**Form 1** **NATIONAL RAILROAD ADJUSTMENT BOARD**
**THIRD DIVISION**

**Award No. 35048**
**Docket No. MW-35357**
**00-3-99-3-223**

**The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.**

**PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes**
**(CSX Transportation, Inc.**

**STATEMENT OF CLAIM:**

**"Claim of the System Committee of the Brotherhood that:**

**(1) The Agreement was violated when the Carrier disqualified employe 0. Alston from the position of backhoe operator on SPG Force 5XT2 on Monday, February 10, 1998. [System File 21(30)(98)/12 (98-0928) CSX].**

**(2) As a consequence of the above-stated violation, ' . . . the disqualification letter and all matter relative thereto be removed from Mr. Alston's personal file and he be immediately return [sic] to the backhoe and made whole for all loss suffered as a result of this Carrier's actions."'**

**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.**

At the time the instant claim arose, the Claimant had over 24 years of service with the Carrier, and 19 years as a Machine Operator. At the beginning of the 1998 production season, the Claimant was assigned to operate a backhoe on System Production Gang 5XT2. On February 2, 1998, while working in the vicinity of Thomasville, Georgia, the Claimant was directed to tear out road crossings in advance of the tie installation gang. In the performance of his work, the Claimant was using a backhoe with two levers, rather than a three-lever machine with which he was more familiar. According to the Carrier, the Claimant's work on this machine was "jerky" and too slow to stay ahead of the tie gang. Thus, Supervisor Fitchett informed the Claimant that he was disqualified from the position. The written notice given to the Claimant stated, "Reason can not meet expection [sic] with this equipment that required for the job."

The Claimant discussed this matter with Fitchett, who subsequently rescinded the disqualification notice and gave him an opportunity to work on a three-lever backhoe. On February 10, 1998, Fitchett again gave the Claimant a notice that he was disqualified from the backhoe position. The Organization, on the Claimant's behalf, requested an Unjust Treatment Hearing, which was held on March 4, 1998. Following the Hearing, the Carrier reaffirmed the Claimant's disqualification.

The Carrier argues the burden of proof in this case is upon the Claimant to show, with credible evidence, that he had been treated unfairly. It denies the Claimant met this burden. It asserts the Hearing demonstrated the Claimant worked significantly slower than the normal time on such a machine, thereby impeding the progress of the tie gang. It further asserts the Claimant did not perform his work in a safe and efficient manner.

The Organization, on the other hand, insists the Carrier's action constituted the imposition of discipline without just cause. Contrary to the Carrier's contention, the Organization argues the Carrier must support its decision to disqualify the Claimant with substantial evidence. It denies that the reasons advanced by the Carrier represent a sufficient basis upon which to disqualify the Claimant.

Our review of the record indicates the Carrier had concerns about the Claimant's ability to perform his job in a safe and efficient manner. The Carrier cited the need for the Claimant to be careful when there are other employees working in the vicinity of the backhoe. When questioned, however, Fitchett testified there were no men working in

proximity to the machine while the Claimant was operating it. He mentioned that the Claimant's operation of the machine was jerky and "looked real kind of unsafe, scary to me.. . ." This was before the February 2 disqualification notice, though. The Carrier rescinded that notice and allowed the Claimant to work on a machine with which he had more familiarity. From that point on, the Carrier cited no problems with the operation of the equipment. In the absence of any specific incidents after the Claimant began work on the three-lever machine, we fail to find any problems with the Claimant's ability to perform his work in a safe manner.

The Carrier's second concern was with the speed of the Claimant's work. Fitchett cited only one crossing that was not torn out in time before the tie gang arrived. The evidence indicates that this crossing took longer than anticipated because the asphalt was thicker than normal. Fitchett acknowledged that thicker asphalt may cause the job to take longer, and there is no way to gauge the thickness before the work is begun. Rather than saying the Claimant's performance was not up to standard, Fitchett merely testified he was "not up to par as to the better operators." The Board finds this to be an inappropriate standard by which the Claimant's performance was measured. While it may be true, he was not as fast as the better employees, the Carrier has not demonstrated the Claimant could not meet some minimum standard of performance. The citation of a single incident of delay, which was probably the result of unanticipated conditions, is not a sufficient basis to form a conclusion that the Claimant could not perform his work efficiently.

