

**BEFORE
PUBLIC BOARD No. 7100**

**Award No. 3
Case No. 3**

**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 C.J. Westeng alleging that on April 12, 2002¹, the Carrier failed to assign Westeng a welder position, Bulletin No. 3506, at Albert Lea, Minnesota. As a remedy, the Organization asks for Westeng to be compensated for the differential wages from the track foreman position he held to the bulletined welder position between April 12, until he was assigned to a welder position and to acquire M/W Welder and Welder Helper seniority date April 12, and be placed upon the appropriate seniority rosters.

FINDINGS:

The following facts are undisputed: Claimant has seniority in various classes in the track subdepartment in District T-2 Zone C. On April 4, Carrier issued the bulletin for the welder position in question. The bulletin stated the position required a Commercial Drivers License ("CDL") and a certification by the U.S. Department of Transportation ("DOT"). On April 12, Carrier announced it did not assign the welder position stating there were no qualified bids ("NQB"). Thereafter, the position was re-

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

bulletined and Claimant again placed his bid. On April 26, Claimant was assigned to the bulletined welder position No. 3542.

The Organization argues Carrier should have assigned Claimant to the bulletined welder position because he was the most senior bidder for the vacancy and he was fully qualified since he had the required CDL license and DOT certification for the position. Specifically, the Organization alleges Claimant had a CDL license since April 1, 2001. In support of this claim, it submitted a copy of Claimant's CDL license which expires on April 26, 2005, claiming all CDL licenses are issued for a four year period. According to the Organization, this means Claimant's CDL license was issued on April 2001. It also submitted copies of Claimant's DOT certification which shows the medical examiner's certificate expires on February 1, 2003, claiming the DOT certificates are issued for a two year period. This means, according to the Organization, Claimant's DOT certificate was issued on February 1, 2001. The Organization argues by failing to assign Claimant to the bulletined position when he was fully qualified, the Carrier violated Rules 2B, 4D, 7B-4, 15 and 16 J and 17 C of the November 1, 2001 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

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 promotion 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 shall 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.

RULE 17- CONCURRENT SENIORITY

C- All employees holding seniority under this Agreement shall be shown on either the basic B&B roster or basic Track roster with appropriate seniority dates. For the supplemental rosters which include higher classes, the same principle as set forth in sections A and B of this Rule 17 shall apply; i.e., employees shall be given a concurrent seniority date in all lower classes covered by the supplemental roster involved. Employees hired for machines that are utilized in both Track and B&B Subdepartments shall be required to designate whether they desire their seniority on the basis Track or basic B&B roster.

Alternatively, the Organization argues even if Claimant did not possess his CDL license and DOT certificate prior to April 12, Carrier should have assigned him to the welder's position. In so doing, it argues Claimant was seeking to establish new seniority rights in a higher classification within a subdepartment when he bid for the welder position. In these circumstances, it argues, Rules 4, 15 and 16 J, provide qualification for the position occurs after the assignment, not before.

Carrier, on the other hand, argues the Agreement was not violated because prior to April 12, Claimant did not possess the required CDL license or DOT certification for the position. Carrier asserts Claimant did not possess the CDL license and DOT certification until April 24. Carrier urges Claimant was promoted to the bulletined welder position on April 26, as soon as he acquired his CDL license and DOT certification. According to Carrier, a copy of Claimant's license was submitted in the Organization's appeal letter dated September 5, by Acting General Chairman Jorde.

However, Carrier asserts the date in the copy of the license submitted in the appeal letter was not decipherable and the Organization was silent in its appeal letter as to whether Claimant was in possession of the required CDL license and DOT certification prior to April 12. The only arguments raised in the appeal letter, Carrier claims, was Claimant did not need to have the CDL license and DOT certification in order to be assigned to the welder position. Carrier reasons it is apparent from the Organization's omission Claimant did not possess his CDL license and DOT certification prior to April 12. It also asserts Claimant's personnel records had none of the required CDL license or DOT certification; and a close examination of Claimant's CDL license shows the effective date to be April 2002 rather than April 2001, as alleged by the Organization.

Carrier also argues the requirement for the welder and welder helper to possess a CDL license and DOT certification is within its managerial rights and is reasonable for the following reasons: historically, welders and welder helpers have been required to drive their trucks. 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. In order to ensure compliance with Federal and State law, Carrier implemented a policy in June 1999, which requires drivers to possess all the licenses and certifications required by law.

Furthermore, the right to establish qualifications is within its managerial right unless is restricted by law or the language of the Agreement. The requirement for the CDL license and DOT certification is reasonable because it has been established to ensure compliance with Federal and State law, which supersedes the terms of the

Agreement; and there is no language in the Agreement restricting Carrier's managerial right to request CDL license from its welder or welder helpers.

