

SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to Dispute:)
)
BROTHERHOOD OF MAINTENANCE) Case No. 29
OF WAY EMPLOYEES DIVISION,) Award No. 29
INTERNATIONAL BROTHERHOOD OF)
TEAMSTERS,)
) **OPINION AND AWARD**
Organization,)
)
and)
)
BURLINGTON NORTHERN SANTA FE)
RAILWAY COMPANY,)
)
Carrier,)

Hearing Date: September 8, 2006
Hearing Location: Sacramento, CA
Date of Award: March 30, 2007

MEMBERS OF THE BOARD

Organization Members: R. B. Wehrli and Donald F. Griffin
Carrier Members: Kenneth Gradia and John Hennecke
Neutral Member: John B. LaRocco

ORGANIZATION'S QUESTIONS AT ISSUE

1. Did the Carrier violate the provisions of the Agreement dated February 7, 1965, as amended September 26, 1996, (Feb 7th Agreement) particularly Article II, Section 1, when it suspended the protective status and associated compensation benefits of employee D. M. Medrano during the periods he was furloughed December 27, 2000 through December 30, 2000; and January 1, 2001 through January 20, 2001?
2. Shall the Carrier be required to restore Claimant Medrano's protective status and associated compensation benefits during the period identified in 1 above that were improperly denied as a result of the Carrier's inappropriate suspension of his protective status?

CARRIER'S QUESTION AT ISSUE

1. Must a protected employee maintain his rules qualification, thereby enabling him to hold positions that his seniority permits him to hold, and is the Carrier obligated to pay benefits under the Feb 7th Agreement if the employee fails to do so?

OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted according to the 1996 Mediation (National) Agreement and as specified in the National Mediation Board appointment letter dated August 18, 2004; and that all parties were given due notice of the hearing held on this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

Claimant, a Trackman, is a protected employee pursuant to the September 26, 1996, National Mediation Agreement. Effective on or about December 26, 2000, the Carrier abolished Claimant's position. Thereafter, Claimant filed claims for protective benefits for the remainder of December, 2000 and January 2001.

The Carrier allowed the claim from January 22, 2001 through January 31, 2001. The Carrier denied the rest of the claim contending that Claimant could have displaced a junior employee from Trackman-Flagman Position No. 83005 from December 26, 2000 through January 2, 2001, and then displaced a different junior employee from Trackman-Flagman Position no. 83122 from January 3, 2001 though January 20, 2001. In essence, the Carrier denied the claim contending that Claimant failed to exercise his seniority as required by Article II, Section 1 of the February 7, 1965, Job Stabilization Agreement, as amended, which provides:

An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, or failure to accept employment as provided in

this Article. A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee. If an employee dismissed for cause is reinstated to service, he will be restored to the status of a protected employee as of the date of his reinstatement.”

On this property, the Carrier and the Organization agreed that prior rights, protected employees incur a suspension of protective benefits rather than a forfeiture of protective benefits when they are subjected to the provisions of Article II, Section 1. [See Part B1 of Appendix M.] Claimant is covered by this special agreement.

To occupy the position of Flagman, an employee must be qualified on the Maintenance of Way Book of Rules.¹ When the Carrier abolished Claimant’s Trackman position, Claimant was not qualified on the Book of Rules. Therefore, the Carrier’s Manpower Office would not have offered Claimant an opportunity to displace to Positions No. 83055 and No. 83122 inasmuch as he did not possess the requisite qualification to work as a Flagman.

To a large degree, this dispute centers not only on Claimant’s Book of Rules qualification history but also the rules qualification testing process.

Carrier records reflect that Claimant took and passed the re-qualification Book of Rules examination on December 22, 1998. Claimant’s qualification on the Book of Rules endured for one year from December 22, 1998. In 1998, the re-qualification process consisted of scoring 80% or above on an open book, multiple choice examination. The Carrier explained that if an employee scored less than eighty percent (80%), the instructor tutored the employee on the subject matter of the incorrect answers.

¹ Rule 1.1.2 requires Flagmen to be qualified on these rules.

Then the employee immediately retested on only those questions answered incorrectly. If the employee's score reached 80% (or more), the employee passed the exam.

Due to amendments to applicable Federal Railroad Administration Regulations, the Book of Rules examination became more rigorous beginning on August 1, 2000. [See: *49 CFR Parts 213, 214 and 217*] Among other revisions, the coverage of the Book of Rules examination increased by five subjects and the questions were open ended as opposed to providing the employee with a selection of answers from which to choose. Statistical evidence in the record reveals that initially, many employees failed the examination albeit most employees eventually passed through retesting opportunities.

