

SPECIAL BOARD OF ADJUSTMENT NO. 1135

Case No. 1

Award No. 1

PARTIES TO DISPUTE: BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier (a) failed to comply with the provisions of Rule 21 when advertising various positions and vacancies and (b) improperly and unilaterally required the applicants of some of the advertised positions to possess proper license, health cards and DOT qualifications to be eligible to be assigned to the involved positions beginning February 2, 1994 and continuing.

T-D-816-B/MWB 94-10-20AB; B-M-322-H/MWB 94-08-10AQ; B-M-323-H/MWB 94-08-10AR;
B-M-324-H/MWB 94-08-10AS; B-M-325-H/MWB 94-08-10AT; B-M-326-H/MWB 94-08-10AU;
B-M-342-H/MWB 94-11-29AD; B-M-343-H/MWB 94-11-29AE; B-M-344-H/MWB 94-11-29AF;
B-M-345-H/MWB 94-11-29AH; B-M-346-H/MWB 94-11-29AG; T-D-769-B/MWB 94-08-10AI;
T-D-770-B/MWB 94-08-10AJ; T-D-771-H/MWB 94-08-10AK; T-D-772-H/MWB 94-08-10AL;
T-D-773-H/MWB 94-08-10AM; T-D-774-H/MWB 94-08-10AN; T-D-775-H/MWB 94-08-10AD;
T-D-776-EVMWB 94-08-10AP; T-D-809-H/MWB 94-10-11AA; T-D-810-HUMWB 94-10-11AB;
T-D-811-H/MWB 94-10-AC; T-D-824-H/MWB 94-11-29AB; T-D-825-H/MWB 94-11-29AC.)

- (2) As a consequence of the violations referred to in Part (1) (a) above, the Carrier shall be required to advertise all positions and vacancies with the proper information as specifically stipulated within Rule 21B and all bulletins, in the files identified in Part (1) above, shall be posted in the form stipulated in Rule 21K.

- (3) As a consequence of the violation referred to in Part (1) (b) above, the Carrier shall correct the bulletining in question and it shall be required to cease the placing of improper qualifications, i.e., possess proper license, health cards and DOT qualifications, on the advertised positions."

**This is an incorrect claim number; the Organization should have cited "MWB 94-08-AO."*

FINDINGS:

This Board, upon the whole record and all the evidence, finds as follows:

That the parties were given due notice of the hearing;

That the Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Board has jurisdiction over the dispute involved herein.

On March 28, 1994; April 11, 16 and 18, 1994; July 8, 1994; August 9 and 16, 1994; and September 28, 1994, the Organization filed a total of 24 claims alleging a continuing violation of Rule 21, BULLETIN PROCEDURE, of the Agreement by the manner in which the Carrier bulletined 534 positions at numerous locations throughout the property.

It is the Organization's position that these bulletins violated Rule 21 in two respects. First of all, the Organization contends that the Carrier violated Rule 21 K. of the Agreement since some of the bulletins did not:

- include a reason for designating positions as temporary
- include the anticipated duration of temporary positions
- include the tentative schedules for district and regional positions
- state whether a position was mobile or headquartered

The Organization requested that the bulletins be corrected to comply with Rule 21 K.

Secondly, the Organization argues that the positions that were bulletined required applicants to possess a Department of Transportation (DOT) certification. The Federal Motor Carrier Safety Regulations, as promulgated by the U.S. Department of Transportation Federal Highway Administration, require operators of certain commercial motor vehicles to be certified.

The Organization claims that the Carrier arbitrarily added the requirement to be DOT certified to some positions, such as Assistant Foremen; Permanent Foremen; Head Welders, and so forth. However, according to the Organization, this prerequisite was arbitrary and unreasonable since these positions do not operate commercial motor

vehicles that are subject to the DOT Regulations. The Organization requests that DOT certification be limited to truck drivers who operate vehicles in excess of 10,000 pounds or who operate vehicles used to transport hazardous materials requiring placarding.

The Carrier denied the 24 claims submitted by the Organization contending that the bulletins the Organization is protesting complied with Rule 21 K. of the Agreement. The Carrier further argues that it retains the right to determine qualifications for positions. Where it determines that positions might reasonably be required to operate commercial vehicles subject to DOT regulations, the Carrier maintains that it has the right to require the incumbents of those positions to possess DOT certification.

The 24 claims were appealed by the Organization to the highest designated Carrier officer but they could not be resolved. On March 26, 1997, the Organization notified the Third Division of the National Railroad Adjustment Board (hereinafter referred to as the Adjustment Board) of its intent to combine the 24 claims into one submission that would be filed with the Board as part of a single *ex parte* submission.

