

**BEFORE
PUBLIC BOARD No. 7100**

**Award No. 6
Case No. 6**

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

Appeal by the Organization on behalf of Everett W. Tonyan, III alleging that on February 13, 2004¹, the Carrier failed to assign Tonyan to a system machine operator (“snow blower”) position, Bulletin No. 417, at Crystal Lake, IL, instead of assigning the position to T. Damask. As a remedy, the Organization asks for Tonyan to be compensated for the differential wages from the trackman position he held to the bulletined snow blower position from February 13, until the claim in this case is resolved, to be compensated at the applicable snow blower rate of pay for all straight time and overtime worked by Damask that are in excess of the hours worked by Tonyan subsequent to February 13 and to acquire the snow blower seniority date February 13, and be placed upon the appropriate seniority rosters.

FINDINGS:

The following facts are undisputed: Tonyan has a trackman seniority date June 26, 2001 and a seniority date February 27, 2003, for common machine operator, machine operator Class A, B and C foreman, assistant foreman and truck driver classification within the Maintenance of Way and Structure Department. At the time the dispute arose, Damask had trackman seniority date October 2, 2002, within the Maintenance of Way

¹ All dates hereinafter refer to the year 2004 unless otherwise specified.

and Structure Department. On February 5, Carrier issued bulletin No. 417 at Crystal Lake, IL for the snow blower position. The bulletin stated a Commercial Drivers License ("CDL") and a certification by U.S. Department of Transportation ("DOT") were required for the position. Tonyan submitted his bid for the position before the bulletin closed on February 10, without having his CDL license and DOT certification on record. On February 12, Tonyan submitted by facsimile transmission a copy of his CDL license and DOT certification. On February 13, Damask was assigned to the snow blower position. Neither Tonyan nor Damask retained seniority within the System Machine Operator (snow blower) classification and neither one of them had driven the vehicle assigned to snow blowers before the bulletined position was assigned.

The Organization argues Carrier should have assigned Tonyan to the bulletined snow blower position effective February 13, because he was the most senior qualified applicant in the next lower classification. The Organization argues by failing to assign Tonyan to the bulletined position, the Carrier violated Rules 2B, 4D, 7D, 15 and 16 J 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

- D. Machine Operators and Assistant Machine Operators shall not establish separate seniority on each type machine. However, when and as need for operators of a particular type machine occurs it shall be the obligation of those holding seniority as Machine Operators to establish to the satisfaction of the Supervising Officer that they are qualified to operate the machine involved. **It is understood that an employee shall be allowed a reasonable opportunity (including assistance when necessary) to demonstrate his ability.** (emphasis added)

- I. Heavy machines, such as Jet Snow Blowers, Yard Cleaners, Locomotive Cranes and Pile Drivers, cranes with lifting capacity of 20-tons or greater and Jordan Ditcher and Spreader operate over the former C&NW property and may work on B&B or Track work or a combination thereof. Due to the nature of their work it is desirable that the operator stay with the machine. A separate seniority roster shall be established for operators of such machines. **Where there are no qualified bidders holding seniority on such roster for such machine operator positions, vacancies shall be bulletined to both B&B and Track Subdepartment employees on the former C&NW who shall be eligible to bid for such positions. Assignment to the vacancy shall be based upon their oldest retained seniority.** (emphasis added)

I.

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 4 of the Agreement provides seniority entitles employees to consideration for positions in accordance with their seniority; and Rule 7 of the Agreement provides where there are no qualified bidders holding seniority on such roster for such machine operators, as in the instant case, "vacancies shall be bulletined to both B&B and Track Subdepartment employees on the former C&NW who shall be eligible to bid for such positions. *Assignment to the vacancy shall be based upon the oldest retained seniority date.*" The Organization asserts it is uncontested neither Tonyan nor Damask retained a seniority date within the System Machine Operator (snow blower) classification and thus, it argues, Rule 7 is clearly controlling. With regard to Carrier's

defense that Tonyan did not possess the required CDL license and DOT certification, the Organization asserts Tonyan possessed his CDL license and DOT certification before the position was assigned to Damask. It asserts on February 12, before the assignment was made, Tonyan provided Carrier via facsimile transmission a copy of his CDL license. Therefore, according to the Organization, Carrier should have assigned the snow blower position to Tonyan, the most senior applicant who possessed all the necessary qualifications for the position.

In addition, the Organization asserts in accordance with Rule 15 of the Agreement, Tonyan should have been assigned to the snow blower position even if he did not possess a CDL license and DOT certification. Rule 15 of the Agreement, it argues, provides employees who are promoted from a lower classification are entitled to sixty (60) calendar days to qualify for the position. The Organization asserts that Tonyan could have obtained his CDL license and DOT certification within the sixty (60) days provided in Rule 15. Moreover, 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. In summary, the Organization contends seniority was ignored and Tonyan was not given the opportunity to demonstrate his qualifications or abilities as provided by the Agreement. For all these reasons, the Organization asks for the Board to sustain its grievance on behalf of Tonyan.

Conversely, Carrier argues the Agreement was not violated because Tonyan's fitness and ability was not equal to Damask inasmuch as Damask possessed his CDL license and DOT certification on February 10, when the bulletin was closed. It asserts the bulletin clearly indicated a CDL license and DOT certification was required. In

addition, it argues, the copy of the CDL license and DOT certification submitted on February 12 by Tonyan, is “belated documentation” which has no more merit than had Tonyan submitted his bid two (2) days after the bulletin closed. Essentially, Carrier asserts Tonyan was not qualified because he did not possess his CDL license and DOT certification within the finite period when applications were accepted on bulletin No. 417.

