

PUBLIC LAW BOARD NO. 7120

(BROTHERHOOD OF MAINTENANCE OF WAY
PARTIES TO DISPUTE: (EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF THE CASE:

The Claimant, A. D. Schroeder, bid for the position of B&B Machine Operator position 067 on force 6MP3 and was awarded it on September 7, 2009. He was held over on his previous job and did not report for the new position until September 14, 2009. By letter dated October 5, 2009, Manager Bridge T. R. Petrea informed Claimant Schroeder that he “failed to qualify as a B&B Operator due to the fact you have not operated the machine the sufficient amount of time, due to having been absent for personal reasons. Therefore,” Manager Petrea’s letter continued, “we could not determine whether or not you met the qualifications for the position.” The letter concluded, “In accordance with the requirements of Rule 3, Section 5 of the June 1, 1999 System Agreement, you will not be entitled to obtain seniority as a B&B Operator.” Manager Bridges also informed Claimant Schroeder orally of his disqualification.

The Vice Chairman, Allied Federation of BMWED (“the Organization”), by letter dated October 7, 2009, addressed to Manager Petrea, requested an Unjust Treatment Hearing pursuant to Side Letter 32 of the June 1, 1999, collective bargaining agreement between the parties. The request for an Unjust Treatment Hearing cited Rule 3, Section 1

of the Agreement and asserted that “Mr. Schroeder was removed from this position, after holding this position for only 15 working days, and was not given any instructions or training.” Rule 3, Section 1 provides as follows:

RULE 3 - SELECTION OF POSITIONS

Section 1. Assignment to position

In the assignment of employees to positions under this Agreement, seniority shall govern. The word “seniority” as used in this Rule means, first, seniority in the class in which the assignment is to be made, and thereafter, in the lower classes, respectively, in the same group in the order in which they appear on the seniority district roster. If 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 Vice Chairman requested that Claimant Schroeder “be reinstated to this position (including seniority) made whole for any lost wages, given equal and fair instructions and training for this position, or advise on what date a hearing will be scheduled.”

A hearing was scheduled to be held on October 22, 2009, in the Carrier’s Nashville Division Headquarters Building in Nashville, Tennessee. After postponements at the requests respectively of the Carrier and the Organization the hearing was held on December 15, 2009.

The employees under the supervision of Manager Petrea repair and maintain the

bridge structures under his assigned territory, which extends from Nashville, Tennessee, to Decatur, Illinois. He is headquartered in Evansville, Indiana. Claimant Schroeder reported for his bid position of B&B Machine Operator on September 14, 2009. He worked on the following days between September 14 and October 5, 2009, when he was informed that he was disqualified: September 14, 15, 16, 17, 18, 21, 22, 23, 24, 29, October 5. He did not work because of sickness or vacation on the following dates: September 25, 28, 30, October 1, and October 2. His rest days were September 19, 20, 26, 27, October 3 and 4.

The B&B Machine Operator job that Mr. Schroeder bid for required him to operate a hydro-boom truck. Manager Petrea described it as “a rubber tire based crane that’s propelled by motor carrier.” The crane weighs over 26,000 pounds. The vehicle can be driven on the highway and is used for bridge repair and maintenance such as for rebuilding bridge structures and culverts. The boom is used for lifting such items as rails, bridge structures, and culvert pipes and for unloading basic material. The truck has a dual axle, a clutch, and manually operated gears.

To qualify as a B&B Operator, Manager Petrea testified, you have to be able to operate the crane, have knowledge of state, local, and highway rules for operating a motor vehicle, and have a CDL. You have to know how to figure the weight of steel, other metal, and wood objects. You have to be able to operate the vehicle on track and on the road. You have to be able to put it on and off the track. And you must know the

capabilities of the equipment. An operator of the machine has 30 days to qualify. In Claimant Schroeder's case, the 30 days began on September 7, 2009, the date that he was awarded the position.

