

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

**Award Number 24249
Docket Number MW-24094**

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: { **Brotherhood of Maintenance of Way Employees**
(**Detroit, Toledo and Ironton Railroad Company**)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier's disqualification of Machine Operator Alphonso Ward as a backhoe operator on July 18, 1979 was improper, without just and sufficient cause and in violation of the Agreement.

(2) The claimant's seniority as a backhoe operator shall be restored as of June 11, 1979."

OPINION OF BOARD: On June 11, 1979 Claimant was awarded (following advertisement) the position of Machine Operator 1st Class-Backhoe operator. Effective June 29, 1979 the Award of Backhoe Operator was cancelled. Subsequently, on July 2, 1979 Claimant exercised his seniority and was awarded the position of Machine Operator 1st Class-Speedswing Operator. He had held the position of Backhoe Operator for 21 calendar days. On or about July 20, 1979 Claimant was informed by the Engineer, Maintenance of Way and structures as follows:

"With reference to the position of Machine Operator 1st Class-Backhoe Operator at Section 3 II, Flat Rock, awarded to you on Bulletin T-1834 effective June 11, 1979, which you held for 21 days before transferring to the awarded position Machine Operator 1st Class-Speedswing on July 2, 1979.

Since you transferred from this position prior to qualifying, your name will not be shown as Machine Operator 1st Class-Backhoe Operator on the seniority roster at this time."

The applicable rules provide in pertinent part as follows:

Rule 5 - Time in Which to Qualify

"(a) An employee awarded an advertised position and failing to qualify within 60 calendar days, will return to his former position unless such position is filled by an employee of greater seniority, in which case he may exercise seniority in accordance with Rule 13(f). When it is definitely determined that an employee will not qualify, he may be removed before the expiration of 60 calendar days. (Effective h-55.)" .

Rule 8

"(a) An employee's seniority in each classification in a sub-department will begin at the time his pay starts in that classification except

1. No seniority will be established unless the position has been acquired as the result of advertisement.
2. As provided in Rule g(b).
3. No seniority will be established when the employee fails to qualify.

When the pay of an employee starts in a higher classification in a Group of a sub-department, he will acquire seniority in that classification and also start to acquire seniority in the lower classifications of that same Group."

Petitioner argues that Claimant's seniority as a Backhoe Operator started on June 1, 1979 and he had acquired the position as the result of an advertisement. Furthermore he had not failed to qualify. The Organization argues in addition that Carrier's sole position, that Claimant had not been in the position in question for sixty days, is without merit. It is urged that Claimant was permitted to operate the equipment for 21 days and clearly had the ability required to operate the machine. Petitioner contends that employees can qualify in less than sixty days, as was the case here.

Carrier takes the position that it did not disqualify Claimant as a Backhoe Operator, merely that he had not yet qualified when he vacated the position. Carrier insists that the Rules (Rule 8) provides that First Class Machine Operators are placed on the seniority roster based on the qualification date on each machine. Carrier notes that it, of course, has the sole right to judge whether an individual has had sufficient time to qualify for a position. In addition it is urged that the entire matter is moot in view of Claimant's termination of service on March 4, 1980.

The Board cannot accept Carrier's argument with respect to the dispute being moot. The record discloses that the termination of Claimant is being challenged and is not yet resolved; thus the argument raised by Carrier is at best premature, and its acceptance could well deprive Claimant of important contractual rights.

On the merits, Carrier's argument is not persuasive. The Engineer, in his letter dated August 31, 1979, stated that Claimant had not been disqualified, but that Carrier had not had sufficient time to determine whether or not he was qualified. There is no rule mandating that an employee serve in a position for a particular number of days in order to qualify and clearly

claimant had operated the equipment for some twenty-one days. He met all the requirements of Rule 8(a), supra, and did not fail to qualify. Without in any way tampering with Carrier's right to determine qualifications, it is evident that it made an error in judgment in this particular case. The Claim must be sustained.

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

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee Within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of March 1983.