

**BEFORE
PUBLIC BOARD No. 7100**

**Award No. 2
Case No. 2**

**BROTHERHOOD OF MAINTENANCE OF)
WAY EMPLOYES)**

VS.

UNION PACIFIC RAILROAD COMPANY)

**) PARTIES TO
) DISPUTE**

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

Appeal by the Organization on behalf of D.G. Miller alleging that on March 8, 2002¹, the Carrier failed to assign Miller a welder helper position, Bulletin No. 3438, at Trenton, Missouri. As a remedy, the Organization asks for Miller to be compensated for the differential wages from the trackman position he held to the bulletined welder helper position between March 8 and April 5, when he was assigned to a machine operator Class B position and to acquire a welder helper seniority date March 8, and be placed upon the appropriate seniority rosters.

FINDINGS:

The following facts are undisputed; Claimant has seniority in the Track Subdepartment date March 15, 2000, and assistant track foreman seniority date of October 13, 2000. On February 28, Carrier issued bulletin No. 3438 at Trenton, Missouri for the welder helper position in question. The bulletin stated a Commercial Drivers License ("CDL") and a certification by the U.S. Department of Transportation ("DOT") was required for the position. On March 8, Carrier announced the position was not awarded for insufficient bids. Thereafter, Carrier re-issued the bulletin for the welder

¹ All dates hereinafter refer to the year 2002 unless otherwise specified.

helper position under Bulletins No. 3444 and 3469. Claimant submitted his bid for both bulletins No. 3444 and 3469. None of these bulletins were awarded. On March 28, Claimant acquired his CDL license and DOT certification. On March 28, the Carrier re-issued the bulletin for the welder helper position under Bulletin No. 3485 and Claimant again placed his bid. On April 5, the position was awarded under Bulletin No. 3485 to J.M. Davis, who had established welder seniority in 2001. That day, on April 5, Claimant was awarded a Class B machine operator position.

The Organization argues Carrier should have assigned Claimant to the welder helper position effective March 8, when it closed its first bulletin No. 3438 without assigning the position, because he was the most senior qualified applicant in the next lower classification. The Organization argues by failing to assign Claimant to the bulletined position on March 8, the Carrier violated Rules 2B, 4D, 7A, 7B-4, 15 and 16J of the November 1, 2001 Agreement ("the Agreement").

RULE 2- SUBDEPARTMENTS

The following subdepartments are within the Maintenance of Way and Structures Department.

- A. Bridge and Building Subdepartment
- B. Track Subdepartment
- C. Roadway Equipment Repair Subdepartment

* * *

B. Track Subdepartment

- 1. Track Supervisors
- 2. Track Foremen
- 3. Assistant Track Foreman
- 4. Truck Drivers
- 5. Welders
- 6. Welders Helpers
- 7. Trackmen and Crossing Watchmen
- 8. Machine Operators
- 9. Assistant Machine Operators

10. Track Walker

RULE 4- SENIORITY

- D. Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company.

RULE 7- SENIORITY LIMITS

- A. Separate seniority in the B&B and Track Subdepartment shall be established in the following classes:

* * *

Track Subdepartment

1. Track Supervisors
 2. Track Foremen (including Classes A, 1, 2 and 3)**
 3. Assistant Foremen (including Assistant Foremen-Truck Drivers)
 4. Trucks Drivers
 5. Trackmen and Crossing Watchmen
- * Treated equal in class for promotion purposes.
- ** Class A- Foremen on track gangs of 18 or more
Class 1- Foremen on track gangs of less than 18
Class 2- Section Foremen, Headquartered Maintenance Foremen, and B&B Foremen
Class 3- Flagging

- B. Supplemental rosters, where applicable, shall be maintained separately for the following classifications for the Seniority Districts identified in Rule 5:

4. Welders including Helpers

RULE 15-ASSIGNMENTS-PROMOTIONS

Promotion is advancement from a lower classification to a higher classification within a Subdepartment.

