

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 149

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

WHEELERSBURG TERMINAL

(Carrier File MW-WHEL-04-02)

Statement of Claim:

Request on behalf of D. B. Hall that he be paid for the Relief Field Supervisor duties at Wheelersburg Terminal performed by M. L. Knight beginning September 15, 2004, and continuing until he is placed on the Relief Field Supervisor position.

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

BACKGROUND

This case concerns an allegation by the Organization that Relief Field Supervisory duties were improperly performed by D. L. Knight, who is junior to D. B. Hall, the Claimant herein.

By way of background, the Claimant began performing the duties of a Relief Terminal Supervisor in or about 1991 when the Carrier purchased the Wheelersburg Terminal (WBT) from Kentucky Ohio Transportation (KOT). Claimant performed Relief Terminal Supervisor duties on the first and second shifts until September 2002 when the Claimant notified Management that he no longer desired to be considered for any further Relief Field Supervisor work. Other Equipment Operators

were subsequently trained by Management to perform this service. Subsequently, in or about September 23, 2003, the Claimant was asked if he would be interested in performing Relief Supervisory Duties to which the Claimant responded affirmatively. However, due to the time that elapsed between his forfeiture of such duties in September 2002 and his desire to resume such duties in September 2003, it was necessary for the Claimant to refresh his skills. It was the Claimant's position that because of his earlier qualification by Management he had a right to be used for such work occurring on his shift rather than the Carrier using some other Equipment Operator, or employee from another craft, who had subsequently been trained and qualified by Management. However, the Carrier elected to utilize the services of M. L. Knight, who was qualified to immediately assume the Relief duties. Given the Claimant's greater seniority, the Organization requested that he be "immediately placed on the position for training and placement onto the position." The Organization's request was denied by management, who maintained the right to have the work performed in the most efficient, cost saving and expeditious manner using any means unless otherwise restricted by the agreement.

DISCUSSION

In this case, Claimant D. B. Hall, a BMWE-represented Equipment Operator, was initially qualified by Management in 1991 to perform as a Relief Field Supervisor. Field supervisor duties are regularly performed by non-agreement supervisors and there is no obligation to have any agreement employees performing such duties. However, when Management determines to have Field supervisor duties performed by agreement covered employees, in a relief capacity, the historical practice since 1991 reserves preference to using BMWE-represented Equipment Operators who Management have previously qualified. In February 2002, Rule 14 was included in the applicable Agreement in part to ensure that Equipment Operators were paid a higher rate when performing as a Relief Field Supervisor. In addition to acknowledging that management retains the discretion to determine the employees who are to be qualified for such relief work, this rule also gives a preference for use among the Equipment Operators based on the order in which the respective Equipment Operator had been qualified by Management for this relief work.

On days when an Equipment Operator is used to perform as a Relief Field Supervisor, the employee so used is not a part of the Equipment Operator crew and is paid at the appropriate Relief Field Supervisor rate, rather than at the Equipment Operator rate. Otherwise, such employee remains a part of the Equipment Operator crew and is subject to the same overtime provisions as the rest of his crew on the work days and rest days that he is not performing as a Relief Field Supervisor.

In September 2002 the Claimant notified Management that he no longer desired to be considered for any of the Relief Field Supervisor work. Other Equipment Operators were subsequently trained by Management to perform this service. However, the Claimant subsequently expressed his desire to perform those duties associated with the Relief Field Supervisor position, and asserted that because of his earlier qualification by Management he had a right to be used for such work occurring on his shift rather than the Carrier using some other Equipment Operator, or employee from another craft, who had subsequently been trained and qualified by Management.

Rule 14 sets forth a preference among Equipment Operators "based on their earliest applicable date of qualification." Since Claimant was initially qualified in 1991, at issue here is the impact of Claimant's subsequent 2002 notification to Management that he no longer wanted to be considered for the Relief Field Supervisor opportunities, as well as the Carrier's contention that additional computer applications have been added to the Field Supervisor duties since 2002 for which the Claimant is not qualified to perform.

Inherent in the preference provided to Equipment Operators by Rule 14 (as well as the historical practice), is the obligation to perform the duties. Accordingly, where it has been demonstrated that an employee qualified by Management subsequently renounces his right and desire for preference to perform as a Relief Field Supervisor, such employee has no further contractual demand to be used in this capacity. Accordingly, any subsequent use would solely be at the discretion of the Carrier.

Although matters such as an employee's renouncement of an otherwise contractually provided right are normally confirmed in some manner, here there is no document confirming that the Claimant

signed away his contractual preference to use on this work. However, the handling on the property supports that at some definitive point in 2002 the Claimant chose to no longer perform as a Relief Field Supervisor and made the Carrier aware of this desire. Accordingly, and without more, such action would effectively sever the Claimant's right to any subsequent performance.

