

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 36036  
Docket No. MW-36293  
02-3-00-3-466

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(Union Pacific Railroad Company)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly removed and disqualified Mr. K. L. Vermillion from a speed swing operator position on System Rail Gang 9031 on January 12, 1999 and continuing (System File 4WJ-7253G/1197233).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. L. Vermillion shall now ‘ . . . have his Speed Swing Operator qualifications reinstated and must be compensated for the difference between the Speed Swing Operator pay received on the 9031 Gang and the position filled by Claimant subsequent to his January 12, 1999 disqualification.\*\*\*”

**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.

Effective August 1, 1998, the Carrier and the Organization entered into an Agreement consolidating Maintenance of Way system operations of the Union Pacific, Southern Pacific Western Lines, Denver and Rio Grande Western, Western Pacific, and Chicago and NorthWestern under one Agreement. As set forth in the Agreement, former CNW Machine Operators were given Machine Operator seniority on the consolidated system rosters.

On January 8, 1999, the Claimant, a former CNW employee, was assigned to a Speed Swing position on System Rail Gang 9031. During the next several days, Carrier Officers and other employees observed the Claimant operate the Speed Swing and concluded that the Claimant was unable to safely and efficiently operate the machine. Consequently, on January 12, 1999, the Carrier notified the Claimant that he was disqualified from the Speed Swing position. Another employee, E. E. Ewoldt, was also disqualified as a Speed Swing Operator in that time frame, and the propriety of Ewoldt's disqualification is also before the Board in Third Division Award 36035.

The Organization protested the disqualification and requested an Unjust Treatment Conference pursuant to Rule 48(n). A conference was held on March 4, 1999, and when the parties were unable to resolve the matter, the Organization filed the instant claim.

It is the Organization's position that, while working for the CNW, the Claimant operated a Speed Swing for more than one year in a safe manner and without any complaints by supervision. The Organization also submitted during the handling of this case on the property statements by employees who claim that they observed the Claimant operate the equipment properly. These statements further allege that the Claimant's disqualification was due not to his inability to operate the Speed Swing but to the origin of his seniority. The Organization contends that former CNW employees were not welcome on the UP gang and that was the true motivation underlying the disqualification in this case.

In addition, the Organization argues that the Carrier failed to present direct and probative evidence refuting the Organization's proofs pertaining to the Claimant's performance. Moreover, the Carrier did not dispute the accuracy of the statement proffered by the Organization from the manufacturer of the Speed Swing regarding its safe operation. To the Organization, this is clearly a case where the Carrier has imposed discipline under the guise of a disqualification. The Claimant's seniority rights should not be stripped away on the basis of general allegations and without affording

**the Claimant the opportunity to face his accusers at a fair and impartial disciplinary Hearing.**

**The Carrier contends that it acted reasonably and in conformity with the Agreement when it disqualified the Claimant from the Speed Swing position. In the Carrier's view, the Claimant did not perform satisfactorily as a Speed Swing Operator. His unsatisfactory performance was noted by several Supervisors and employees, and he was properly taken off of the position.**

**Our review of this case is guided by the basic proposition that the Carrier's determinations with regard to an employee's ability and qualifications are within its managerial authority. Absent probative evidence that the determination was arbitrary or capricious, it will not be set aside. Third Division Awards 30093, 30119.**

**The statements submitted by the Organization and the letter from the manufacturer do not directly refute the Carrier's safety concerns. While the Claimant's past experience on the CNW may have been sufficient to enable him to exercise his seniority to the Speed Swing position, he could still be required to demonstrate his proficiency on that machine in conjunction with the overall efficiency and safety of the Carrier's production gang.**

**The Organization's claims of bias and favoritism have been carefully examined and in our view they have been sufficiently refuted by the Carrier. The Supervisor who disqualified the Claimant is a former CNW employee. He specifically requested that other Foremen and Machinists observe the Claimant's performance to substantiate his conclusions and to ensure that the Claimant received a fair evaluation of his ability on the Speed Swing. The list of observations that resulted in the Claimant's disqualification was detailed and extensive, and presented legitimate concerns as to the Claimant's ability to safely operate the machine. These reasons, and not speculative claims of improper motive, warranted the disqualification of the Claimant.**

**It is true that the Claimant was not afforded notice of the charges or a disciplinary Hearing. However, the action taken by the Carrier was not tantamount to discipline thereby warranting the Investigation and Hearing procedures of the Agreement. The Claimant was afforded an Unjust Treatment Conference in accordance with Rule 48(n) and nothing more than that was contractually required.**

**The record developed in this case convinces the Board that the Carrier's decision was not arbitrary, capricious or improperly motivated. Accordingly, there is no basis to disturb the Carrier's decision and the claim must be denied.**

**AWARD**

**Claim denied.**

**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 21st day of May, 2002.**