Assignments and promotions will be based on seniority, fitness and ability. Fitness and ability being sufficient, seniority shall prevail.

Employees are entitled to promotions to positions coming within the scope of this Agreement in the Seniority District and Subdepartment in which they hold seniority.

Employees declining promotion shall not lose their seniority in the class in which employed or in lower classes.

Employees accepting promotion and failing to qualify within sixty (60) calendar days will return to their former positions. In the event their former position has been filled, the employee filling the position shall return to his former position.

RULE 16-BULLETING NEW POSITIONS AND VANCANCIES

J. Assignments to new or vacant positions shall be as follows: by assigning the senior qualified applicants of the class in which the vacancy occurs as defined in Rule 7. An employee vacating a position shall not be eligible for assignment to the vacancy created thereby unless there are no other applicants or the position has been filled and is again vacated.

If no such qualified applications are received, then the position shall be filled by assigning the senior qualified applicant of the next lower class, successively, until the vacancy is filled.

The Organization argues Rule 16 provides if no qualified applications are received, as in this case, the position should be filled by assigning the senior qualified applicant of the next lower class, successively, until the position is filled. It further argues in accordance with Rule 15 of the Agreement, employees promoted from a lower classification are entitled to sixty (60) calendar days to qualify for the position. The Union asserts Claimant is the most senior qualified applicant in the lower class, and as such, Carrier should have assigned the welder helper position to him on March 8 rather than re-issuing the bulletin until it was assigned to Davis. It also claims Claimant could have obtained his CDL license and DOT certification within the sixty (60) days provided in Rule 15. In addition, the Organization claims the Carrier past practice has been to give employees ten (10) calendar days following the assignment to obtain the CDL license and

DOT certification. The Organization asserts Claimant passed the CDL written test in 2001, a year before the bulletin was issued for the welder helper position. According to the Organization, Claimant was unable to complete the driving portion of the CDL test because his manager, MTM Langan, did not provide him with the Company vehicle for the test. It contends Claimant should not be held responsible for the Carrier's failure to provide him with a vehicle for the test. Claimant obtained his CDL license on March 16, and received his DOT certification on March 28. Essentially, the Organization insists seniority was ignored and was not given the opportunity to qualify for the position as provided by the clear language the Agreement.

Carrier, on the other hand, argues the Agreement was not violated because the welder helper position was assigned to Davis, the most senior bidder in the welder's classification who possessed the required CDL license and DOT certificate. Initially, according to the Carrier, when the bulletin was first issued, two bids were submitted for the position, including Claimant's bid. Neither of the bidders possessed the required CDL license or DOT certification and thus, the bulletin was closed without being assigned. The Carrier then issued two other bulletins for the welder helper position. The bulletins were closed because none of the bidders possessed a CDL license and DOT certification. On April 5, the position of the welder helper under bulletin No. 3485 issued on March 28, was assigned to Davis, who had seniority in the classification of welder helper and possessed the required CDL license and DOT certification.

Carrier also argues the requirement for the welder and welder helper to possess a CDL license and DOT certification is within its managerial rights. The trucks assigned to welders and welders helpers weight over 26, 000 pounds. Federal and State law requires

drivers operating vehicles of more than 26,000 pounds to possess a CDL license and DOT certification. Carrier implemented a policy in June 1999, which requires drivers to possess all the licenses and certifications required by law.

In addition, Carrier asserts seniority is not the only factor that it needs to consider when making an assignment or a promotion. Rule 15 of the Agreement specifically states "Assignments and promotions shall be based on seniority, fitness and ability. Fitness and ability being sufficient, seniority shall prevail." It asserts fitness and ability means that the employee should be qualified for the position. Carrier argues the Organization has not met its burden to establish on March 8, Claimant was fully qualified for the welder helper position when the Carrier did not assign him to the first bulletin No. 3438. With regard to the Organization's argument the Agreement provides qualification may occur after the assignment and Carrier should have given Claimant the sixty (60) calendar days provided the Agreement, Carrier asserts; in promotion situations, an employee cannot begin to qualify for the position when he lacks the necessary pre-requisites for the position. Therefore, the Carrier asks the Board to dismiss the Organization's claim on behalf of Claimant.