The record is not entirely clear concerning how an employee re-qualifying on the Book of Rules was examined during the implementation of the qualification revisions. Nevertheless, since Claimant was not qualified on the Book of Rules as of August 2000, he would have had to successfully complete the more rigorous examination during the latter part of 2000 to become qualified on the Book of Rules. However, the Carrier submits that if Claimant had passed the old examination in December, 1999, his Rules qualification would have endured through the end of 2000 (pursuant to a special extension of time) and so, Claimant would have had until at least December 31, 2000, to retest under the new regulations.²

Claimant did not take the old Book of Rules examination in December, 1999 and he did not take the new examination in August, 2000 or thereafter. Thus, his Book of Rules qualification expired in December, 1999.

² The Carrier further represented that the Book of Rules certification for qualified employees was actually extended until July 1, 2001.

II. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Employees holding Trackman seniority have never been compelled to maintain all possible qualifications to secure continued active employment with the Carrier. The Carrier cannot hold protected employees to a higher standard than unprotected employees and thus, the Carrier cannot impose the Book of Rules qualification as a condition of continuing employment on Claimant. Moreover, the Schedule Agreement does not contain any term allowing the Carrier to force employees to be qualified for all positions in the craft or classification.

Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement only applies to positions for which the protected employee is qualified. Nothing in the February 7, 1965, Job Stabilization Agreement imposes a duty on protected employees to become qualified on all positions. Stated differently, the authors of the February 7, 1965 Job Stabilization Agreement did not insert qualifications in addition to exercising seniority in Article II, Section 1. Since the Carrier concedes that its Manpower Office would not have offered the two Flagman positions to Claimant because he was not qualified, Claimant was relegated to furloughed status which entitled him to protective benefits.

Next, given the dramatic changes in the Book of Rules examination, there was not any guarantee that Claimant would have satisfied the new qualification requirement even if he took the Book of Rules examination in August, 2000. Adding rigor to the Book of Rules examination caused many Maintenance of Way employees to lose their desire to

fill Flagman positions. Moreover, even if Claimant had passed the Book of Rules examination in December, 1998, passing the old exam did not constitute any presumption that he would have passed the new examination in August, 2000.

The Schedule Agreement does not contain any rule compelling employees who hold Trackman seniority, to either displace to Flagman jobs or to maintain Book of Rules qualification to obtain Flagman positions. Rule 2, Class 3, which lists the classes of Trackman, does not mention Flagman. Most importantly, neither Rule 2 nor any other rule requires a Trackman to fill a Flagman job as a condition of maintaining Trackman seniority. Indeed, the Carrier did not assert that Claimant relinquished his Maintenance of Way Trackman seniority by failing to exercise his seniority to a Flagman position which shows that Claimant was not under any duty to exercise his seniority to a Flagman position.

Also, the Schedule Agreement actually barred Claimant from displacing to a Flagman position. Schedule Rule 12 reserves Flagman jobs to longtime employees who are no longer able to perform heavy work. Thus, a Trackman's right to fill a Flagman position is not predicated exclusively on seniority. Since the Flagman job was not a position available to Claimant in the normal exercise of his seniority, Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement was inapplicable.

In sum, the Carrier improperly suspended Claimant's protective benefits.

B. The Carrier's Position

Claimant failed to "retain or obtain a position available to him in the exercise of his seniority rights", per Article II, Section 1 of the February 7, 1965 Job Stabilization

Agreement, as amended, when he permitted his Book of Rules qualification to lapse. After qualifying on the Book of Rules on December 22, 1998, Claimant abjectly failed to re-qualify, due to his own volition, within the year preceding the abolishment of his job in December, 2000. Since Claimant permitted his Rules certification to lapse, he was unable to displace to Trackman-Flagman positions. Stated differently, if Claimant had properly remained qualified on the Book of Rules, he could have occupied two Flagman jobs through January 20, 2001. Claimant was obligated to maintain his rules qualification to displace to a Flagman position, a job that his Trackman seniority permitted Claimant to hold.

Claimant cannot evade responsibility to obtain a position available to him in the exercise of his seniority merely by refraining from taking a re-qualification examination. A protected employee must work wherever the protected employee's seniority permits him to work. The protected employee must exert reasonable efforts to fully exercise seniority. In this case, Claimant did not even attempt to retain Book of Rules qualification. If Claimant had taken the Book of Rules examination in December, 1999, undoubtedly he would have passed the test, since he previously passed the same test. Claimant need not enhance his qualifications but he must keep the qualifications that he possessed when he became a protected employee.

It is important to note that Claimant permitted his Book of Rules qualification to lapse when the old examination was still in effect. Therefore, Claimant cannot blame his lack of qualification on the new, stricter Book of Rules examination. Indeed, if Claimant

had re-qualified, his certification would have extended through December 31, 2000 which was well after the abolishment of his position.

The formal title of a Flagman position is Trackman. The position is filled by the employees within the Trackman's classification in accord with Trackman's seniority. When it advertises Flagman positions for bid, the Carrier bulletins the position as Trackman jobs. The junior employees occupying the two Flagman positions, to which Claimant could have displaced, obtained their jobs through their seniority as opposed to having any physical disabling conditions.

