

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 31600  
Docket No. MW-30819  
96-3-92-3-627**

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

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(CSX Transportation, Inc. (former Louisville  
( and Nashville Railroad Company)

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

- (1) The disciplinary disqualification of Mr. M. Wise as a backhoe operator on April 1, 1991 was arbitrary, capricious and in violation of the Agreement [System File 15(22)(91)/12(91-950) LNR].
- (2) The Claimant shall be reinstated to the position of backhoe operator with his seniority unimpaired, he shall be compensated for all wage loss suffered as a result of the disqualification and his record shall be cleared of any reference thereto."

**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 waived right of appearance at hearing thereon.

Claimant operated a backhoe unloading ties on March 18-28, 1991. Prior to the start of work on April 1, 1991, Roadmaster Brooks informed Claimant that he had been disqualified from his position as Machine Operator due to:

**SAFETY-**

- Under machine without safety pins in place.
- Not checking equipment out before operating.
- Not following the hand signals as instructed.
- Not having outriggers down in proper position while working.
- Not using personal judgement while operating backhoe.

**OPERATION OF BACKHOE-**

- Took four hours to put in 20 ties.
- Trying to move backhoe with outriggers down.
- Working with outriggers not down properly.
- Trying to move backhoe with boom while front bucket down.
- Had to move backhoe three times to put in one tie.
- Not able to make backhoe perform work required.

At Claimant's request, a formal Investigation was held on June 4, 1991. Each of the five individuals who worked with Claimant testified with respect to his performance on the backhoe. Each of these coworkers expressed "concern" regarding Claimant's ability, especially emphasizing "safety concerns" when working with or near Claimant's machine. Although Mr. Wyrosdick, Claimant's Foreman, found "nothing wrong" with Claimant's performance, he did admit that Claimant seemed unable to effectively perform a number of tasks at which he should "probably" have been proficient.

**Subsequent to the Investigation, Carrier sent Claimant the following notification:**

**"Upon review of the transcript, the facts revealed support and confirm Mr. Brooks disqualification. In fact, during the period you operated the backhoe on Mr. Brook's territory (March 18-28, 1991), there were several instances that clearly indicated your inability to properly operate the backhoe in a safe or productive manner. Three of these incidents during this time could have easily resulted in fellow workers being injured.**

Account of the facts revealed, I find no reason to reinstate you as a backhoe operator and Mr. Brook's disqualification will stand."

The Organization protested the disqualification premised upon Roadmaster Brook's "limited observation" of Claimant's performance. With respect to Claimant's co-workers statements, the Organization asserted that Roadmaster Brooks had "instructed" each of the individual's to write letters concerning Claimant's performance. Finally, the Organization maintained that one of the individual's statement was "self serving" as he had been displaced by Claimant on the backhoe due to a reduction in forces.

In its final declination, Carrier advised that there would be "no justification whatsoever in disturbing the lenient discipline assessed in this case."

The Organization raised procedural concerns in its Submission to the Board. Those concerns were not raised throughout the handling of the dispute on the property, and therefore, must be treated as de novo evidence which cannot properly be addressed by this Board.

With the exception of Claimant's Foreman, each of the individuals who testified regarding Claimant's ability as a backhoe operator, stated that they had "serious" concerns when working with Claimant. The Organization attempted to minimize the seriousness of Claimant's miscues because, fortunately, no one was injured during the time period March 18-28, 1991. However, that rationale begs the more important issue of Carrier responsibility regarding the safety of its employees. The Carrier cannot reasonably be expected to overlook negligent/unsafe work habits, or to run the risk of injury to employees or damage to property, with attendant liability. We are persuaded by the evidence of record that Carrier had justification to disqualify Claimant and exercised reasonable managerial discretion in doing so. Based on all of the foregoing, we conclude that this claim must be denied.

### **AWARD**

**Claim denied.**

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**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 29th day of August 1996.**