

**BEFORE
PUBLIC BOARD No. 7100**

**Award No. 4
Case No. 4**

**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 A.W. Winship, regarding the Carrier's decision on March 21, 2003¹, to assign J. Foth to a bulletined welder position at Fort Dodge, Iowa, instead of assigning the position to Winship. As a remedy, the Organization asks for Winship to be compensated for all lost wages for the time he was unable to work in the welder's position (one week), prior to assuming his new position as a foreman and to acquire a welder seniority date of March 21.

FINDINGS:

The following facts are undisputed: on March 13, the Carrier issued a bulletin for a track welder position at Fort Dodge, Iowa. The bulletin stated a Commercial Drivers License ("CDL") and a certification by the U.S. Department of Transportation ("DOT"), and a Hazardous Material endorsement ("Haz-Mat endorsement"), were required for the position. Winship holds district T-2 trackman seniority date of October 31, 1996, and Foth holds district T-2 trackman seniority date of September 15, 1997. Both Winship and Foth were working as trackmen when the position was posted. Neither Winship nor Foth

¹ All dates hereinafter refer to the year 2003 unless otherwise specified.

retained seniority within the welder or welder helper classifications prior to bidding for the vacant welder position. Winship was the most senior bidder for the bulletined welder position. On March 21, Carrier assigned Foth to the welder position in question. When Winship bid for the welder's position, he had the required CDL license and DOT certification. However, at the time, Winship did not possess the required Haz-Mat endorsement included in bulletined welder position. On March 24, three days after Foth was assigned to the welder position, Winship obtained a Haz-Mat endorsement. On March 28, Winship was assigned to a track foreman position.

The Organization argues the Carrier should have assigned Winship, the senior employee, to the bulletined welder position in accordance with the provisions of Rule 16 J of the November 1, 2001 Agreement ("the Agreement"). The Organization also argues that by assigning the welder position to Foth, Carrier also violated Rules 4C & D, 7B, and 16A & J of the Agreement, which serves to establish Winship's contractual right to the bulletined welder position.

RULE 4- SENIORITY

- C. Seniority of employees promoted to bulletined positions shall date from the date of their assignment on the bulletined position, except that when an employee so promoted fails to qualify on such bulletined position within sixty (60) days, he shall not acquire a seniority date as a result of filling such position.
- 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 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

A. In part

Employees assigned to positions on bulletins must take position to which assigned within ten (10) calendar days, unless prevented from doing so by illness, leave of absence or other good and sufficient reason, or they shall forfeit rights to that position.

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 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.

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.

The Organization asserts Winship was fully qualified for the position since he had the required CDL license and DOT certification. With regard to Carrier's defense Winship was not qualified because he did not possess a Haz-Mat endorsement, the Organization argues as follows:

Pursuant to Rule 4 C and D and Rule 15 of the Agreement, when an employee seeks a promotion to a higher classification, as in this case, qualification may occur after the assignment to a bulletined position. In such cases, the employee has up to sixty (60) calendar days to meet all qualifications. In addition, the Organization argues Rule 16A allows employees who are assigned a position ten (10) calendar days to report to the position. It contends since the Federal and State DOT regulations were implemented, the past practice has been to allow ten (10) calendar days for employees to secure their CDL license, DOT certification and Haz-Mat endorsement. Winship obtained his Haz-Mat endorsement on March 24 and thus, he would have assumed the position with the required Haz-Mat endorsement well within the time provided by the Agreement.

The Organization also argues the vehicle assigned to the bulletined welder position does not require Haz-Mat endorsement on the operator's CDL license because it does not carry enough hazardous materials to be placarded. According to the Organization, the amounts, type and classification of hazardous materials of the welders' trucks haul do not require the vehicle to be placarded or have placarding displayed. Therefore, the additional requirement for a Haz-Mat endorsement is arbitrary, unreasonable and unnecessary. It insists Winship should have been assigned to the position because he possessed the CDL license and a DOT certification required by Federal and State law and was the most senior employee to bid for the job. In support of

its claim, the Organization also cites the Carrier's CDL policy dated June 25, 1999, by Vice-President Bill Wimmer, which states, in part, as follows:

1. Directors, Managers and Supervisors who are responsible for bulletining positions will be conversant with and comply with Chapter 74 of the Union Pacific Railroad Rules effective April 10, 1994, and rules prescribed in the Federal Motor Safety Regulations Pocketbook, Parts 383, 387, and 390-399.

State regulations can exceed Federal DOT requirements and DMV regulations of the state in which the vehicle is operated must be met.

2. Vehicles, which are rated more than 10,001 pounds vehicle weight but less than 26,001 pounds gross vehicle **weight that have not been placarded for hazardous materials in a 12 months period** will not be bulletined with the requirement of a CDL. However, operators of the vehicle will be required to be DOT certified.
(Emphasis added)

The Organization argues the additional requirement of a Haz-Mat endorsement is in violation of the Carrier's own CDL policy since the vehicle assigned to the welder position in question has not been placarded during the 12 months period preceding the bulletin in question. In support of its claim, the Organization submitted the statements of Welder D. Wiklander and Welder K. Janes, both are welders in Fort Dodge, Iowa.

Wiklander stated:

The Fort Dodge welding truck is equipped (sic) with Haz-Mat placard's (sic). However I have never displaced them because I have never hauled enough material at one time to warrant there (sic) use.²

Janes, who vacated the bulletined welder position, stated:

I have work (sic) on several different Welding Gangs that require haz-mat endorsements several of the trucks do not have placards (sic) nor do they carry enough hazardous materials to be placarded (sic). On the other welding trucks that have pre placards (sic) holders we never have had to use their either.³

² Organization Exhibit A-8

³ Organization Exhibit A-8

In summary, the Organization asserts the requirement of a Haz-Mat endorsement for the welder's position is not required by Carrier's own CDL policy or by law, and is an arbitrary restriction of Winship's right of seniority.

