremen or assistant foremen to obtain CDL or other DOT certification, given the length of time that this issue has festered between the parties, those foremen and assistant foremen who presently do not hold such credentials shall be given a reasonable amount of time to meet those qualifications.

III. AWARD

Subject to the conditions set forth in II(B) of the opinion, the Carrier can require foremen and assistant foremen who may be reasonably required to operate certain vehicles as part of their job duties to obtain a CDL or other DOT certification.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Chicago, Illinois

Dated: July 22, 2005