Manager Petrea came to Nashville from his home base in Evansville on two occasions to observe how Claimant Schroeder operated the hydro-boom truck, September 25, and 30, 2009. Mr. Schroeder was not at work on either date, having taken off with permission either because of sickness or a vacation day. Manager Petrea therefore relied on the information received from his bridge foreman, Joshua Carman, in determining to disqualify Mr. Schroeder. According to the testimony of Manager Petrea, "Mr. Carman stated that Mr. Schroeder couldn't properly drive the vehicle, that he couldn't understand the . . . dual shifter in the truck, that he couldn't run it properly on the road and that he wasn't comfortable with Mr. Schroeder operating the vehicle or the boom itself."

Because of the training time lost by Mr. Schroeder as a result of being held over for a week on his previous job and by his absences; and because he was not able personally to observe how Mr. Schroeder performed on the job, Manager Petrea considered asking the Organization to agree to a one-week extension for an additional week of training. Mr. Schroeder, however, bid for and was awarded another position before the expiration of the 30-day training period. In his testimony, Mr. Schroeder acknowledged that he bid off of the B&B Operator position before he knew that he had been disqualified. (Tr. 63).

Because Mr. Schroeder bid off, Manager Petrea testified, he had no other choice but to disqualify him. According to Manager Petrea, he did not qualify Mr. Schroeder because he was not satisfied that Mr. Schroeder had the ability to drive the vehicle on the road and operate the crane properly. On the days that he drove to Nashville, Mr. Petrea testified, he did not know beforehand that Mr. Schroeder was off those days. On both occasions, he stated, Mr. Schroeder worked the day before. Asked on cross-examination whether Foreman Carman was qualified on the hydro-boom truck, Manager Petrea answered, "Yes."

Josh Carman, Bridge Foreman for Gang GMP3 in Nashville, Tennessee, testified that the first time Mr. Schroeder showed up for the job, he asked him if he was comfortable driving the truck back to Nashville from a location it was then at. Mr. Schroeder told Mr. Carman that he had never driven a truck like that. Foreman Carman therefore went to Evansville and drove the truck back by himself.

The first week Mr. Schroeder was on the job, Foreman Carman gave him the truck to drive around the yard and get used to driving it. He had Mr. Schroeder take the truck to the knob, where ties, rails, joint bars, and other material and equipment are stored, and operate the boom and pick up stuff to get used to it before actually going out and performing any work.

Mr. Carman testified that he got on the truck and showed Mr. Schroeder the basic controls of the boom truck, how to turn the crane on, and how to operate the truck and the

boom. He explained the gear shifting to him and how to drive the truck. Mr. Schroeder had stated to the foreman that he never before drove a split axle truck besides the little section trucks in the track department. After showing these things to Mr. Schroeder, Foreman Carman told him to go out and practice and get comfortable doing them. Mr. Schroeder asked Mr. Carman for the instruction books that pertained to the truck and Mr. Carman gave them to him to study.

Foreman Carman testified that the only job that Mr. Schroeder performed using the boom was unloading barricades that CSX had purchased. Two truckloads of barricades had been delivered to the yard that had to be unloaded. Foreman Carman testified that Mr. Schroeder performed the unloading duties, although he was a little slow. With a little assistance from the mechanic, Wally, Mr. Carman stated, eventually Mr. Schroeder got the barricades unloaded. Foreman Carman testified, "Mr. Schroeder had some issues – some personal issues that he had to miss work a few days so we didn't actually perform any other duties with the boom truck."

Mr. Schroeder, according to Foreman Carman, did not operate the truck on the road or highway. He did so only in the yard where the top speed was 10 or 15 MPH. A couple of times, Foreman Carman testified, Mr. Schroeder had to stop and start over shifting gears. He told Foreman Carman that he was having problems getting used to the truck. Foreman Carman explained to him that the truck was different from all other trucks in the yard and is one of the hardest trucks to drive that CSX owns. He feels that

Mr. Schroeder had sufficient time to get used to drive and operate the truck, Mr. Carman testified. The truck, Foreman Carman testified, is used for a number of day-to-day operations such as putting ties, guard rails, and caps in.

