

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7163**

Brotherhood of Maintenance of Way)	
 Emploes Division, IBT)	
)	
vs.)	Case No. 135
)	
CSX Transportation, Inc.)	

Statement of Claim

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed to properly award Mr. M. Fincher the track foreman position advertised in job bulletin CORI-0109 and also failed to give him the appropriate time to train and qualify for the position (System File G33849511/2011-098019).
2. As a consequence of the violation referred to in Part I above, Claimant Fincher shall now receive: (1) any difference in compensation between his lower rated Bridge and Building (B&B) mechanic position and the wrongfully denied track foreman position, commencing May 31, 2011 and continuing until the conclusion of the violation; (2) an amended track foreman seniority date of May 31, 2011, within the Richmond Seniority District of the C&O Division as well as on the applicable bid/bump list and SPG roster; and (3) all other appropriate relief."

Background

Claimant entered service with the Carrier on November 29, 2010. In May 2011 he was assigned to the position B&B Mechanic when the Carrier posted a job bulletin for the position Track Foreman. The position would be awarded May 31 and effective June 6, 2011; qualifications were one (1) year of railroad experience or six (6) months of railroad experience and training for the "FRA qualified" designation. Claimant was the only bidder but the Carrier declined his bid and posted the award as no bidders.

On June 17, 2011 the Organization filed a claim alleging a violation of Rule 3, Section 1, where "[i]f required, the awardee will be given equal and fair instruction and training up to a period of thirty (30) days depending on the position in order to become qualified for the position."

The Carrier denied the claim on August 3, 2011: "The bid states that employee must have FRA qualifications, which he did not have. He must have five (5) months of service and attend the REDI Center in Atlanta for training for this qualification. [Claimant] did not do this."

On September 14, 2011 the Organization appealed to the Carrier's highest designated officer (HDO) for this matter asserting Claimant should have been awarded the position as he had 6 months railroad service and, during the 30-days allotted in Rule 3, could attain FRA qualified status with training at the REDI Center which Claimant had requested in January 2011. "The very reason the Agreement provide[s] an employee (30) days to qualify is in order for the Carrier to have time to provide the employee with equal and fair instructions and training up to a period of [30] days."

A conference convened on January 26, 2012 and the HDO denied the appeal on March 20, 2012 as Claimant was not FRA qualified. "[T]he Organization is fully aware of the Carrier's policy in regards to positions mandated by [FRA] with specific requirements to be able to perform the functions of those positions." FRA Rule 213.7(b) states that "[e]ach person designated shall have at least one (1) year of experience in railroad track inspection; or, a combination of experience in track inspection and training from a course in track inspection or from a college level educational program related to track inspection."

The Carrier requires at least 6 months of railroad experience and training to attain FRA qualified status at the REDI Center where there are a limited number of instructors and classrooms. Awarding Claimant the position and, thereafter, providing the training would "almost guarantee that the incumbent would not have time to qualify on a foreman's position." Although Claimant requested training in January 2011, Rule 42 states the prescribed order for training is seniority and "this invariably creates a delay in providing training for some positions. Employees are sent to training as quickly as possible after they request training."

On April 23, 2012 the Organization responded to the HDO's denial by stating FRA Rule 213.7(b) does not require 6 months of railroad experience and Claimant requested training (January 2011) far in advance of bidding for the position (May 2011). "The Claimant was well aware of the fact that attending the REDI Center was required along with [6] months service in order to comply with 'the Carrier's policy' in order to become 'FRA qualified.'" Furthermore, had Claimant been awarded the position and required more than 30 days training to attain FRA qualified status, the Carrier could submit a request under Rule 37 to the General Chairman to extend the training period; such request would be granted.

Carrier's Position

Third Division Awards 37958 and 28474 reinforce the Carrier's right to determine fitness and ability to perform the duties of a position. A Track Foreman ensures that track restoration work completed by employees reporting to the Foreman satisfies FRA requirements. Given that context, the Carrier determined that an applicant bidding for the position Track Foreman must satisfy FRA regulations at the time of the bid to be awarded the position. Claimant was not awarded the position because he was not FRA qualified through training at the REDI Center or obtained in a college level course related to track inspection. Claimant did not meet the job requirements posted in the job bulletin.

Although Claimant requested training in January 2011, the Carrier is without authority to assign training out of the prescribed order (seniority) under Rule 42. Since the Organization did not submit evidence showing a junior employee receiving foreman rights ahead of Claimant in his seniority district due to the junior employee completing training prior to Claimant, there is no violation. The claim must be denied.