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 argues fitness and ability means the employee should be qualified for the position. Carrier asserts the Organization has not met its burden to establish Claimant was fully qualified for the position on April 12. With regard to the argument that the Agreement provides the qualification may occur after the assignment, and an employee has sixty (60) calendar days to meet all requirements, Carrier asserts the employee cannot begin to qualify for the position when the employee lacks the necessary pre-requisites. The CDL license and DOT certification are necessary pre-requisites for the welder position. Further, the Federal and State law supersedes the terms of the Agreement and Carrier is not privileged to circumvent the law. It further argues if Claimant does not have a properly licensed driver on a given day, Carrier would have no recourse but to send the employee home for the day (without pay) as they would be unable to perform the work. Therefore, Carrier asks for the Organization's claim on behalf of Claimant to be dismissed in its entirety.

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 Carrier exercised its judgment in an unreasonable, arbitrary, capricious or discriminatory manner in order to establish the Agreement was

violated. (Third Division No. 30669). The underlying issue is whether Carrier could properly deny Claimant the bulletined welder position because at the time of the assignment he did not possess a CDL license and DOT certification. This Division has held the Carrier can require welders and welder helpers to possess a CDL license and DOT certification because these employees are required to drive the welders' trucks; and Federal and State law requires the operators of vehicles that weight over 26,001 pounds (such as the welders' trucks) to possess a CDL license and DOT certification. (Third Division Awards 28599 and 23886).

With regard to the Organization's claim Claimant possessed his CDL license and DOT certification prior to April 12, the Board finds the Organization failed to meet its burden to proof. It did not refute Carrier's assertion that prior to April 12, Claimant's personnel records had none of the required CDL license or DOT certification. The Board also notes Carrier asserted its close examination of Claimant's CDL license shows the effective date to be April 2002 rather than April 2001, as alleged by the Organization. In its Submission statement, the Organization submitted a copy of Claimant's CDL license which shows the CDL expires on April 26, 2005 and a copy of the DOT certification which shows that it expires on February 1, 2003. However, neither of these copies show when the documents were issued and thus, it is unclear from the record if Claimant possessed his CDL license and DOT certification prior to April 12. Had the Organization made known to Carrier that which it set forth in its Submission to the Board, the outcome may have been different. Nonetheless, basing the decision solely on the property handling, and ignoring all is new evidence in the Submission, it is the Board's finding the

record evidence is insufficient to show Claimant possessed his CDL license and DOT certification prior to April 12.

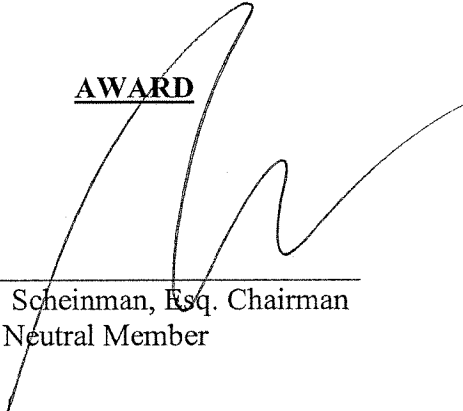
Further, this Board also considered the Organization's argument Claimant should have been assigned to the welder's position even if he did not possess a CDL license and DOT certification prior to April 12. The Organization argues the Agreement provides qualification for a promotion occurs after the assignment, not before. In past awards, the Third Division has held in cases where an employee is seeking a promotion in a higher seniority classification within a subdepartment, such as in this case, 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 he can perform the work in a satisfactory manner within the qualifying time provided by the Agreement. (Third Division Awards Nos. 8197, 22357, 22782). Therefore, employees possessing 'the requisite fitness and ability' to perform duties required of the position are to be given the opportunity to qualify within the sixty (60) calendar days provided in the Agreement. This Division has defined "fitness and ability" to mean the employee has the requisite intelligence, training and experience so it can be reasonably assumed the employee could perform in a satisfactory manner within the time provided by the Agreement.

Essentially, there are minimum requirements the applicants needs to meet before he is assigned to the position and given the opportunity to demonstrate his abilities. Moreover, it is well established, 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 establish Carrier's determination Claimant did not possess the minimum qualifications prior to April 12, was unreasonable, arbitrary or discriminatory. This Board finds an employee cannot begin to demonstrate his abilities for the welder position within the sixty (60) calendar days provided by the Agreement when he lacks the CDL license and DOT certification required by Federal law. Carrier is under no contractual obligation to put an employee in a driving position without the necessary licenses, certifications and endorsements. Accordingly, the claim is denied.

AWARD

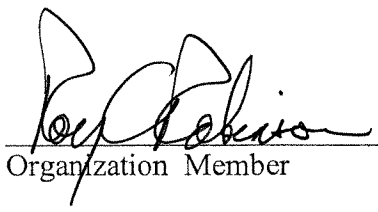
Claim denied.



Martin F. Scheinman, Esq. Chairman
Neutral Member



Carrier Member



Organization Member

Dated: November 14, 2008