

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 3510

UNITED TRANSPORTATION UNION

and

CSX TRANSPORTATION, INC.  
(Former Chesapeake & Ohio Railway--Proper)

AWARD NO. 141

Carrier File No. 4(91-1661)  
Organization File No. 20070-T/M

QUESTION AT ISSUE

Does Article XII, Section 3(1) of the October 31, 1985 National Agreement permit the Carrier to subjectively select candidates for engine service from any (minority) population source, without primary regard for relative (Trainman) seniority standing?

FINDINGS

The general question at issue before the Board arises from a particular circumstance in the selection and subsequent promotion of employees with Trainman seniority to the position of Engineer. Notice was given as to the availability of such positions. Trainmen from Consolidated District No. 3 were eligible for training for the Hinton Engineers District. There were, eventually, ten employees determined to be qualified for the training and who indicated continued interest in the program.

Among these were a black male and a white female, who held the least seniority among the ten candidates.

Along with training undertaken for other seniority districts, the Carrier selected six Hinton employees to commence training on August 8, 1988. These included the four most senior employees (concerning which there is no dispute here), the black employee, and the female employee. The four others, all white males, were selected for training classes commencing on later dates -- three on September 12, 1988 and one on May 22, 1989.

Upon successful completion, all ten were given Engineer seniority standing from the date of the commencement of training. This resulted in four employees being placed in Engineer seniority below the two black or female employees who held less Trainmen seniority. It is this result which gives rise to the Organization's challenge to the Carrier's action. More specifically, the Organization contends that the Carrier is in rule violation for selecting the black and female employees instead of four more senior employees for the initial August 8, 1988 training program.

Applicable here is Article XIII, Section 3 of the October 31, 1985 UTU National Agreement, which reads in pertinent part as follows:

Section 3 - Retention of Seniority

(1) Subject to the carrier's legal obligations, when selecting new applicants for engine service, opportunity shall first be given to employees in train and yard service on the basis of their relative seniority standing, fitness and other qualifications being equal. . . .

The Carrier defends its selection of the black and female employees out of seniority order on the basis for the qualifying phrase, "[s]ubject to the carrier's legal obligation". The Carrier interprets "legal obligation" to refer to Federal law and regulation as to affirmative action employment and promotion obligations.

This obvious conflict between first opportunity by seniority and "legal obligations" was initially reviewed in Public Law Board No. 5041 (Procedural), Award No. 1 (Marx), in which the Carrier challenged the Organization's right to dispute the Carrier's obligation, as it perceived it, to meet Federal law requirements. That Award, which is incorporated herein by reference, found that the Organization could properly challenge the particular action taken by the Carrier as to its consonance with the Agreement. In brief summary, the Award noted as follows:

. . . The Carrier makes a convincing case as to the accepted understanding that such "legal obligations" refer specifically to affirmative action.

There can be no doubt that the Organization's claim is bottomed on a specific provision of the applicable agreement which offers seniority protection. It is equally clear that the Carrier has certain "legal obligations" which may modify application of the provision.

Almost simultaneously with the issuance of PLB 5041 Award No. 1, an Arbitration Award was issued by Arbitrator Don B. Hays concerning the same Agreement provision and involving the same Organization and a different carrier. Arbitrator Hays dealt with both the seniority/legal obligation issue as well as the "fitness

and other qualifications" issue (which is not relevant here). In answering the identical question as here under review, Arbitrator Hays concluded that, unlike the situation here under review, the Carrier's "legal obligations" did not sanction selection of candidates for Engineer from outside the Trainman roster. However, in answering negatively the same question as before this Board, Arbitrator Hays left open the possibility that the carrier therein might be challenged in court or an enforcement proceeding for failing to meet affirmative action requirements. Against such eventuality, Arbitrator Hays retained jurisdiction "to insure the proper interpretation and application of . . . our award".

With this guidance, attention now returns to the precise facts before the Board. If the Carrier had need for only six candidates from the Hinton District and had included therein two out-of-seniority-order Trainman for affirmative action purposes, this Board might well have reached a different conclusion. However, here there were ten candidates all eventually selected, among which there is no dispute that the black and female candidates were properly included based on their Trainman seniority. The only remaining question is whether the Carrier could have complied with Article XIII, Section 3(1) -- including its "legal obligations" -- by maintaining the proper seniority order of the ten selected candidates based on their "relative [Trainman] seniority service".

The Board concludes that the resulting placement of four successful Engineer candidates behind the two employees with lesser seniority was in conflict with the seniority requirements of the

Agreement. Put another way, the Carrier has failed to demonstrate that, in offering and providing promotion to the black and female employees, it would have not met its "legal obligations" if it had done so while retaining the proper seniority order of the ten employees.

This having been said, the Board is limited to a response to the specific question posed to it. The question involves "subjective" selection of candidates and the need for "primary regard" for seniority. In consonance with the Hays Award, the question must be answered in the negative. In so finding, the Board notes, as it did in PLB 5041, that there are indeed "legal obligations" which the Organization obviously recognized when it agreed to the terms of Article XIII, Section 3(1).

A W A R D

The question at issue is answered in the negative.

  
HERBERT L. MARX, Jr., Chairman and Neutral Member

  
VIRGIL V. ELSNICK  
Employee Member

  
H. S. EMERICK  
Carrier Member

NEW YORK, NY

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