

The Second Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers  
(Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That the Consolidated Rail Corporation unjustly disqualified Altoona, PA. Electrician W. A. Barger from his position of 'C' rated Maintenance Electrician on August 4, 1982.

2. That the Consolidated Rail Corporation unjustly held Electrician W. A. Barger from service from August 5, 1982 until September 7, 1982 when on August 4, 1982 it unjustly disqualified him from his position of 'C' rated Maintenance Electrician.

3. That the Consolidated Rail Corporation unjustly held Electrician W. A. Barger from service from August 5, 1982 until September 7, 1982 when it unjustly disqualified him from his position of 'C' rated Maintenance Electrician and unjustly refused him his right to displace Electrical Workers junior to him on his seniority roster during that period.

4. That accordingly the carrier be ordered to restore Electrician W. A. Barger to service with seniority unimpaired and with all pay due him from the first day he was held out of service until the day he is returned to service, at the applicable Electrician's rate of pay for each day he has been improperly held from service; and with all benefits due him under the group hospital and life insurance policies for the aforementioned period; and all railroad retirement benefits due him, including unemployment and sickness benefits for the aforementioned period; and all vacation and holiday benefits due him under the current vacation and holiday agreements for the aforementioned period; and all other benefits that would normally have accrued to him had he been working in the aforementioned period in order to make him whole; and expunge his record.

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 employees 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 waived right of appearance at hearing thereon.

Claimant was employed as a Switchboard Operator at the Carrier's Juniata Power Plant. The Carrier planned a plant shut down from August 1, 1982, to September 6, 1982. During the week prior to the shut down, Claimant and his Union Representative met with the Power Plant General Foreman, B. L. Claar. Claimant requested to displace the "C" rate Electrician during the shut down period. Claar explained the duties of the job and explained that the first job scheduled for the shut down was to complete the new light fixtures that had been partially installed. Although Claimant was working as a Switchboard Operator, in the past, Claimant had served as an Electrician. Claimant stated that he could perform the described duties and was permitted to bump a junior man in accord with his request.

On August 4, 1982, Claimant was disqualified from the "C" rate Electrician position. The Carrier claimed that Claimant demonstrated that he was unqualified for the job. Specifically, the Carrier cites the following incidents as the basis for its determination. First, on Friday, July 30, 1982, Claimant worked with the Electrician who was then installing the lights and questioned him concerning what had to be done for completion of the job. Second, on August 2, 1982, Claimant stated that he could not understand how the system had been installed thus far and was supplied a copy of the installation and Electrical Prints. The design engineer also spoke to Claimant and explained how the system was to be installed. On that day, Claimant made no progress on the job. Third, on August 3, 1982, Claimant was again instructed on what needed to be done. Claimant again made no progress. Fourth, on August 4, 1982, Claimant again made no progress on the job. He was then disqualified. The above stated recitation constituted the facts that existed as the Claim was handled on the property.

The Organization seeks eight hours pay at the pro rata rate for the 22 days Claimant was not permitted to work during the plant shut down as a "C" rate Electrician, along with broader relief, arguing that the disqualification was arbitrary, capricious and discriminatory. The Organization also claims that Claimant was wrongfully not permitted to bump other "C" rate Electricians. The Organization further contends that the action taken against Claimant amounted to discipline and he was therefore entitled to an Investigation and Hearing pursuant to Rules 6-A-1 and 3.

The burden in this case is on the Organization to prove the elements of its Claim. We find that the requisite burden has not been met.

Initially, the parties are in Agreement that the Carrier is empowered to make decisions concerning fitness and ability, and such determinations can only be set aside if shown by the Organization to be done in an arbitrary, discriminatory or capricious fashion. See Second Division Awards Nos. 10513; 10431. Taking the facts that the Carrier assertedly relied upon, i.e., that Claimant simply could not and did not perform the job to which he was assigned prior to his disqualification, we cannot say that the decision was arbitrary or capricious.

However, if we accept as proven the assertions of the Organization that Claimant could not perform the assigned job because he was given other duties; was sent for a medical checkup; and that he was further told that he was not desired in the position and that the Carrier was out to get him, we would have no hesitation finding that the Organization met its burden of demonstrating that the Carrier's action of disqualification was arbitrary, discriminatory or capricious. A close examination of the record shows, however, that the Organization's assertions are not supported by facts; argument is not evidence.

With respect to the Organization's assertion that Claimant was not permitted to bump other employees after his disqualification, likewise, we find no factual support for such a position aside from the mere conclusion made by the Organization. There are no facts sufficient to show that Claimant even sought to bump other employees.

Finally, with respect to the Organization's argument that the action taken against Claimant was disciplinary in nature thereby requiring the invocation of the Investigation and Hearing procedures of the Agreement, the Organization has made no factual showing that the actions of the Carrier were wilful and malicious so as to constitute discipline. See Fourth Division Award No. 3260.

Rule 2-A-3 permits the Carrier to remove an employee "during the fifteen (15) day qualifying period if it becomes apparent that he does not possess the necessary ability and fitness to permit him to qualify." The Organization has not presented facts raised in a timely fashion that show the Carrier's determination to remove Claimant was arbitrary, discriminatory or capricious. In light of our disposition of the Claim, we find it unnecessary to address the other arguments raised by the Carrier concerning the scope of the relief requested.

A W A R D


Claim denied.

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Award No. 11064  
Docket No. 10849  
2-CR-EW-'86

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 12th day of November 1986.