

PROCEEDINGS BEFORE PUBLIC LAW BOARD NO. 3781

AWARD NO. 67

Case No. 67

Referee Fred Blackwell

Carrier Member: J. H. Burton

Labor Member: Henry Wise

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

Claim of the Brotherhood (MW-816) that:

This is a time claim on behalf of D. L. Durham, for compensation for time worked by junior Track Foreman, E. Jamison, from August 4, 1989 to date and continuing.

FINDINGS:

Upon the whole record and all the evidence, after February 25, 1994 hearing in the Carrier's Office, Philadelphia, Pennsylvania, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

DECISION:

Claim sustained in part.

OPINION

This case arises from a claim filed on September 13, 1989 on behalf of Claimant

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Trackman D. L. Durham, alleging Carrier's violation of Rules 3 and 4 of the Agreement and requesting compensation for said violation from August 4, 1989 and continuing, account of being denied displacement on that date to a Track Foreman position held by junior Track Foreman E. Jamison.

The pertinent facts of record are that following an absence from his Foreman position in Erie, Pennsylvania, due to physical incapacity to work, the Claimant took a physical examination and was found medically qualified to return to work on August 2, 1989.

On August 4, 1989, the Claimant reported for work before starting time and attempted to return to his Foreman position by displacing junior Track Foreman E. Jamison from the position. The Claimant was not permitted to exercise his bump to the Track Foreman position by Supervisor B. Baker, on the basis that he had not qualified on the Book of Rules Examination in 1989.

The Claimant passed the Rules Examination on May 17, 1990. However, at this time, there was no position to which he was entitled by seniority, so he remained in furlough status.

The Organization does not dispute that passing the Book of Rules Examination is a requisite of the qualifications for a Foreman's position. The Organization asserts, however, in the initial claim that although the Claimant had attempted to arrange for a Book of Rules Examination, the Carrier had failed to make the Rules Examiner available for the examination. The Organization further asserts that the Carrier controls the

administration of the Book of Rules Examination and that the Claimant could not take the examination until the Carrier provided opportunity for him to do so. The Organization asserts further that the Carrier should have given the Claimant the Book of Rules Examination at the time of his displacement on August 2, 1989, or that the Carrier should have scheduled the Rules Examination. The Organization asserts that on at least two (2) occasions between August 4 and October 23, 1989, the Claimant drove from Erie, Pennsylvania to Cleveland, Ohio, for the sole purpose of being tested on the rules and was not tested on either occasion.

The Carrier submits that there is no proof in the record that the Claimant made unsuccessful attempts to take the Rules Examination, that the allegation that he made several such attempts is not credible, and that it is unlikely that he had no opportunity to take a rules exam over an eight-month period. The Carrier says further that the Claimant was required to displace to a Trackman position when he was denied the displacement to a Foreman position on August 4, 1989, and that, consequently, the Claimant's resultant monetary loss was due to his own actions.

* * * * *

From full review of the whole record, the Board finds that the credible evidence of record shows that on and after August 4, 1989, the Claimant made a reasonable effort to be tested on the Book of Rules. The Carrier controlled the administration of the examination on the rules and had the authority to schedule an examination for the Claimant, but did not do so until eight (8) months after the disallowance of his

displacement in August 1989. The Claimant was not tested and qualified to work a Track Foreman position until May 17, 1990. The Carrier's actions of allowing eight (8) months to elapse before scheduling the Claimant for an examination on the Book of Rules, after disallowing the Claimant's attempted bump to a Foreman's position, due to his not being qualified on the rules, is arbitrary and unreasonable and therefore a compensatory award will be issued as hereinafter provided.

In regard to remedy, the credible record evidence shows that between August 4 and October 23, 1989, the Claimant made two (2) trips from Erie, Pennsylvania to Cleveland, Ohio in order to be examined on the Book of Rules. However, the record does not contain evidence of phone calls, trips, letters, etc. concerning the Claimant's efforts to be tested, between October 23, 1989 and May 17, 1990 and the record does not show how the Claimant came to be examined on May 17, 1990. Hence, the record evidence is insufficient to award compensation to the Claimant for the entire claim period of August 4, 1989 to May 17, 1990. Accordingly, compensation will be awarded the Claimant for a period of six (6) months beginning August 4, 1989, for all times within said period that the Claimant's seniority entitled him to hold a Foreman position. The Board has considered and rejects as not supported by the record the Carrier's request for mitigation due to Claimant not displacing to a Trackman position.

A handwritten signature in cursive script that reads "Fred Blackwell". The signature is written in black ink and is positioned above a solid horizontal line.

Fred Blackwell
Chairman / Neutral Member
Public Law Board No. 3781

April 26, 1995

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AWARD

The Carrier's actions in not scheduling the Claimant for a Book of Rules Examination prior to May 17, 1990, were arbitrary and unreasonable and violated Rules 3 and 4 of the Conrail-BMWE Agreement. Accordingly, the claim for compensation is sustained on the basis that the Carrier shall compensate the Claimant for all times that the Claimant's seniority entitled him to hold a position in the six (6) month period beginning August 4, 1989.

BY ORDER OF PUBLIC LAW BOARD NO. 3781.

Fred Blackwell

Fred Blackwell, Neutral Member

J. H. Burton
J. H. Burton, Carrier Member
Ant. gaj on should be registered.

H. Barthelmy

Executed on 10-16, 1995

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