Carrier, on the other hand, argues it did not violate the Agreement because the Haz-Mat endorsement requirement on the welder's position is reasonable and in compliance with Federal Law. It asserts Rule 15 provides promotions and assignments are to be made based "seniority, fitness and ability." Therefore, assignments and promotions are not made merely based on seniority. In evaluating the bids received for the welder position, Carrier determined Winship was not qualified for the position because he did not have the required Haz-Mat endorsement. Foth was assigned to the position because he was in possession of the required CDL license, DOT certification and Haz-Mat endorsement at the time the assignment was made.

Carrier further contends the requirement for a CDL and Haz-Mat endorsement is to ensure the trucks are operated in compliance with the Federal Law. In support of its position Haz-Mat endorsement is required to comply with Federal Law, Carrier submitted a statement by David H. Deurloo, the Manager to whom the welding gang reports to. In his statement, Deurloo states:

"All Welders' trucks that I have are placarded haz-mat and as such are required to have the endorsement on their license prior to being assigned as a qualified bidder on this bulletin stating that requirement."⁴

Further, Carrier asserts the requirements for CDL license, DOT certification and Haz-Mat endorsement are part of Carrier's well established policy since June 1999,

⁴ Carrier Exhibit No. E-7

which requires compliance with Federal and State DOT regulations. It argues that the right to issue policies and institute rules, as well as the right to establish qualifications, is part of Carrier's managerial rights unless it is specifically restricted by contractual language.

With regard to the argument Carrier could have waited for Winship to obtain his Haz-Mat endorsement, Carrier asserts Rule 16 requires Carrier to assign bulletins within three (3) calendar days after the bid line is closed. It asserts waiting five (5) days for Winship to obtain his Haz-Mat endorsement, would have put Carrier in violation of Rule 16 and subjected it to claims from other employees. Carrier also asserts the collective bargaining agreement does not supersede Federal Law and it is under no obligation to assign an employee to a driving position without all the licenses required by Federal and State law. Therefore, the Carrier asks the Board to deny the claim since it acted in conformity with the Agreement and Federal law when it declined to assign Winship to the welder position.

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.⁵ 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 that the Agreement was violated. This Board finds the Organization has not met its burden. It is well established, Carrier has the managerial right to establish qualifications on a position except as restricted by law or contract language. Precedent indicates the Carrier can require welders and welder helpers to possess a CDL license and DOT certification.

⁵ Third Division Award No. 30669

Here, the Organization argues the additional requirement of a Haz-Mat endorsement is arbitrary, unreasonable and unnecessary because the trucks assigned to welders and welder helpers are not required to be placarded since the trucks do not transport the amounts, type and classification of hazardous materials which would require a Haz-Mat endorsement. This Board concludes that it is without jurisdiction to interpret the requirements of the Commercial Motor Vehicle Safety Act which defines the Carrier's obligation for transporting hazardous materials.

The Board also considered the Organization's argument Carrier should have assigned Winship to the welder position even if the Haz-Mat endorsement is a necessary requirement for the position. It argues: (1) Carrier past practice has been to afford the employee ten (10) calendar days before reporting to the position to make a good faith effort to secure the required the Haz-Mat endorsement; (2) the Agreement gives an employee assigned to a bulletined position ten (10) calendar days to report to the position after the assignment is made; and (3) the Agreement provides an employee has up to sixty (60) calendar days to meet all qualifications after he is assigned to a position.

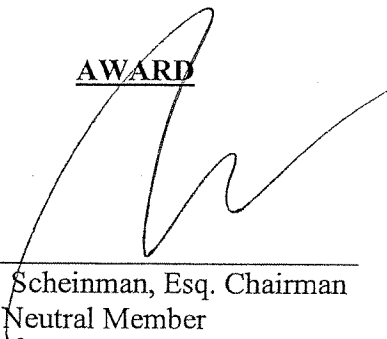
First, the Board finds the Organization failed to establish its past practice claim since there is simply no probative record evidence to establish a past practice existed granting employees ten (10) calendar days to secure their Haz-Mat endorsement. Secondly, the Board finds Rule 16, the Bulleting New Positions and Vacancies provision cited by the Organization, applies to qualified applicants who have been assigned to bulletined positions. Winship was never assigned to the position since Carrier determined he was not qualified. Therefore, the Board finds the ten (10) calendar days provision in Rule 16 does not apply to the facts of this case. Finally, the 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 legally required licenses, certifications or endorsements to drive the vehicles assigned to them.

Essentially, there are minimum requirements applicants need to meet before being assigned to the a position and given the opportunity to demonstrate ability. 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 Carrier's determination. Simply put, Carrier is under no contractual obligation to put an employee in a driving position without the necessary licenses, certifications and endorsements. In this case, it is uncontested Winship did not possess the Haz-Mat endorsement required by Federal law at the time the assignment was made. Accordingly, the Board must deny the claim.

AWARD

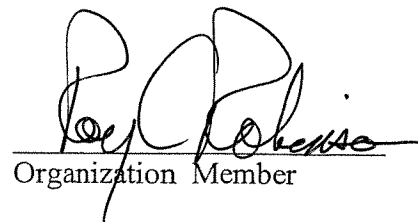
Claim denied.



Martin F. Scheinman, Esq. Chairman
Neutral Member



Carrier Member



Organization Member

Dated: November 19, 2008

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