This particular case is further complicated by the assertion that subsequent to the Claimant's 2002 renouncement of his desire to perform the claimed work, the Terminal Manager contacted the Claimant for the purpose of utilizing his services as a Relief Field Supervisor in order to fill a void resulting from one of such qualified employees going off on sick leave in September 2003. Such act to re-establish Claimant's qualification and connection to performing as a Relief Field Supervisor would be properly within the discretion of Management had the Terminal Manager chose to have done so. The Claimant has asserted that Management offered him opportunity to resume performing some of the Relief Field Supervisor work but once the Claimant accepted this offer and took action in preparation of being afforded some of the Relief Field supervisor opportunities the Terminal Manager advised the Claimant that he had decided not to use him. The record reveals however that the Terminal Manager subsequently used the services of qualified employees from other crafts as well as other Equipment Operators for some Relief Field Supervisor service. Although the Carrier disputes the details as presented by the Claimant, no statement that would sufficiently negate the Claimant's assertion was provided from the Carrier Officer who was the Terminal Manager at the time of this incident

In the Carrier's exercise of its discretion to allow an employee who previously gave up the right to perform any Relief Field Supervisor duties to once again be used in this capacity, there none-the-less remains the question of whether the Claimant was qualified to do so given the one-year hiatus between his renouncement and his showing of interest in performing these duties once again. In this regard, the Carrier has satisfied its burden in demonstrating that the duties of the Relief Field Supervisor position changed in a material fashion since Claimant's prior performance in 2002. Although the record establishes that the Claimant is not familiar with some of the newly added computer applications there has been no reliable showing as to whether such tasks could promptly be mastered or whether they are beyond the fitness and ability of the Claimant.

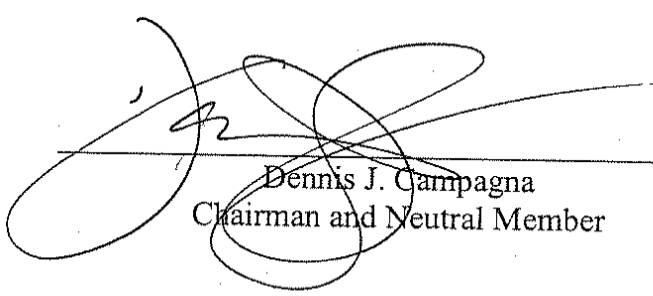
Also, of import in this particular case is the delay between the Claimant's dealings with the Terminal Manager and his subsequent formal complaint that after the Terminal Manager had arranged with him to resume performing as a Relief Field Supervisor, he was not given the opportunity to do so.

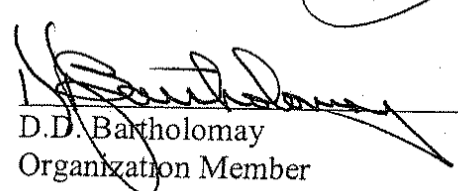
In light of all of the foregoing, it is the determination of this Board that the Claimant is not entitled to any monetary remedy. However, the Claimant, upon notifying the Terminal Manager of his desire to do so, should be afforded the opportunity to resume performing as a Relief Field Supervisor, an opportunity apparently offered to him by the Terminal Manager in 2003. Accordingly, the Claimant, upon providing the notice referenced above, should be provided reasonable opportunity to re-qualify, given the recent changes in the duties of the position, and if he satisfactorily does so should be restored to the same status with respect to use as a Relief Field Supervisor as existed prior to his 2002 renouncement.

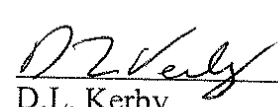
CONCLUSION

The Claimant may notify the Terminal Manager, at his discretion, in writing, of his desire to resume the duties associated with the Relief Field Supervisor position, and shall thereafter be afforded the "refresher" training similar to what would have been provided to him had the Terminal Manager proceeded to use the Claimant in 2003. If the Claimant satisfactorily re-qualifies, his use as a Relief Field Supervisor shall be covered under Rule 14 in the same manner as before he renounced performing such duties in 2002. If once given the opportunity to refresh his skills the Carrier determines that the Claimant is not reasonably capable of satisfactorily requalifying for Relief Field Supervisor duties, the Claimant may grieve the Carrier's determination. The Carrier shall then be required to support its determination with probative evidence concerning the necessary tasks and the Claimant's deficient or unsuitable performance.

Finally, the Claimant's request for a monetary remedy for not being used in this capacity since 2003 and demand to otherwise be immediately placed as a Relief Field Supervisor are denied.



Dennis J. Campagna
Chairman and Neutral Member

D.D. Bartholomay
Organization Member

D.L. Kerby
Carrier Member

July 24, 2006
Dated