Carrier also argues the requirement for snow blowers to possess a CDL license and DOT certification is within its managerial rights and is a reasonable requirement. In order to ensure compliance with Federal and State law, Carrier implemented a policy in June 1999, which requires its drivers to possess all the licenses and certifications required by Federal and State law. Furthermore, the right to establish qualifications is within its managerial right unless is restricted by law or the language of the Agreement.

In addition, Carrier asserts seniority is not the only factor 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 further 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 that on February 10, when the bulletin closed, Tonyan was fully qualified for the snow blower position.

With regard to the argument the Carrier should have given Tonyan time to secure his CDL license and DOT certification, Carrier argues in promotion situations, as in the instant case, an employee cannot begin to qualify for the position when he lacks the necessary pre-requisites for the position.

Carrier also asserts Rick A. Sturm, the Director of Track Maintenance, notified Tonyan before the bulletin closed on February 10, about the need to secure his CDL license and DOT certification to qualify for the promotion. Sturm submitted a statement during the on property handling of the claim in this case stating he gave Tonyan time off on February 10 and February 11, to complete the requirements. Specifically, Sturm stated:

Tonyan was not awarded the position due to the fact that he does not have a Commercial Driver's License which is required to operate the Air-Forced-I snow blower. He was given numerous opportunities by MTM Johnson to obtain his CDL but did not do so. Mr. Damask, although junior to Mr. Tonyan, possessed the required CDL and was awarded the position.

Per Mr. Dick Johnson the MTM for this area

'On date Mr. Weiss assigned the job Mr. Tonyan did not have required CDL. Mr. Tonyan talked to Mr. Weiss and myself on week of 2-9-04 and asked if he passed the CDL could be assigned this job. I gave him time off on 2-10-04 and 2-11-04 with pay, with company truck, and with a CDL driver to get his done. He failed the test on 2-11-04 and was forced to go back on 2-12-04 to complete the requirements thus missing the deadline. Mr. Tonyan was given many opportunities to get his CDL. He as also allowed to practice, with pay, on company truck.

On 11-21-03, when another man was assigned to this piece of equipment, I specifically discussed the CDL issue with Mr. Tonyan, in front of witnesses, and advised him a second shift was going on this vehicle and to get his CDL. Mr. Tonyan failed to pursue this in a time fashion.

For all these reasons, Carrier asks for the Claim to be dismissed in its entirety.

With regard to the remedy sought by the Organization, Carrier contends there is no basis for the requested remedy: (1) Tonyan did not possess his CDL license and DOT certification before bulletin closed; (2) he was fully employed and remained assigned on his flagging foreman assignment throughout the claim period; (3) on March 5, senior machine operator Class 1 J.J.Wessel, with seniority date January 30, 2004, displaced Damask from the bulletined position in dispute. Wessel has Machine Operator Class 1

seniority over Tonyan and Damask. Therefore, Carrier asks even if the Board finds Tonyan is entitled to the position in question, any and all potential monetary liability should cease as of the date Wessel displaced Damask.

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. We find Carrier can require a CDL license and DOT certification from employees who are required to drive vehicles which by Federal and State law require the driver to possess a CDL license and DOT certification. Therefore, the requirement of a CDL license and DOT certification is a matter of law, and not a matter of the Carrier's discretion.

Further, the Board considered the Organization's claim Tonyan possessed his CDL license and DOT certification on February 12, before the position was assigned to Damask. The unrefuted record evidence does not support this assertion. The record shows the position was assigned after the bulletin closed on February 10, and before Tonyan submitted proof of his CDL license on February 12. Simply put, by the time Tonyan submitted proof of his CDL license, the position had already been assigned to Damask.

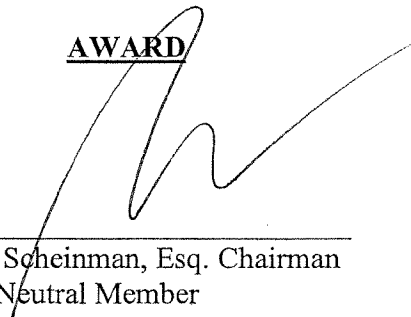
In addition, the Board considered the argument Tonyan should have been assigned to the bulletined position even if he did not possess a CDL license and DOT certification. The Organization argues the Carrier's past practice has been to afford

employees ten (10) calendar days before reporting to the position to make a good faith effort to secure the required CDL license and DOT certification and the Agreement provides an employee who bids for a promotion has up to sixty (60) calendar days to meet all qualifications after he is assigned to a position. With regard to the past practice argument, 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 Tonyan should have been given sixty (60) calendar days to secure his CDL license and DOT certification. In past awards, the Third Division has held that 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 that he can perform the work in a satisfactory manner within the qualifying time provided by the Agreement. 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. Stripped to its essence, there are minimum requirements the applicants needs to meet before he is assigned to the position and given the opportunity to demonstrate his abilities. Furthermore, 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 meet its burden to establish the Carrier's determination Tonyan lacked the minimum qualifications for the

snow blower position was unreasonable, arbitrary or discriminatory. This Board finds an employee cannot begin to demonstrate his abilities for the snow blower position within the sixty (60) calendar days provided by the Agreement when he lacks the pre-requisite requirements of a 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.

Claim denied.

AWARD



Martin F. Scheinman, Esq. Chairman
Neutral Member



Carrier Member



Organization Member

Dated: December 4, 2008