In June 1997, the Organization filed an *ex parte* submission with the Adjustment Board. On February 27, 2001, the parties agreed to withdraw the claims from the Adjustment Board and submit them to this Special Board of Adjustment (hereinafter referred to as the Board). Based on the extensive evidence and arguments advanced by the Organization and the Carrier this Board renders the following decision.

I. RULE 21K. – BULLETIN PROCEDURE

As noted heretofore, the Organization contends that some of the 1994 bulletins it is disputing violated Rule 21K. of the parties' Agreement. However, this Board finds that these bulletins were in substantial compliance with Rule 21.

Rule 21b. requires bulletins to specify whether a position will be temporary or permanent. However, there is no requirement in Rule 21 that the Carrier give the reason why a position will be temporary or permanent. Therefore, the Carrier was not obligated to include a reason on the bulletins for designating some of the 534 positions at issue as temporary.

Nor was the Carrier required to include on the bulletins the tentative schedules for district and regional positions. There is no reference in Rule 21 to "*work schedules*." In the past, the Carrier has included on some bulletins the anticipated schedule of work for a gang. However, under Rule 7D., such data is for information only; is subject to change without notice; and does not constitute a guarantee that the gang will work the posted schedule. Neither Rule 7D. nor any other Rule compels the Carrier to include a work schedule on bulletins.

The Organization argues that several of the bulletins that the Carrier caused to be posted in 1994 did not comport with Rule 21K. of the Agreement. However, in this Board's opinion, the bulletins protested by the Organization were in substantial

compliance with the bulletin illustrated in Rule 21K. There is not a scintilla of evidence before this Board that any employees were misled or harmed by the bulletined positions to which they submitted bids in the 24 claims before us.

II. POSITIONS REQUIRING DOT CERTIFICATION

It cannot be gainsaid that it is the Carrier's prerogative to determine the qualifications of its employees. This Board finds that the Carrier did not abuse this managerial prerogative when it concluded that certain positions bulletined in 1994 required DOT certification. The Carrier's determination was not arbitrary, capricious or unreasonable. Rather, there was a rational basis for this determination.

The Organization argues that the Carrier's decision to require positions such as Foreman, Assistant Foreman and Head Welder to be DOT certified was unreasonable and unnecessary since these positions do not regularly operate commercial motor vehicles subject to Federal Motor Carrier Safety Regulations.

It must be stressed that on this property, Foremen and Assistant Foremen are working foremen. In addition to supervising employees under their jurisdiction these working foremen may be called upon to occasionally perform some of the duties of the employees they supervise. Thus, in the absence of a DOT certified truck driver it may be necessary for a Foreman or Assistant Foreman to operate a commercial vehicle requiring DOT certification. Requiring a Foreman or Assistant Foreman to serve as a back up driver for a principal truck driver is not an arbitrary or unreasonable determination by the Carrier. Rather, it assures that someone in the gang is qualified to operate DOT-regulated vehicles if the primary driver is unavailable. This is a valid operational objective, in our judgment.

Similarly, it was not arbitrary or unreasonable for the Carrier to require Head Welders to be DOT certified. Two-person welding crews are not uncommon on this property. Requiring both members of the welding crew to be DOT certified makes sense inasmuch as they often drive to remote locations alone. It is not unusual for both members of a welding crew to operate the welding truck during their tour of duty.

Some Machine Operator positions must also be DOT/CDL certified. Therefore, it was not arbitrary or unreasonable for the Carrier to require these positions to be DOT certified.


Contrary to the Organization's contention, the Carrier is not restricted to requiring only truck drivers to be DOT certified. While truck drivers are primarily responsible for operating commercial vehicles subject to Federal Motor Carrier Safety Regulation, as observed above, other positions also operate such commercial vehicles even though this is not their primary duty.

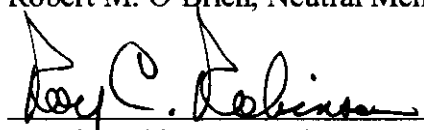
That the Carrier required some positions to be DOT certified in 1994 that were previously exempt from such certification did not prohibit it from requiring these position

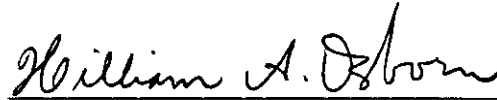
to be DOT certified, in our view. For the reasons set forth above, when the Carrier concluded that some positions other than truck drivers may intermittently operate commercial vehicles it required these positions to be DOT certified. It is immaterial that previously the Carrier did not require these positions to be DOT certified. The Carrier's decision to require these positions to be DOT certified was a managerial prerogative that was not arbitrary or unreasonable.

For all the foregoing reasons, the instant claim is denied.

AWARD: Claim denied.


Robert M. O'Brien, Neutral Member


Roy C. Robinson, Employee Member


William A. Osborn, Carrier Member

Dated: 8/27/02