

**BEFORE
PUBLIC BOARD No. 7100**

**Award No. 11
Case No. 11**

**BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES**

VS.

UNION PACIFIC RAILROAD COMPANY

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STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

Appeal by the Organization on behalf of J Davis,¹ regarding the Carrier's decision on August 11, 2005², to assign V. Hutchinson to a welder position, Gang 2910, Bulletin No. 5164, at Trenton, MO, instead of assigning the position to Davis. As a remedy, the Organization asks for Davis to be compensated for all lost wages for the time he was unable to work in the welder's position and to acquire a welder seniority date of August 19.

FINDINGS:

On August 5 and August 18, Carrier issued bulletins No. 5149 and 5164, respectively, for a welder position at Trenton, MO. Both bulletins stated that 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. Davis placed his bid on each of the bulletins. Hutchinson placed his bid for position on bulletin No. 5164. Davis holds

¹ The Organization also filed a claim on behalf of Davis in Case No. 9, regarding the Carrier's determination on November 5, 2004, to assign the bulletin vacancy welder position No. 4741 to D. Owen, a junior employee, because Davis did not possess a Haz-Mat endorsement.

² All dates hereinafter refer to the year 2005 unless otherwise specified.

C&NW district T-2 service and trackman seniority date March 27, 2000, and a welder helper seniority date May 4, 2001. Hutchinson holds a service and trackman seniority date February 17, 2004, and a welder helper seniority date August 13, 2004. Neither Davis nor Hutchinson had seniority in the welder classification when the bulletins were issued. On August 26, the Carrier assigned Hutchinson to the bulletined welder position in question. At the time of the assignment, Davis did not possess a Haz-Mat endorsement.³

The Organization argues Carrier should have assigned Davis, 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 contends by assigning the welder position to Hutchinson, a junior employee, the Carrier also violated Rules 4 D, 7B, and 16 J of the Agreement, which serves to establish Davis' contractual right to the bulletined welder position.

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

³ In his appeal letter dated June 12, 2006, General Chairman Kent L. Bushman, stated Davis possessed the required Haz-Mat endorsement. However, in the Organization's Submission to the Board, and all other correspondence, the Organization concedes Davis did not possess a Haz-Mat endorsement during the period in dispute.

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 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 Davis was fully qualified for the position since he had the required CDL license and DOT certification. In response to Carrier's defense asserting a Haz-Mat endorsement is necessary to qualify for the position, the Organization contends as follows:

Rule 16 provides if no qualified applications are received, as alleged by Carrier, the position should be filled by assigning the senior qualified applicant of the next lower

class, successively, until the position is filled. The Organization argues Davis is the senior qualified employee of the lower class and thus, he should have been assigned to the welder position. It also asserts this case involves a promotion. 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. Therefore, it contends Davis should have been given up to sixty (60) calendar days to secure his Haz-Mat endorsement after the assignment was made. The Organization also claims 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 Haz-Mat endorsement. Therefore, it insists Carrier should have given Davis, at a minimum, ten (10) calendar days to secure his Haz-Mat endorsement.

In addition, the Organization argues the vehicle assigned to the bulletined welder position does not require the driver to possess a Haz-Mat endorsement since the vehicle 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, it contends, the additional requirement for a Haz-Mat endorsement is arbitrary, unreasonable and unnecessary. In support of its argument, the Organization cites 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 does not dispute the trucks assigned to welders weight *over* 26,001 pounds gross vehicle weight (“gvw”). Notwithstanding, it argues the additional requirement of a Haz-Mat endorsement is in violation of Carrier’s own CDL policy since the vehicle assigned to the welder position in question has not been placarded during the twelve months period preceding the bulletin in question.

In summary, the Organization asks for the claim to be sustained because the requirement of a Haz-Mat endorsement for the welder’s position is not required by the Carrier’s own CDL policy or by law, and is an arbitrary restriction of Davis’ 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. Carrier asserts that the trucks assigned to welders in this case transport oxygen, acetylene and other welding materials that fall in the category of hazardous materials regulated by Federal law. It also contends it is irrelevant whether the trucks have been placarded in the twelve months preceding the bulletin since the DOT does not require the vehicles transporting hazardous materials to be placarded at all times and under all circumstances. In addition, Carrier argues the bulletined position in this case involves the same welder position for which Davis applied in 2004, when Owen, a

junior employee, was assigned the welder position. In 2004, Carrier notes, the bulletins also stated a Haz-Mat was required for the position. At the time, Davis was not assigned the welder position because he did not possess the required Haz-Mat endorsement. In view of these circumstances, Carrier asserts Davis was fully aware a Haz-Mat endorsement is required for the position and he had ample time to obtain his endorsement before the bulletin in this case was issued.