Asked by the hearing officer whether at the end of the qualification period he felt comfortable that Mr. Schroeder could safely install ties on the bridge working around the foreman and his men, Foreman Carman testified, "Honestly . . . I would not feel comfortable putting ties in. Basic lifting and lowering objects from Point A to Point B, I would feel comfortable. My job is to make sure that my men are safe and the work is done right, and . . . it's a little more complex and more difficult to insert ties on a bridge with a boom truck." Foreman Carman added that he would feel comfortable with Mr. Schroeder going from point A to B, up and down, left and right, "but as far as inserting ties and things to that nature, I honestly have to say that I wouldn't feel comfortable with that."

Asked by the hearing officer what he told his supervisor with regard to qualification of Mr. Schroeder, Foreman Carman testified, "I told him that . . . he is a little slow operating the boom truck. The driving, eventually he will probably get use[d] to it. . . . I wouldn't feel comfortable going out on a bridge and doing the more complex jobs with Mr. Schroeder." Foreman Carman stressed that it is not his job to qualify or disqualify anybody; that it is Mr. Petrea's decision. "It is my job," he stated, "to make sure that the work is done right and that my men are safe."

On cross-examination Foreman Carman testified that he is not qualified on the hydro-boom truck. Every morning, he stated, he has a conference call with Manager Petrea and reports the personnel on duty or on vacation. On redirect examination Foreman Carman testified that he is familiar with the basic operations of the hydro-boom truck and was able to show Mr. Schroeder how to operate the truck.

Claimant Schroeder testified that he has been with the Carrier for three and one-half years and has held the positions of Trackman, Vehicle Operator, Welder Helper, Welder, Foreman, and Backhoe Operator. This was the first time, he stated, that he held a job in the B&B department. The first week, according to Mr. Schroeder, there was a lot of rain, and he operated the truck as much as he could as the foreman requested him to. He tried to familiarize himself with the truck, he stated, and with the load charts. He did every operation on the truck, he testified, that he was requested to by the foreman. "I may have been slow," he testified, "but I don't feel there was a need for me to be disqualified over being slow; I was trying to be cautious."

Mr. Schroeder acknowledged that he had trouble at first driving the truck because it was the first split axle truck that he had ever driven, and he stalled it. After the first week, he testified, he thinks that he operated the truck fine on the road. Given the time that he had to operate the truck, Mr. Schroeder stated, he thinks that he operated it sufficiently and drove it sufficiently. The foreman never raised any problems with him, Mr. Schroeder testified, or brought anything to his attention. It came as a surprise to him,

Mr. Schroeder stated, that Manager Petrea disqualified him. "He called me over the phone on the 29th day of me being on the machine position to notify me that he was disqualifying me because I wasn't there when he came through to qualify me which I made . . . specific arrangements [to be off]." Mr. Schroeder further testified that Manager Petrea told him that he was disqualifying him because he (Mr. Petrea) was unable to make it down there.

Mr. Schroeder testified that the vacation days he took off were pre-approved by Manager Petrea and that "I don't really understand how he could have okayed my vacation and then come down while I was on vacation." The day after he was disqualified, Mr. Schroeder stated, Foreman Carman asked him to drive the truck to unload some barricades because there was nobody there with a CDL to drive the truck. Foreman Carman was off that day and spoke to him by telephone. The mechanic, who was qualified to operate the truck, did not have a CDL. Mr. Schroeder checked with Manager Petrea if he could operate the truck after being disqualified and was told not to operate it.

