

**BEFORE
PUBLIC BOARD No. 7100**

**Award No. 1
Case No. 1**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
)	
vs.)	
)	PARTIES TO
)	DISPUTE
UNION PACIFIC RAILROAD COMPANY)	

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

Appeal by the Organization on behalf of B.J. Griffins, alleging that on March 15, 2002¹, the Carrier failed to assign Griffis to an assistant track foreman position at Marshalltown, Iowa. As a remedy, the Organization asks for Griffis to be compensated for the differential in pay from the trackman position he held since the improper assignment on March 15, until the instant claim is settled, as an applicable rate of pay; and to acquire an assistant track foreman seniority date March 15, and be placed upon the appropriate seniority rosters.

FINDINGS:

The following facts are undisputed: Claimant has established seniority in the Track Subdepartment date August 23, 2000. On March 7, Carrier issued bulletin No. 3409 at Marshalltown, Iowa, for the assistant track foreman position in question. The bulletin stated a Commercial Drivers License ("CDL") and a certification by the U.S. Department of Transportation ("DOT") are required for the position Claimant bid for this position. On March 15, bulletin No. 3409 closed without the position being awarded

¹

All dates hereinafter refer to the year 2002 unless otherwise specified.

stating insufficient bids were received. Thereafter, Carrier re-issued the bulletin for the assistant track foreman position under Bulletin No. 3427. On March 22, Carrier assigned the assistant track foreman position to R.L. Hicks, who has a service date seniority date July 22, 1996, Bridges & Buildings ("B&B") Subdepartment seniority date March 27, 1998, and machine operator seniority date November 14, 1997. Prior to the assignment of the assistant track foreman position, Hicks did not possess any seniority in the Track Subdepartment. At the time the assignment was made, Claimant did not possess a CDL license or a DOT certification.

The Organization argues by failing to assign Griffis to the bulletined position on March 15, Carrier violated Rules 2, 4D, 7A, 15 and 16 J of the November 1, 2001 Agreement ("the Agreement").

RULE 2- SUBDEPARTMENTS

The following subdepartments are within the Maintenance of Way and Structures Department.

- A. Bridge and Building Subdepartment
- B. Track Subdepartment
- C. Roadway Equipment Repair Subdepartment

* * *

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

- A. Separate seniority in the B&B and Track Subdepartment shall be established in the following classes:

B&B Subdepartment

1. B&B Foremen (including Classes 2 & 3)
2. Assistant B&B Foremen (including Assistant Foremen-Truck Drivers)
3. Truck Drivers*
4. B&B Carpenters (including Masons and Lead Carpenters)*
5. B&B Helpers, Bridge Tenders and Cooks

* * *

Track Subdepartment

1. Track Supervisors
 2. Track Foremen (including Classes A, 1, 2 and 3)**
 3. Assistant Foremen (including Assistant Foremen-Truck Drivers)
 4. Trucks Drivers
 5. Trackmen and Crossing Watchmen
- * Treated equal in class for promotion purposes.
- ** Class A- Foremen on track gangs of 18 or more
Class 1- Foremen on track gangs of less than 18
Class 2- Section Foremen, Headquartered Maintenance Foremen, and B&B Foremen
Class 3- Flagging

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 not 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.

The Organization argues Rule 4 of the Agreement provides seniority entitles employees to consideration for positions in accordance with their seniority; and Rule 7 of the Agreement provides for separate seniority for the B&B Subdepartment and the Track Subdepartment. It further urges assignments for new and vacant positions, such as the bulletined assistant track foreman position, should be made in accordance with Rule 16J, which provides "if no qualified applications are received, the position will be filled by assigning the senior qualified applicant of the next lower class, successively, until the position is filled." In addition, it claims in accordance with Rule 15 of the Agreement, employees who are promoted from a lower classification are entitled to sixty (60) calendar days to qualify for the position. The Organization asserts Claimant is the most senior qualified applicant in the next lower class, i.e., the Track Subdepartment. In accordance with the cited provisions, it argues, on March 15, Carrier should have assigned Claimant to the assistant track foreman position rather than closing the bulletin

No. 3409. The Organization insists Carrier should not have assigned Hicks to the position in question because he had no seniority in the Track Subdepartment.

In addition, the Organization argues Claimant should have been assigned to the bulletined position even if he did not possess a CDL license and DOT certification. It contends Claimant could have obtained his CDL license and DOT certification within the sixty (60) days provided in Rule 15. The Organization also contends Carrier past practice has been to give employees ten (10) calendar days following the assignment to obtain the CDL license and DOT certification. The Organization notes Claimant passed the CDL written test on March 16, and received his DOT certification on March 22. At the time Hicks was assigned to the position in question, all that remained was for Claimant to complete the driving portion of the test in order to obtain his CDL license. The Organization argues Claimant was unable to complete the driving portion of the CDL test because Carrier failed to provide him with the Company vehicle for the test; and Claimant should not be held responsible for the Carrier's failure. In summary, the Organization argues seniority was ignored and Claimant was not given the opportunity to qualify for the position as provided by the clear terms of the Agreement.

