

PUBLIC LAW BOARD NO. 3445

Award No. 11

Case No. 11

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

And

Southern Railway Company

STATEMENT OF CLAIM:

Claim of Laborer J.R. Dewell for pay at his laborer's rate for all time worked from September 3, 1982 until he is allowed the position, account of being cut off and a junior laborer allowed to work.

FINDINGS:

Claimant, at the time of the dispute in question, was employed as a track laborer on TM Gang No. 653.

The Organization filed Claim on behalf of Claimant seeking compensation on the basis that Claimant was unjustifiably denied the position held by Laborer R.G. Autwell on September 3, 1982 and all subsequent dates.

The issue to be decided in this dispute is whether Claimant was entitled to displace on the position in question and should therefore be compensated for service denied.

The position of the Carrier is that it did not violate the Agreement by disallowing Claimant to displace a junior employee when his position was cut off. The Carrier admits that

Claimant's seniority entitled him to junior employee Autwell's position. However, the Carrier contends that since Autwell's position required a driver's license and Claimant did not possess one, it was within its right in denying the position.

In support of its position, the Carrier cites Rule 36(b), which allows a senior employee to displace a junior employee in the case of a force reduction if his qualifications are "sufficient". The Carrier contends that Claimant did not have sufficient qualifications because he failed to possess a driver's license as required by the position. The Carrier alleges that Autwell's duties include the operation of the "Hy-Rail" track inspection truck, and that state law requires that the truck driver have a valid driver's license, since the truck travels over public highways.

The Carrier cites awards holding that once it has determined an employee is not qualified for a position, the burden shifts to the employee to prove that he is qualified. The Carrier maintains that the Organization has failed to show that Claimant is qualified for the position in question.

The Carrier further contends that Rule 11 of the Agreement does not allow employees to choose the specific work they are to perform. The Carrier cites that part of Rule 11 stating, "... Bulletins of laborers' position shall contain only the number of positions open in the gang or force to be organized or already in existence" The Carrier contends that Claimant had no contractual right to select Autwell's position. The Carrier additionally contends that Claimant has no basis to claim pay

for time lost, since at the time Claimant's request to displace was refused, he was notified that a position was available on TM Gang 655. The Carrier alleges that Claimant voluntarily elected not to take that position immediately, and therefore is entitled to no compensation for time lost. The Carrier cites several awards holding that an employee has a duty to mitigate damages if reasonably able to do so.

The position of the Organization is that Claimant was wrongfully denied Autwell's position since Claimant's seniority entitled him to displace Autwell on the position in question. The Organization first alleges that Autwell's position is classified as "laborer" and that such position does not require an employee to possess a drivers license. The Organization further alleges that on October 4, 1982, Claimant was allowed by Carrier to displace a truck driver. The Organization maintains that this establishes that Claimant was qualified to perform the position in question, and that the Carrier was therefore required under the Agreement to allow Claimant to displace Autwell.

Finally, the Organization alleges that Division Engineer Morrow indicated that he thought he was wrong in denying Claimant the position in question but did it anyway.

After review of the applicable contract provisions, the Board finds that the Claim must be denied.

The Carrier has established that the Claimant was not qualified for the position in question. The Carrier established that the position required a valid driver's license, and that

Claimant did not possess one. The Organization does not dispute the fact that Claimant did not possess a driver's license.

We find the Organization's position concerning Claimant's entitlement unpersuasive. The Organization's first contention concerning the lack of necessity for a driver's license is not supported by probative evidence. To the contrary, the Carrier has demonstrated that the position requires an employee to operate a vehicle over public roads. Therefore, state law would require the employee to have a valid driver's license even if the position's requirements did not. The Organization's argument concerning Claimant's prior service as a truck driver is equally unpersuasive. Even if we were to accept the Organization's allegation that Claimant worked as a truck driver, it would not change the situation involved in this Claim. As stated above, it is a matter of state law that an operator of a vehicle must possess a valid driver's license. Either Claimant previously possessed such a license or he violated state law by operating the vehicle previously. In either case, Claimant's prior operation of Carrier's vehicle, if it occurred, has no bearing on the Claim at hand.

We conclude the Carrier established that Claimant was unqualified for the position in question and that therefore Rule 36(b) does not apply. Rule 36(b) requires that "qualifications be(ing) sufficient"; in the present case, Claimant's qualifications were not sufficient.

AWARD:

Claim denied.

Nicholas Rymos
Neutral Member

J. M. Miller
Carrier Member

Super L. Hall
Organization Member

Date: 11/13/85