SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 481

Case No. 481
File 900131

Parties to Dispute: Brotherhood of Maintenance of Way Employes
and
Union Pacific Railroad Company
(Former Missouri Pacific Railroad

Statement of Claim: (1) Carrier violated the Agreement, especially Rules 1 and 2, the Memorandum Agreement of September 1, 1963 and the letter of understanding of October 8, 1986, when Trackman Driver T. E. Ross, Sr. was not allowed to exercise his seniority.

(2) Claim in behalf of Mr. Ross for difference in pay beginning November 1, 1989, until allowed to exercise his seniority.

Findings: The Board has jurisdiction of this case by reason of the parties Agreement establishing this Board therefor.

The Carrier in the mid 1980's commenced upgrading its truck fleet on the former MOP by placing heavy duty trucks with booms on its maintenance and construction gangs.

The Carrier in late 1986-1987 then instituted a structured crane training program on the care and operation of boom cranes on its vehicles because of the high amount of accidents and damage to vehicles, equipment and material. Such training was open to any and all employees.

The instant dispute was created by the following claim filed on December 13, 1989.

"I am presenting a time claim, and grievance by and in behalf of the below listed employees, who retains seniority on the Louisiana division:

T. E. Ross, Sr. 435-74-7697 Trackman Driver

'On Tuesday, October 31, 1989, claimant was cut-off his assigned position on Gang 1674, at Monticello, Arkansas. Prior to being cut-off while at a Safety Meeting in the vicinity of Monroe, Louisiana, claimant informed MTM Jackie Graham of his intentions to displace Trackman Driver Newsome on Gang 1601, at Bonita, Louisiana, on Wednesday, November 1, 1989. MTM Graham informed claimant that he could not displace the Trackman Driver on Gang 1601, contending he was was (sic) not qualified to operate the boom on the truck.

As a result of the above, claimant traveled to Pine Bluff, Arkansas, and exercised his seniority as a Trackman on Gang 1046.

As a result of being denied said displacement claimant had to travel an additional 110 miles one way to exercise his seniority. The actions by MTM Graham were without Agreement support, as outlined under the Memorandum Agreement of September 1, 1963, which established the 'Trackman Driver,' and the Letter of Understanding dated October 8, 1986, signed by former Director of Labor Relations J. J. Shannon, and BMWE General Chairman L. W. Borden. I call you attention to the language contained within each, whereas the only requirement to hold said position is to have a valid chauffeur's license for the state in question. Nowhere, within these Agreements is there any language which mandates that an employee must be qualified on the operation of a boom, before being considered for the position of Trackman Driver. Even if there was, an employee can operate a boom truck. No special skills are required. It is obvious the carrier is using the word qualified as a tool to pick and choose who they want for these positions, with total disregard for the employees seniority.

It is our contention that certain rules of our current Working Agreement have been violated, especially, Seniority Rights Rule (2), Memorandum Agreement of September 1, 1963, and the Letter of Understanding Dated October 8, 1986.

Therefore, based on the above, time is being claimed by and in behalf of claimant for the difference in rate of pay for Trackman to Trackman Driver, for 40 hours per week, and full payment of all overtime and holiday pay, as well as mileage at 24 cents per mile, for a round trip total of 220 miles per week, for the additional travel, from November 1, 1989, to continue thereafter, until allowed to exercise his seniority as Trackman Driver on Gang 1601." (underscoring added)

Carrier replied on April 30, 1990, denying the claim:

"Investigation into the facts surrounding your claim reveals Claimant had been working as a Trackman on Gang 1674 when it was cut off effective October 31, 1989. Claimant exercised his seniority on Gang 1046 at Pine Bluff, Arkansas as a Trackman on November 1, 1989. Carrier records also reveal that Claimant bid on a Trackman position on Gang 1719 and was assigned to that position December 29, 1989. Therefore, any liability would end at that time.

The Organization is taking the position that the only qualification for a Trackman Driver is that he possess a valid chauffeur's license. While Claimant is hy-rail qualified, he is not qualified on the crane and was not allowed to displace Mr. Newsome, who was crane qualified. This position was for a truck driver and the truck driver needed to operate the crane which was on the truck. Therefore, in accordance with Rule 10, Mr. Newsome was assigned to the position.