Organization's Position

Claimant should have been awarded the position because Rule 3, Section 1 states that "[i]f required, the awardee will be given equal and fair instruction and training up to a period of thirty (30) days depending on the position in order to become qualified for the position." Third Division Award 37431 supports the Organization's position that Claimant is entitled to receive a fair and equal opportunity to qualify for Track Foreman. Since the Carrier did not provide any instruction and training in the 30-day period, it violated Rule 3, Section 1.

Claimant possessed 6 months railroad experience and, even though he was not FRA qualified at the time of his bid, he could have demonstrated ability to qualify during the 30 days allotted under Rule 3. The Carrier never responded to Claimant's request in January 2011 for training at the REDI Center; therefore, the Carrier stymied Claimant's efforts to attain FRA qualified status. Should this claim be denied, the Carrier could deny training to senior applicants without regard to Rule 3.

Findings

Public Law Board 7163, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employee within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute and (3) the parties to this disputes were accorded due notice of the hearing and participated in this proceeding.

The right to determine fitness and ability for performing the duties of a position resides with the Carrier. Claimant was not FRA qualified when he submitted his bid for the Track Foreman position; however, the Organization argues that Rule 3, Section 1 provides "up to a period of thirty (30) days depending on the position in order to become qualified for the position."

As noted in Third Division Award 28474, the FRA regulation supports the Carrier's position. FRA Rule 213.7 – Designation of qualified persons to supervise certain renewals and inspect track, states that "(b) Each track owner to which this part applies shall designate *qualified* persons to inspect track for defects. Each person designated shall have 'at least' one (1) year of experience in railroad track inspection *or* a "combination of experience in track inspection *and* training from a course in track inspection *or* from a college level educational program related to track inspection." [Emphasis added.]

When Claimant bid for the posted Track Foreman position, he did not possess the required "training from a course in track inspection or from a college level educational program related to track inspection." Thus, he did not meet the job requirement mandated by Rule 213.7 that the Carrier designate "qualified persons to supervise certain renewals and inspect track[.]"

Also noted in Award 28474 at p. 3 is the following - -

Whether the Carrier can or should provide such training for employees *before* the actual assignment is a matter not before the Board for review. It is possible to conceive a situation where there is no previously qualified employee available for a position as Track Inspector. It appears, however, that such was not the case in this instance.

[Emphasis added.]

The situation noted in the preceding paragraph is “the case in this instance” before the Board. There was “no previously qualified employee available” for the posted position. Claimant was the only bidder and he qualified for the Track Foreman position only with the Carrier providing the requisite training for “up to” 30 days.

The Organization relies on Third Division Award 37431 for its position that Claimant should have been awarded the Track Foreman position followed by the Carrier providing him with the requisite training. Unlike the situation in Award 37431 where the requisite training course was scheduled by a carrier but not offered to the claimant, this record does not establish that training was scheduled at the REDI Center, or otherwise available to Claimant under Rule 42, at the time of Claimant’s bid or within 30 days of the bid’s effective date.

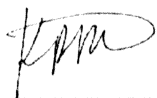
Should Claimant not qualify within 30 days, the Organization offers to agree to extend the period for training. This, however, is counter to Rule 3, Section 5 (Failure to qualify – advertised position) where “[a]n employee failing to qualify for a position within [30] days will not acquire seniority dating on the position for which he failed to qualify and will, within five (5) working days, return to his former position unless it has been abolished or filled by a senior employee, in which event he may exercise seniority.”

The Carrier’s position that an employee be FRA qualified for track inspection at the time of bid is not arbitrary or capricious as it is derived from the mandate of Federal regulations imposed on the Carrier. That is, the Carrier cannot designate an employee to perform track inspections without “FRA qualified” status. The regulations do not authorize the Carrier to designate an employee to perform track inspections while simultaneously engaged in obtaining the “FRA qualified” credential during training.

Rule 3 (Section 1, Section 5) and Rule 42 must be read and applied as a whole to give effect and meaning to the agreed-upon provisions. They cannot be read in isolation from each other or apart from FRA Rule 213.7 and the requirement to have completed training which results in FRA qualified status. Within this framework, the Board finds that Claimant did not qualify for the Track Foreman position when it was posted and would not have met the qualification within the structure and time period of the rules. Given these findings, the claim is denied.

Award
Claim denied.

Patrick J. Halter /s/
Patrick J. Halter
Neutral Member
Award No. 135



Rob Miller
Carrier Member



Andrew M. Mulford
Organization Member

Dated on this 20th day
of August, 2014