

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 28028  
Docket No. MW-27826  
89-3-87-3-325

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

(Brotherhood of Maintenance of Way Employes  
PARTIES TO DISPUTE: (  
(The Atchison, Topeka and Santa Fe Railway Company

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

(1) The disqualification of Machine Operator P. Anchando as operator of 'Tie Knock Out machine' was arbitrary and improper (System File 100-8-866/-11-1740-40-63).

(2) Claimant P. Anchando's seniority as 'Tie Knock Out machine' operator shall be restored unimpaired and he shall be compensated for all compensation loss suffered."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 held seniority as a Group 7, Class 3 Machine Operator on January 6, 1986, when he reported to Tie Gang 37 to break in on a Tie Knock Out machine (TKO), a bulletined position for which he was senior bidder. Claimant alleges as follows: he worked the TKO machine from 7:30 A.M. to 10:30 A.M. on January 6 and was then reassigned by his Foreman. The next day he worked the TKO from 8:00 A.M. to 10:00 A.M. and was reassigned. The following day, he was reassigned by his Foreman after working the TKO from 8:00 A.M. to 11:00 A.M. On the fourth day he was reassigned by his Foreman after working the TKO from 8:00 A.M. to 10:00 A.M. On the fifth day after working in the TKO until 2:30 P.M., the Assistant Roadmaster told him he was going to be disqualified because he could not keep up.

Claimant further alleges both the Supervisors disqualified him in retaliation for his activities as Lodge President, but no evidence in support of that position was submitted.

Rule 8 - Promotions, Assignments and Displacements provides in pertinent part:

"8 - (c) - Failure to Qualify.

An employee who accepts promotion to a higher class but fails to satisfactorily perform the duties of the higher class within twenty-five (25) work days will be disqualified. This employee will return to his former position in accordance with Rule 5. All employees affected thereby will be governed by Rule 5.

An employee who is assigned more than twenty-five (25) work days to a position will be considered qualified.

An employee who fails to pass the examination(s) or who is otherwise disqualified, shall be advised promptly in writing, with copy to the General Chairman, as to the cause or causes of his failure to qualify."

On August 25, 1984, the following Note was added to Rule 8(c) by the parties:

"An employee disqualified under the provisions of this rule after having been assigned more than twenty-five (25) work days to the position, may, within 20 days following notification of disqualification, request a formal investigation. If the employee requests a formal investigation and a claim is filed for restoration of his rights, it will be handled as a discipline case."

In a May 27, 1986, response to the Claim, the Carrier wrote:

"Without prejudice to the foregoing, Claimant Anchando was the senior applicant for position of operator on Tie Knock Out Machine, and he began training (he was not qualified to operate said machine) on January 6, 1986. He was allowed to demonstrate his ability to operate said machine from January 6 through 17, 1986. During said period, he performed very poorly on this machine, causing serious delays to the

daily production. When it became apparent that he simply could not handle this machine, he was removed therefrom and was allowed to break in on the Spike Puller machine.

Rule 8-(c), which you have cited in support of your claim, was neither violated nor applicable in the instant dispute. This for the reason that said rule applies solely to an employee who accepts 'promotion to a higher class position' and fails to qualify in that position. Claimant was not disqualified as a Group 7, Class 3 Operator. He was merely removed from a Group 7, Class 3 machine that was not qualified to operate."

On June 10, 1986, the Organization responded:

"You have stated the alleged reasons for Claimant Anchando being disqualified from running the Tie Knock Out Machine. If Claimant had had knowledge, he would have known why he was being removed. It is true that Claimant has not met his burden of proof with respect to fitness and ability for the position here involved. This is the first time anyone has told Claimant what the reason for his removal was. No one had ever complied with Rule 8 (c) and wrote Claimant the reason he was disqualified from the Tie Knock Out Machine. If he did not know the charges, how could he know what to try to prove to get back on the machine."

The Organization argues Rule 8(c) required Carrier to advise Claimant and the General Chairman in writing as to the causes of disqualification and this was not done. Carrier takes the position that the notice provisions of Rule 8(c) apply to promotions from lower class to higher class positions within a seniority group. Claimant was not promoted. He had and retained seniority as a Group 7, Class 3 Operator.

We agree with Carrier that Rule 8(c) does not apply as no promotion or disqualification within the meaning of the Rule was involved.

We further note that although the General Chairman argued Claimant was prejudiced because he had not been told the reason for his removal from the TKO, Claimant in his original statement reported, that the Assistant Roadmaster told him he was disqualified "on account I could not keep up. I told him I knew I wasn't fast...."

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 10th day of August 1989.