Rule 10 clearly states that management is to be the judge of fitness and ability. In this case Mr. newsome possessed the fitness and ability, whereas Claimant did not. As you are aware, the Organization and Claimant must demonstrate that he had the necessary ability and qualifications to perform the duties required. There is nothing in your letter which indicates he was qualified. A mere statement that Claimant was qualified cannot be considered proof.

With regard to the Organization's request for mileage, there is nothing contained in the Rules cited which provide that the Carrier will compensate an employee for mileage under the circumstances outlined. Therefore, your claim must be considered excessive.

In your letter you contend that the Carrier has violated certain provisions of the Agreement, and we have again reviewed the language contained therein; however, based on the information contained in your correspondence there is absolutely nothing found to support your contention. This claim has been progressed without ample substance and must obviously fail since a claim based merely on allegation cannot stand. The relief you seek is not clearly supported by a bona fide violation of the Agreement, and you have not recognized your burden to prove your allegations. Since we find no basis to your contentions, this claim is respectfully declined in its entirety for lack of merit and Agreement support." (underscoring added)

The Carrier, after final conference, denied the claim by replying in part:

"During the claim conference at Omaha, Nebraska on June 7, 1990 this case was discussed during which time we reviewed our respective positions. As a result of our conference, I indicated to you that the claimant did not possess the necessary qualifications and therefore Rule 2 was not violated. Claimant has had plenty of opportunity to attend schools and become qualified. Attached, you will find a list of dates schools have been presented. As you are aware Crane Training was implemented several years ago due to the

number of vehicles incurring bent bent booms, etc. and to protect the safety of our employees, our operation and the general public.

The Carrier is not unreasonable in this requirement and has the latitude to set qualifications on a position as long as they are not restricted by the Agreement. In this regard you are referred to Second Division Award 6760 which states in part:

'We frequently have held that Carrier has the right to assign work and to determine job content of positions, except as restricted by the express terms of the Agreement. Awards 3454, 6405, 12346, 13490, 13719 et al (Third Division). Likewise, we have upheld the propriety of Carrier tests to determine qualifications on ability, so long as they are fairly and reasonably applied in a nondiscriminatory manner. Awards 1118, 4214 (Second Division), 12461, 15002, 15493 (Third Division). In the instant case there is no evidence of discrimination or arbitrary, unreasonable or capricious activity by Carrier in assessing Claimant's qualifications.' (underscoring added)

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The issue was thus joined. The Carrier perceived it to be one of judging an employee's qualifications for the position bumping onto as exemplified by this quote from Third Division Award 28600, dated October 13, 1990:

"...Whether an employee has sufficient fitness and ability to fill a position is a matter of judgment that is a managerial prerogative. Unless the Organization can prove that Carrier acted in an arbitrary, biased or prejudicial manner in evaluating the Claimant's competency, the decision of the Carrier must be final. See Third Division Awards 26595, 4040, 5966, 6054. It is also well-established that Carrier can require the employee to demonstrate fitness and ability by examination, and provided the test is fair, work related and other employees have been subject to the same requirements, the Board will not interfere with the Carrier's determination (See Public Law Board 2035, Award 9)."

The facts of this case, on first impression, appear to differ markedly from those in the Awards cited by the Carrier. The Board finds no quarrel with the general premise being articulated therein to the effect that unless specifically restricted by the Schedule Agreement, management is the sole judge of an employee's qualifications for skilled and semi-skilled positions.

The question raised is were the Trackman/Driver positions involved, i.e., the one with Gang 1674 at Monticello, Arkansas from which Claimant Ross was displaced and Trackman driver Newsome, Gang 1601 at Bonita, Louisiana the same? Or was it as the facts indicate that Ross was a displaced Trackman who simply possess a chauffeur's license and merely wanted to displace a junior Trackman/Driver? Ross was refused the displacement because he was not "boom" qualified on the new trucks.

Carrier Exhibit A is apparently aimed at Crane Operators and "Astronauts." Nonetheless, since the Trackman/Drivers the crane qualification requirement has been in effect several years preceding the instant claim and since most, if not all, Trackmen/Drivers have qualified thereon and since Claimant willfully chose to not qualify then it is not unreasonable to conclude that such qualifications must be met before the Claimant is permitted to displace on Bonita's position.

As soon as Claimant Ross can show that he is qualified to operate a truck crane, he can thereafter bid therefor. However, lacking such qualifications, which apparently was not protested, the denial of his displacement right is upheld.

Award: Claim denied as per findings.

S. A. Hammons, Jr., Employee Member

D. A. Ring, Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued September 26, 1991.