Carrier, on the other hand, argues the Agreement was not violated because the assistant track foreman position was assigned to Hicks, the bidder who possessed the required CDL license and DOT certificate. Claimant was not assigned to the position, it asserts, because he did not have the required CDL license and DOT certification. The first bulletin was closed without being assigned since none of the bidders, including Claimant, were qualified for the position. On March 22, the position was assigned to

Hicks, who possessed all the licenses and certifications required to drive the truck assigned to his gang.

Carrier also argues the requirement for the assistant track foreman position to possess a CDL license and DOT certification is within its managerial rights and is reasonable for the following reasons: historically, the assistant track foreman has always been required to drive trucks as part of their assignment. This employee is the principal driver of the trucks assigned to the gang. Federal and State law requires drivers operating the type of trucks operated by the assistant track foreman to possess a CDL license and DOT certification.

In order to ensure compliance with Federal and State law, Carrier implemented a policy in June 1999, which requires drivers to possess all the licenses and certifications required by law. Furthermore, the right to establish qualifications is within its managerial right unless is restricted by law or the language of the Agreement. The requirement for the CDL license and DOT certification is reasonable since it has been established to ensure compliance with Federal and State law, which supersedes the terms of the Agreement; and there is no language in the Agreement restricting Carrier's managerial right to request a CDL license and DOT certification from the assistant track foremen.

In addition, Carrier asserts seniority is not the only factor it needs to consider when making an assignment or a promotion. 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." It argues fitness and ability means the employee should be qualified for the position.

Carrier also asserts the Organization has not met its burden to establish that on March 15, Claimant was fully qualified for the assistant track foreman position when Carrier did not assign him. It notes it is undisputed Claimant did not possess a CDL license and DOT certification when the first bulletin was closed or when Hicks was assigned to the position.

With regard to the argument qualification may occur after the assignment, and Claimant should have been given the sixty (60) calendar days provided in Rule 15 of the Agreement, Carrier asserts in promotion situations, as in this case, an employee cannot begin to qualify for the position when he lacks the necessary pre-requisites. The CDL license and DOT certification are necessary pre-requisites for the assistant track foreman position.

The Carrier also claims it gives full cooperation to employees wanting to acquire the CDL license and DOT certification by, in part, granting time off with pay, providing payment for their licenses and providing a company vehicle for the driving portion of the CDL examination. Carrier asserts it was Claimant's personal decision to wait for the driving portion of the CDL test and this Board should not hold Carrier responsible for his failure to complete all the requirements for his CDL license and DOT certification in a timely manner. In addition, it argues the Organization has acquiesced to the Carrier's position a CDL license and DOT certification are required since the Organization has allowed similar claims to die on time limits rather than pursuing them to arbitration. For all these reasons, Carrier asks for the Board to dismiss the claim in this case.

After reviewing the record facts, the Board finds that the grievance 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 the Agreement was violated. The underlying issue in this dispute is whether the Carrier could properly deny Claimant the bulletined assistant track foreman position because he did not possess the required CDL license and DOT certification. This Division has held the Carrier can require drivers of their trucks to possess a CDL license and DOT certification to ensure compliance with Federal and State laws. Therefore, the requirement of a CDL license and DOT certification is a matter of law, and not a matter of Carrier's discretion.

Further, the Board considered the Organization's claim Claimant did not possess his CDL license and DOT certification in March, because the Carrier failed to provide him with a company vehicle for the driving portion of the test. Further, the Organization has not set forth which provision(s) of the Agreement were violated by Carrier's alleged failure to provide Claimant with a company vehicle. In view of these circumstances, the Board finds there are no contractual basis, in this case, for holding Carrier responsible for the fact Claimant did not secure his CDL license and DOT certification prior to the assignment of the bulletined position in question.


In addition, the Board considered the Organization's argument Claimant should have been assigned to the assistant track foreman's position even if he did not possess a CDL license and DOT certification. In this regard, the Organization argued Carrier's past practice has been to afford employees ten (10) calendar days before reporting to the

position to make a good faith effort to secure the required CDL license and DOT certification; and the Agreement provides an employee who bids for a promotion has up to sixty (60) calendar days to meet all qualifications after he is assigned to a position. With regard to the past practice argument, 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 CDL license and DOT certification. We also reject the argument Claimant should have been given sixty (60) calendar days to secure his CDL license and DOT certification. In past awards, the Third Division has held in cases where an employee is seeking a promotion in a higher seniority classification within a subdepartment, such as in this case, the Agreement provides 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. In essence, employees possessing 'the requisite fitness and ability' to perform duties required of the position are to be given the opportunity to qualify within the sixty (60) calendar days provided in the Agreement. But, there are minimum requirements applicants need to meet before being assigned the promotion and given the opportunity to demonstrate his or her abilities. In this case, the Board finds the Organization failed to meet its burden to establish Carrier's determination that Claimant lacked the minimum qualifications for the assistant track foreman position was unreasonable, arbitrary or discriminatory. This Board finds an employee cannot begin to demonstrate his abilities for this position within the sixty (60) calendar days provided by

the Agreement when he lacks the CDL license and DOT certification required by Federal law. Carrier is under no contractual obligation to put an employee in a driving position without the necessary licenses, certifications and endorsements. Accordingly, the claim is denied.

AWARD

Claim denied.



Martin F. Scheinman, Esq. Chairman
Neutral Member

Carrier Member

Organization Member

Dated: November 5, 2008