In addition, Carrier argues 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.” Therefore, it asserts, assignments and promotions are not made merely based on seniority. Carrier argues fitness and ability means that the employee should be qualified for the position before the assignment is made. It asserts in evaluating the bids received for the welder position, it determined Davis was not qualified for the position because he did not have the legally required Haz-Mat endorsement. Carrier contends the Organization has not met its burden to establish Davis was fully qualified for the welder helper position when the bulletined welder position was assigned.

In response to the Organization’s argument that the Agreement provides qualification may occur after the assignment and Carrier should have given Davis the sixty (60) calendar days provided the Agreement, Carrier asserts: 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. The Haz-Mat endorsement is pre-requisites for the welder helper position. With regard to the remedy, Carrier contends there is no basis for the remedy requested on behalf of Davis because the Organization failed to

establish a loss of work in this case. Therefore, Carrier asks the Board to dismiss the Claim in its entirety.

After reviewing the record facts, the Board finds the Claim 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 that the Agreement was violated. This Board finds the Organization has not met its burden, here. It is well established, Carrier has the managerial right to establish qualifications on a position except as restricted by law or contract language. Carrier can require welders and welder helpers to possess a CDL license and DOT certification. 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. The Board notes the policy cited by the Organization refers to vehicles which weigh *less* than 26,001. It is uncontested the trucks assigned to welders and welder helpers weight *over* 26, 001. Thus, the cited policy does not apply to the facts of this case. Furthermore, this Board finds it is without jurisdiction to interpret the requirements of the Commercial Motor Vehicle Safety Act which defines Carrier's obligation for transporting hazardous materials.

The Board also considered the Organization's argument Carrier should have assigned Davis to the welder position even if he did not posses the required Haz-Mat endorsement. It argues 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; and the Agreement provides an employee has up to sixty (60) calendar days to meet all qualifications after he is assigned to a position. 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. This Board also finds that 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.

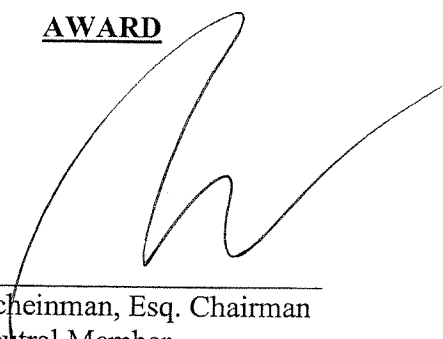
The Third Division has held in cases where an employee is seeking a promotion in a higher seniority classification, such as in this case, the Agreement provides that an opportunity should be given to the applicant with 'the requisite fitness and ability' *albeit* inexperienced or lack of a particular skill to demonstrate he can perform the work in a satisfactory manner within the qualifying time provided by the Agreement. "Fitness and ability" means the employee has the requisite intelligence, training and experience to do the work in a satisfactory manner within the time provided by the Agreement. There are minimum requirements the applicants needs to meet before being assigned to the position and given the opportunity to demonstrate 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. Carrier is under no contractual obligation to put an employee in a driving position without the necessary licenses, certifications and

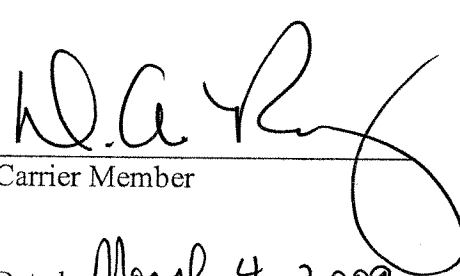
endorsements.⁴ In this case, it is uncontested Davis did not possess the Haz-Mat endorsement required by Federal law at the time the assignment was made. Accordingly, the Board must deny the Organization's claim on behalf of Davis.

⁴ Third Division Award No. 28598

AWARD


Claim denied.



Martin F. Scheinman, Esq. Chairman
Neutral Member

Carrier Member

Dated: March 4, 2009



Organization Member