

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32989
Docket No. MW-33747
98-3-97-3-213**

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier disqualified Mr. R. J. Sciubba as a trackman effective at the end of his tour of duty on May 11, 1995 (System Docket MW-4041).**
- (2) As a consequence of the aforesaid violation, the Claimant shall '... be compensated for all lost wages beginning May 12, 1995 and continuing through May 18, 1995, when his status changed for disabled. Additionally, all lost benefits and credits normally due must be allowed. Also, the Carrier must amend its current employment requirement of clean shaven and thereby make available the safety equipment to those employees who are presently required unnecessarily to be clean shaven to wear a respirator.
* * *"**

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 were given due notice of hearing thereon.

Claimant established and held seniority as a Trackmen at all relevant times herein and was assigned as such on May 11, 1995 on the Harrisburg Division ballast gang. At the end of his tour of duty that day he elected to disqualify himself from that assignment because he had been instructed to shave his facial hair so that he could wear a respirator as required by Carrier's various Safety Rules. Before doing so however he asked that he be provided another type of respirator that would not have required him to shave. Carrier failed to provide him the respirator in question. One month later Carrier did however provide that same type of respirator to another employee.

Carrier contends that the claim has no merit because the position held by the Claimant at the time in question was properly bulletined with the respirator requirement and because the requirement was reasonable and within its managerial discretion to impose. The Organization on the other hand argues that the Carrier failed to properly raise during the handling of the claim on the property its argument that the position in question was properly bulletined and that the Carrier violated the parties' Agreement when it failed to meet the Claimant's request for alternative equipment.

We find it unnecessary to reach the Carrier's contention that the position was properly bulletined with a reasonable requirement that the Claimant wear a respirator for the matter does not turn on questions of notice or the basis for the Rule, but rather on the manner in which the Rule was implemented. We are of this view because the Claimant asked for an alternative type of respirator and the Carrier made no contention that his request was somehow inappropriate. Thus, the only question is whether the Carrier's failure to comply with Claimant's request was improper and therefore unreasonably caused the Claimant to disqualify himself from the position in question.

On this point the Organization relies on the fact that one month after the incident in question the Carrier provided this same type of equipment to another employee. In reply the Carrier argues that the employee's statement to this affect is "... meritless, probative of nothing, and fails to advance the Organization's claim. ..." We disagree

because the statement raises the inference that the type of respirator that the Claimant requested was generally available. More importantly however, the Carrier has failed to rebut that inference with any evidence that the equipment in question was not available at the time the Claimant asked for it. Accordingly, we are left with no alternative but to conclude that the equipment was indeed available, that it would have permitted the Claimant to meet his obligation under the Safety Rule, and that the Carrier's failure to make it available to the Claimant caused him to unnecessarily disqualify himself from the position in question.

The only remaining question therefore is the remedy required under the circumstances. The Organization seeks that the Claimant be made whole for the period from the date on which he disqualified himself, May 12, 1995 until the date on which he entered disability status, May 18, 1995. It also asks that the Carrier be required to take certain affirmative action with respect to the respirator Rule in question. The Carrier on the other hand argues that any backpay liability be limited to May 15, 1995, the only date on which the Claimant missed a day of work before entering disability status. As noted above the Carrier unreasonably caused the Claimant to disqualify himself from the position in question when it failed to make available alternative respirator equipment that the Claimant sought. Thus, the Carrier is responsible to make the Claimant whole for any loss to wages, benefits, or other credits, if any, between the position he held on May 11, 1995 and any other position he held between that date and the date on which he entered disability status. We do not however believe it is necessary for the Carrier, as requested by the Organization, to take any formal action to amend the Safety Rule in question because, as noted above, the shortcoming in this case does not turn on the content of the Rule, but rather the manner in which it was implemented under the circumstances.

AWARD

Claim sustained in accordance with the Findings.

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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 Third Division**

Dated at Chicago, Illinois, this 23rd day of December 1998.