While the Carrier argued the Organization has the burden of proving that the Claimant was competent, we note that all but one of the Awards cited by the Carrier involved employees who were denied the right to exercise seniority to positions. The remaining case, Third Division Award 22462, involved an employee disqualified during her probation period. In that case, it was found that the "Carrier submitted substantial evidence showing that she was not qualified for the position." In the instant case, however, we are faced with an Agreement that squarely puts the burden of proof on the Carrier. The parties' September 28, 1993 Agreement, flowing from the report of Presidential Emergency Board 219, addresses the establishment of system production gangs. Section 2.F. of that Agreement provides as follows:

> "Employees assigned by bulletin to SPG positions on which not previously qualified, will be afforded training and be furnished all related materials involving the position in order to qualify. All employees shall be given

**equal access to training and training materials. Employees assigned to such positions will be given the maximum of thirty (30) calendar days after being assigned in which to qualify, but an employee who fails to show sufficient aptitude may be disqualified in writing at any time during the qualification period. An employee not disqualified during such thirty (30) calendar day period will be considered qualified. An employee who is disqualified within said thirty (30) calendar day period, may, within ten (10) calendar days from the date of disqualification, request an unjust treatment hearing at which the carrier must establish the employee failed to show sufficient aptitude and/or the employee may file a claim or grievance in accordance with this agreement."**

**Based upon our review of the record of the Unjust Treatment Hearing, we find no evidence to support the Carrier's conclusion that the Claimant was not qualified for this position. Even if the burden of proof had been upon the Organization, we would conclude that the Carrier's determination was entirely without basis, and therefore unreasonable. Accordingly, we find the Carrier violated the Agreement when it disqualified the Claimant.**

## AWARD

**Claim sustained.**

## 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 25th day of October, 2000.**

**CARRIER MEMBERS' DISSENT**
**TO**
**THIRD DIVISION AWARD 35048**
**DOCKET MW-35357**
**(Referee Barry E. Simon)**

**We are compelled to dissent to this Award because the Majority decision is inconsistent with one of the most basic tenets of the Board, i.e., that in disputes involving fitness and ability, in the absence of clear and convincing evidence that the Carrier abused its managerial discretion, the Board is not empowered to substitute its judgment for that of the Carrier. Yet, in this case, the Majority did just that, despite the fact that there is absolutely no evidence that the Carrier's reason for disqualifying the Claimant as a Backhoe Operator was an abuse of its authority, or reflected unjust treatment of the employee.**

**It appears that the Majority based its decision on the testimony of the Carrier officer who made the determination that the Claimant was not qualified to operate a backhoe. The Majority points out that while the Carrier officer testified that there were no men working in proximity to the machine while the Claimant was operating it, and that after being given a second opportunity to qualify on a three-lever backhoe with which the Claimant professed he was more experienced, "the Carrier cited no problems with the operation of the equipment." At this point in the Award, the Majority stated ". . . we fail to find any problems with the Claimant's ability to perform his work in a safe manner." The Majority further stated that the Carrier's standard for judging the Claimant's operating efficiency was "inappropriate" and that ". . . the Carrier has not demonstrated the Claimant could not meet some minimum standard of performance."**

**With all due respect, the Majority was in no position to make that determination. The Majority had not observed the Claimant operating a backhoe, and it had no basis upon which to determine that the Claimant had the ability to operate the involved machine in a safe manner. The fact that no one was in close proximity at the precise moment it was observed that the ". . . Claimant's operation of the machine was jerky and 'looked real kind of unsafe, scary to me.. ,'" is irrelevant, because sooner or later the Claimant would have been operating the backhoe in an unsafe manner with other employees in close proximity. Nor did the Majority have the authority to determine which standards the Carrier may use in determining a Backhoe Operator's efficiency. It certainly made sense for the Carrier to compare the Claimant's ability with that of other Backhoe Operators.**

**The Majority presumed to make a determination it did not have the authority to make. That determination undermines the Carrier's ability to ensure that its equipment operators have the ability to work safely and efficiently. Apparently, the Majority believes that unless someone is injured as a result of the Claimant's unsafe operation of the backhoe, and no matter how long it took him to perform his work, he must be a qualified Backhoe Operator. The Majority's rationale is fatally flawed. It was the Claimant's burden to prove that he had been unjustly treated. That burden was <u>not</u> met in this case. In our view this Award is palpably erroneous and will not be regarded by the Carrier as valid precedent for future cases.**

Michael C. Lesnik

Martin W. Fingerhut

Paul V. Varga