After reviewing the record facts, the Board finds the grievance must be denied. When Carrier exercises its right to assign a position based on fitness and ability, the Organization has the burden to prove the claimant's qualifications. Similarly, it is the Organization's burden to demonstrate the Carrier exercised its judgment in an unreasonable, arbitrary, capricious or discriminatory manner in order to establish the Agreement was violated. The underlying issue is whether Carrier could properly deny Claimant the bulletined welder helper position (Bulletin Nos. 3438, 3444 and 3469)

because he did not possess the required CDL license and DOT certification. Carrier can require welders and welder helpers to possess a CDL license and DOT certification.

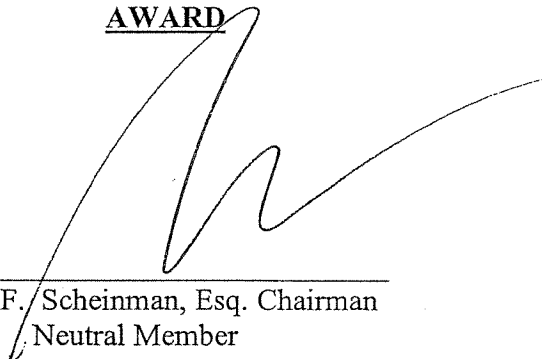
Further, the Board considered the Organization's claim Claimant did not possess his CDL license and DOT certification in March, because the Carrier failed to provide him with a company vehicle for the driving portion of the test. The Board finds there are no contractual basis, in this case, for holding Carrier responsible for Claimant's inability to secure his CDL license and DOT certification prior to the bulletined position in question.

In addition, Board considered the Organization's argument Claimant should have been assigned to the welder helper's position even if he did not possess a CDL license and DOT certification. The Board finds the Organization failed to establish its past practice claim since there is simply no probative record evidence to establish a past practice existed granting employees ten (10) calendar days to secure their CDL license and DOT certification. The Board also rejects the argument Claimant should have been given sixty (60) calendar days to secure his CDL license and DOT certification. In cases where an employee is seeking a promotion in a higher seniority classification within a subdepartment, the Agreement provides an opportunity should be given to the applicant with 'the requisite fitness and ability' *albeit* inexperienced or lack of a particular skill to demonstrate that he can perform the work in a satisfactory manner within the qualifying time provided by the Agreement. This "fitness and ability" means the employee has the requisite intelligence, training and experience that it could be reasonably assumed he could do the work in a satisfactory manner within the time provided by the Agreement. Stripped to its essence, there are minimum requirements that the applicants needs to meet

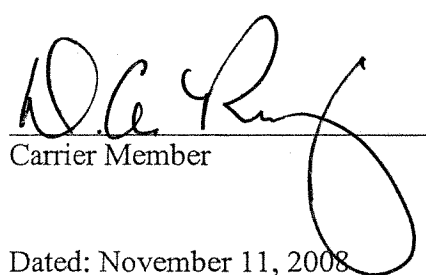
before he is assigned to the position and given the opportunity to demonstrate his abilities. It is Carrier's prerogative to determine if the minimum qualifications of fitness and ability are met and unless there is sufficient probative evidence to the contrary, the Board will not disturb the Carrier's determination. In this case, the Board finds the Organization failed to meet its burden to establish Carrier's determination Claimant lacks the minimum qualifications for the welder helper position was unreasonable, arbitrary or discriminatory. Carrier is under no obligation to put an employee in a driving position without the necessary licenses, certifications and endorsements. Accordingly, the claim is denied.

Claim denied.

AWARD



Martin F. Scheinman, Esq. Chairman
Neutral Member



Carrier Member



Organization Member

Dated: November 11, 2008