Questioned by the hearing officer if he asked any questions, Mr. Schroeder testified that he asked Foreman Carman how to decipher the load charts, and he (the foreman) said that he did not know, that they are posted on the side of the truck. He got no technical answers from Foreman Carman, Mr. Schroeder testified. He then talked to Manager Petrea about the load charts, Mr. Schroeder stated, and he (Mr. Petrea) told him

that he (Mr. Schroeder) needed to read the books. He did read the books, Mr. Schroeder testified, but they were very confusing. Mr. Schroeder acknowledged that after asking questions of Manager Petrea, Mechanic Walley, and reading the manuals he eventually got the information necessary to figure the weight of something (Tr. 41).

Mr. Schroeder testified that he felt that he was sufficiently trained in operating the crane but that he thought that there could have been somebody there that could have helped him out with driving the vehicle.

Mr. Carman testified that he is comfortable with the basic operations of the hydro-boom truck and is able to show somebody the basic operations of the truck. He has shown other employees the same thing that he has shown Mr. Schroeder, he stated, and has qualified four operators including his present operator. He gave Mr. Schroeder the same equal and fair instruction that he gave the other four employees, Mr. Carman testified.

In its closing statement the Organization argued that the transcript will show that Mr. Schroeder did not get proper and sufficient training to do the job. He was trained, the Organization emphasizes, by someone who admitted that he was not qualified on the hydro-boom truck. Mr. Schroeder, the Organization argues, could operate the truck, could operate the boom, and should be awarded seniority in the Bridge Department. The Organization representative further asserted that he was not allowed by the conducting officer to ask questions to get to the facts of the case. As a result, the Organization

contends, “this has not been a fair and impartial hearing.”

On the merits there are two issues in this case. Was there substantial evidence in the record to support the Carrier’s disqualification of Mr. Schroeder? If so, was the disqualification in violation of Rule 3, Section 1, which provides, in relevant part, “If 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”?

On the first issue the Board believes that there is substantial evidence to support the Carrier’s decision to disqualify Mr. Schroeder. Manager Petrea, who was unable personally to assess Mr. Schroeder’s qualifications, relied on his foreman’s assessment of Mr. Schroeder’s abilities. Foreman Carman testified without contradiction that the only actual job that Mr. Schroeder performed using the boom was unloading barricades purchased by the Carrier. The Claimant had never done such tasks as installing ties on a bridge or putting in guard rails or caps. Such work is more complex and difficult than unloading barricades.

It was reasonable for Foreman Carman, as he testified, to inform Manager Petrea that he would not feel comfortable for Mr. Schroeder to go out on the bridge and do the more complex jobs. It was also reasonable for Mr. Petrea to disqualify Mr. Schroeder on that basis. As noted, it is not disputed in the record that Mr. Schroeder had never done that kind of work with the hydro-boom truck. Without such experience he could not be

trusted to be given such an assignment. And Manager Petrea was justified in disqualifying an operator who could not be relied on to do such basic assignments required of a qualified hydro-boom truck operator. The Board so finds.

On the second issue the Organization contends that Mr. Schroeder was not given proper and sufficient training to do the job. The Board agrees that Mr. Schroeder did not receive sufficient training, but it was not the Carrier's fault that this occurred. A large portion of the reason for the insufficient training was Mr. Schroeder's absences. He was absent from work either for vacation or sickness for five workdays. Even though the absences were with permission, the fact nevertheless remains that this was valuable training time that the Claimant deprived himself of.

The other large segment of training time that the Claimant was deprived of was the week that he was held over on his previous job. Manager Petrea was aware of this and wanted to extend Mr. Schroeder's training time by a week to make up for the lost time and to give himself the opportunity personally to assess Mr. Schroeder's abilities. Mr. Schroeder, however, made it impossible for Manager Petrea to do this because he bid out of the B&B Operator job into another position before even knowing whether he had qualified on the B&B Operator position (Tr. 63). Thus it was by his own doing that Mr. Schroeder deprived himself of the additional week of training that would otherwise have been available to him.

