

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13214
Docket No. 13081
98-2-95-2-102

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists and
(Aerospace Workers
(The Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

"Dispute - Claim of Employee

(1) That the Union Pacific Railroad (formerly the Chicago & North Western Transportation Company which hereinafter will be referred to as the Carrier) violated the applicable provisions of Rule 35 of the July 1, 1921 Joint Agreement as specifically amended by Agreement dated July 1, 1979, when on May 4, 1994, without the benefit of a formal hearing, the Carrier arbitrarily removed from active service Scale & Work Equipment Inspector (SWEI/Machinist) David M. Schneider (hereinafter referred to as the Claimant.)

(2) That the Carrier be ordered to make Claimant whole for all time improperly lost from service commencing with the date of May 4, 1994 and ending June 8, 1994."

FINDINGS:

The Second 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 claim arises from Carrier's action in disqualifying Claimant from service from May 3 to June 8, 1994 due to his failure to have an appropriate drivers license for his position of SWEI which requires him to operate a company vehicle on both Carrier property and public roads in order to repair equipment, and due to his failure to take and pass a drug test prior to that date.

The record reflects that while Claimant was on a medical leave of absence (LOA) from the Carrier he was convicted of driving under the influence (DUI) and had his driver's license revoked. On April 28, 1994, the Court approved Claimant's request to obtain a driver's license. Claimant returned to service after passing a return to work physical on May 2, 1994 and advised Carrier that he had his license revoked due to a DUI conviction while on LOA, and requested a letter of insurability from Carrier to obtain his CDL. At that time Carrier disqualified Claimant from service for failing to have a valid driver's license, indicating that its insurance carrier would not cover employees in Claimant's position in the operation of Company vehicles. Claimant obtained the necessary insurance on his own and secured a valid CDL on May 10; there are conflicting claims concerning when Carrier was advised of that fact. The initial claim was filed on May 16, 1994 protesting Claimant's removal without a Hearing.

The record reveals that around that time Claimant took the required drug test. According to Carrier, the results were not reported to it by Claimant until June 8, 1994. The record is unclear as to the reason for this three week delay in notification. Claimant was returned to service on June 9, 1994.

The Organization argues that this is a discipline case, and that Claimant was improperly withheld from service without a Hearing. It contends that Claimant was never provided with any written notification of why he was removed from service or what he had to do to get reinstated, and that he took all necessary actions on his own without the help of Carrier when he was advised what was required. The Organization avers that Carrier bears the burden of proof in a discipline case, which it failed to meet, and indicates that this case does not fall under any disqualification rule. It contends that, at

the latest, Claimant should have been reinstated when he got his drivers license on May 10, 1994, and should be compensated for all losses between then and June 9, 1994.

Carrier argues that this is a qualification case, not a discipline case, and that the Organization has failed to meet its burden of proving that Claimant met the necessary qualifications for his position during the period in issue. It contends that Claimant neither had the requisite drivers license nor met the reasonable drug test requirement, and avers that Carrier was not obligated to put him back to work until such time as it was properly informed that he met both requirements. Carrier avers that Claimant should have known he was obligated to communicate these facts to Carrier, and states that Claimant was not medically certified to return to work until June 8, 1994.

A review of this confusing record leaves many questions unanswered. There is conflicting testimony concerning when Carrier first learned that Claimant had his valid driver's license. It is unclear to the Board why substantial time periods may have elapsed between Claimant's securing a drivers license and Carrier's knowledge of such, or Claimant's taking his drug test and the forwarding of the results to Carrier. The record makes clear that Claimant passed a return to work physical on May 2, 1994; the results were apparently immediately relayed to Carrier who returned Claimant to service the following day. Claimant obtained a valid driver's license on May 10 and took his drug test around May 15, 1994. Thus, he technically met the job qualifications as of the time he passed the drug test. The initial claim was filed on May 16, 1994 protesting Claimant's removal from service without a Hearing, and makes no mention of the license requirement.

There is no doubt that the determinative issue in our minds is who bears the burden of proof in this case, and what conclusions are supported by the record. The Board is of the opinion that this case must be seen as raising an issue of Claimant's qualification to perform his position during the period in issue. We are unable to conclude that his removal from service upon learning of his failure to possess the requisite driver's license was a disciplinary action requiring the holding of an Investigation. Accordingly, the Organization bears the burden of establishing that the Claimant was improperly withheld from service during a time when he was qualified to perform his job.

The record supports the conclusion that Claimant obtained the requisite driver's license on May 10, 1994. There is some evidence supporting a claim that Claimant immediately communicated this fact to his Supervisor, although this is disputed by

Carrier. Claimant took his drug test around May 15, 1994. Although it is unclear how this requirement was first communicated to Claimant, we believe that it was a reasonable requirement to establish fitness to return to work under the circumstances of his prior conviction for DUI. However, we are unable to adopt Carrier's assertion that Claimant should have known it was his responsibility to communicate the results to his Supervisor, since it appears that he was sent by Carrier for the drug evaluation. We believe that Claimant could reasonably have assumed that the results would be directly communicated to Carrier. In the absence of any evidence as to the normal time it takes to complete and forward the findings of such test by the laboratory involved, we will assume a reasonable time of three days for the turnaround of such information.

Therefore, the Board concludes that the Organization has met its burden of proving that Claimant was qualified to perform his job of SWEI as of May 15, 1994, and that Carrier should have been notified of such fact within three days thereafter. We therefore direct that Carrier compensate Claimant for all time lost between May 19, 1994 and his return to service on June 9, 1994.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 26th day of February 1998.