In sum, Claimant was obligated to take reasonable steps to maintain his rules certification. Claimant's failure to be able to displace to the Flagman positions was the sole consequence of his voluntary decision to permit his rules certification to lapse as opposed to the lack of seniority.

III. DISCUSSION

Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement provides that an employee shall cease to be a protected employee (on this property, the protection is suspended) in case of the employee's "resignation, death, retirement, dismissal for cause ... or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements ..." Neither disqualification nor a lack of qualifications is among the events enumerated in Article II, Section 1. *Special Board of Adjustment No. 605, Award No. 514 (LaRocco)*. A protected employee does not relinquish protective status when the Carrier disqualifies the employee

from a position to which he exercised his seniority. *Special Board of Adjustment No. 605, Award No. 194 (Rohman)*.

In *Public Law Board No. 4848, Award No. 1 (LaRocco)*, the Board discussed the interrelationship between an employee's qualifications to displace to another available position upon the abolishment of the employee's position and the employee's protective status. The Board observed that since the Carrier retains the prerogative, in most instances, to judge an employee's qualifications, the Carrier's discretion could be capriciously applied if the Carrier wrongly disqualified an employee from a position and then contended the employee was subject to the forfeiture provisions of Article II, Section 1. Conversely, the Board was concerned about an employee who might intentionally sabotage the employee's attempt to become qualified for a position available to him in the exercise of his seniority knowing that no other position was available to the employee with the motive of collecting protective benefits. The Board held that both the Carrier and the protected employee must exercise good faith in the qualification process.

In this case, whether or not Claimant was qualified was not in dispute when the Carrier abolished his position. The record herein reflects that the Carrier's Manpower Office would have presumptively barred Claimant from going to the Flagman positions because the Carrier deemed him unqualified. This Board would apply the analysis laid down in *Award No. 1, of Public Law Board No. 4848* if Claimant had an opportunity to qualify for the Flagman position at the time of the abolishment of his position. To

reiterate, absence of qualification is not among the events listed in Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended.

Similarly, there is not any terminology in Article II, Section 1 mandating Claimant to renew his Book of Rules qualification when his re-qualification expired in December, 1999. Qualifying on the Book of Rules was unnecessary for Claimant to continue occupying a Trackman position. The Job Stabilization Agreement does not force protected employees to predict when they may have to exercise their seniority in accord with existing rules. It logically follows that employees do not have to maintain qualifications for all potential positions that may be available should they someday be obligated to exercise their seniority upon the abolishment of their existing position.

In conclusion, precedential awards of *Special Board of Adjustment No. 605*, cited herein, control the outcome of this case. [See also *Special Board of Adjustment No. 605; Award No. 303 (Friedman)*] Claimant was entitled to receive protective benefits in December 2000 and January 2001.

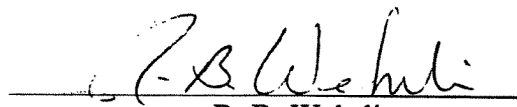
This Board emphasizes that its ruling in this case is narrow. As we stated earlier, the Board does not express any opinion concerning the application of Article II, Section 1 if Claimant had had an opportunity to qualify for a Flagman position coinciding with the abolishment of his position in December, 2000.³ Also, this Board need not express any opinion or address the Organization's argument that a Flagman position was not even available to Claimant in the exercise of his seniority in view of our ruling that Article II, Section 1 was inapplicable to Claimant.

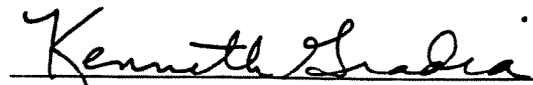
³ Concomitantly, we refrain from commenting on how the added rigor of the Book of Rules examination may have influenced any such qualification opportunity.

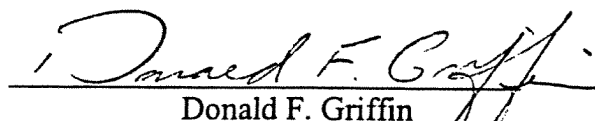
AWARD AND ORDER

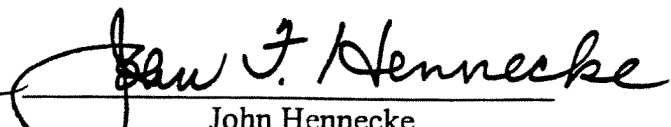
1. The Answer to the Organization's first question at issue is Yes.
2. The Answer to the Organization's second question at issue is Yes.
3. The Answer to the Carrier's question at issue is No; provided however this answer is based solely on this record for the specific reasons expressed in this Opinion.

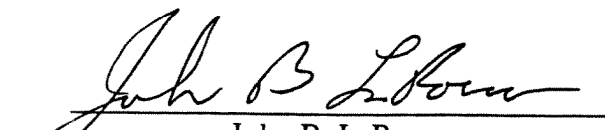
DATED: March 30, 2007


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