The Organization cannot fairly accuse the Carrier of violating Rule 3, Section 1 by

failing to give the Claimant proper and sufficient training to qualify for the job when it was the Claimant's own doing that deprived him of adequate training. First he absented himself five days from work; and then he bid out of the B&B Operator position so as to make it impossible to provide him with additional training.

The Organization argues that Mr. Schroeder did not get proper and sufficient training because he was trained by someone who admitted that he was not qualified on the hydro-boom truck. The evidence shows, however, that Foreman Carman was able to drive the truck from Evansville, Indiana, to Nashville, Tennessee, on his own without assistance. He was also familiar with the basic operations of the machine. In addition, Mr. Schroeder also received training involving the operation of the boom from mechanic Wally, who is a qualified B&B Operator. Further, Foreman Carman has qualified a total of four B&B Operators including the present operator. There is no reason to believe that he lacked the qualifications to train Mr. Schroeder. Finally, the argument that Foreman Carman was not qualified to train Mr. Schroeder is inconsistent with Mr. Schroeder's own testimony regarding his abilities in relation to operation of the machine and that he was surprised when he learned that he was disqualified.

The Organization objected to testimony at the hearing regarding the foreman's assessment of Mr. Schroeder's deficiencies and his communication of his judgments on Mr. Schroeder's abilities to Manager Petrea because Mr. Petrea made no mention of this in his disqualification letter of October 5, 2009, to Mr. Schroeder. It is true that Manager

Petrea did not specifically mention these matters in the disqualification letter. However, the letter did state that Mr. Schroeder had not operated the machine a sufficient amount of time because of his absences and that this prevented the Carrier from determining whether he met the qualifications for the position.

By not operating the machine a sufficient amount of time Mr. Schroeder would have been unable to obtain the necessary experience to do the more complex types of work with it. In addition, Foreman Carman testified that he told Manager Petrea that he would not feel comfortable going out on a bridge and doing the more complex jobs with Mr. Schroeder. It is not reasonable to believe that Manager Petrea would not have taken his foreman's assessment of Mr. Schroeder's abilities into consideration in determining whether to qualify him as an operator of the machine. The Board finds that the Carrier did not violate Rule 3, Section 1 with regard to the disqualification of the Claimant.

On the procedural issue of a fair hearing, the Board does not believe that the Claimant was deprived of a fair hearing because he was not allowed by the hearing officer to ask certain questions. After studying the record carefully, the Board finds that the hearing officer did an excellent job in obtaining a full and complete record.

However, there is substance to the Organization's complaint that the hearing officer at times improperly restricted the Organization representative from asking questions. The hearing officer seems to be of the opinion that once a witness gives testimony pursuant to questioning by the hearing officer, it is improper for the

Organization representative to refer to that testimony in framing a question on cross-examination. For example, at page 55 of the transcript the Organization representative asked Mr. Petrea, "And you also stated that it would be the foreman's job to qualify?" The hearing officer commented, "Mr. Shelton, again I would ask that you not phrase the question in such a manner as to give testimony of what others said or what has been said prior because I don't think that it's always accurate." The hearing officer is correct that it would not be proper to quote another witness's testimony in questioning a witness because it would defeat the purpose of excluding witnesses from the hearing. But there is nothing improper on cross-examination in quoting the witness's own prior testimony to that witness or attempting to clarify if the questioner's understanding of the witness's prior testimony is accurate.

The Board believes that on more than one occasion the hearing officer improperly restricted the Organization representative in his questioning of witnesses. However, the Organization representative was adept in getting all of the information he wanted into the record. The Board reiterates that, on the whole, the hearing officer did an excellent job in obtaining a full and complete record. The hearing officer also deferred to the Organization representative when the latter objected to the hearing officer's questions. See, for example, the transcript at page 10. There is no basis for finding that the Claimant was denied a fair hearing on the basis that the hearing officer prevented the Organization representative from asking certain questions.

A W A R D

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that
an Award favorable to the Claimant not be made.

A handwritten signature in black ink, appearing to read "Sinclair Kossoff", is written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
April 9, 2010