Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33514
Docket No. MW-32449
99-3-95-3-149

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Track Department junior employe F. Kriefall to the assistant foreman's position advertised in Bulletin No. SO-488, dated August 19, 1993, instead of assigning Mr. C. A. Weathersby who holds superior seniority in the assistant foreman's classification (System File C-88-93-L040-01/8-00144 CMP).

(2) As a consequence of the violation referred to in Part (1) above, Claimant C. A. Weathersby shall be assigned to the position in question and he shall be paid for all time lost, including benefits, to which he was entitled between the position of assistant foreman of Crew No. 39B at Milwaukee, Wisconsin and his actual earnings on any and all positions to which he becomes assigned until such time as this dispute is ultimately resolved."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This is a seniority dispute in which the Claimant was the senior applicant for bulletined position and the job was awarded to a junior employee. The dispute revolves around the requirement of possessing a Certified Driver's License (CDL). Undisputed facts include that the Claimant was the senior applicant for Bulletin No. SO-488, a position of Assistant Section Foreman stipulating that applicants have a CDL; that the Claimant took a physical examination necessary to acquire a CDL; that he had not obtained the CDL; and that the position was awarded to a junior employee who had a valid CDL.

The Organization argues that the requirements were arbitrarily changed without notification to include the CDL. The Claimant had held the exact same position on a temporary basis in 1991 and 1992 without the license. Even more important, other employees were awarded positions requiring the CDL when they had yet to obtain a valid CDL, while the Claimant was denied the same opportunity. The Organization rejects the Carrier's late reply as coming too late for the Board's consideration.

The Carrier asserts that on April 1, 1992 the mandatory CDL requirements went into effect. It further argues that the Claimant had ample opportunity to become CDL qualified and did not do so. Therefore, as the junior employee had become CDL qualified, he was the senior qualified applicant properly assigned the position. Since the Claimant had the time and knowledge that he had to obtain the CDL and did not do so, he failed to prepare himself for the successful bid.

We have reviewed the many issues disputed. While Claimant asserts he was several hundred miles away from his home state to obtain a CDL and unable to be granted necessary time off, the Carrier states he had sufficient time off to do so, worked within several miles of a licensing facility and that it always worked to assist employees, if asked. The Organization asserts and supports the argument that other employees were allowed to obtain positions without first obtaining CDL's and others awarded positions pending qualifications. As the Claimant had held the position on a temporary basis in 1991 and 1992 without CDL qualification, he should have either been assigned pending qualification or dealt with in a manner constituting equal treatment. The

Carrier argues throughout that its assignment in this instance was not discriminatory and further by disputed letter dated March 30, 1995 that it engaged in equal treatment.

Clearly, this Board has always held that if the Organization can demonstrate that the CDL is not related to the bulletined job, but required by the Carrier for some arbitrary or unnecessary reason, Carrier's disqualification can't hold (Third Division Awards 29851, 29218). This is the finding of recent Third Division Award 32876. Here, the Carrier maintained that it was a requirement, it was clearly bulletined as necessary for qualifications and that the position was awarded to a qualified junior applicant who held a CDL. Nowhere does this Board find any argument by the Organization that the CDL was unnecessary. The sole issue left before this Board is equal treatment.

The Board has seriously studied the dates and circumstances related to the Carrier's March 30, 1995 letter which asserts equal treatment. There is a considerable record of an attempt to properly exchange information on property related to this dispute, including the Carrier's attempts to fax this same letter without success. In fact, after the claim was conferenced on October 21, 1994, both sides apparently agreed to add facts to the record. The Organization did so by letter of January 23, 1995 and thereafter challenged the Carrier to "produce documentation.." refuting its position. It did not indicate that failing to receive same or reply by known date, it would forward to the Board for handling. It subsequently filed the dispute on March 30, 1995; the same date as the disputed letter from the Carrier and a day before the National Railroad Adjustment Board acknowledged receipt of the dispute. This is clearly not the type of action envisioned by the Railway Labor Act which requires this Board to ignore evidence not handled on the property and bars all such evidence by Circular No. 1. Nor can acceptance of a letter which by technicality falls inside the time limit permit full consideration when it comes too late for rebuttal.

On the whole of this case, the Board finds that the elements essential to prove violation by the Carrier are not sufficiently present. We are persuaded by this record that the CDL was properly bulletined because it was necessary and related to the performance of the Assistant Foreman's position. We find the proof of disparate, discriminatory treatment insufficient. The claim is denied.

AWARD

Claim denied.

ORDER

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of September 1999.