Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36286
Docket No. MW-35584
02-3-99-3-500

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier removed Mr. H. D. Houston from his assigned position as grinder operator on Welding Crew 367 on January 29 and continuing until March 10, 1997 (System File C-97-P018-7/MWA 97-07-10AK BNR).

(2) As a consequence of the violation referred to in Part (1) above, Mr. H. D. Houston shall now be compensated for ' . . . a total of 22 days grinders pay, $153.70 motel costs, $152.00 lost meal per diem payments, and $322.50 travel allowance payment he is owed. ***"

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.

The Claimant held seniority on several positions, including Grinder Operator and Welder. When he was removed from his job in a force reduction, he contacted the Manpower Planning Office (MPO) to determine what positions were available to him given his seniority and qualifications. MPO told him he could displace a junior Grinder on mobile welding crew No. 367. He chose to do so and worked on that Grinder job from January 13 through 23, 1997. He then took four days' personal time off. Before he resumed work on January 29, he contacted MPO to find out whether he had been displaced again. MPO advised him that his earlier move to Grinder on welding crew No. 367 was an error because he did not possess the required Commercial Driver's License (CDL). That is, he was not licensed to operate all of the vehicles assigned to crew No. 367. There were five trucks, two of which had a gross vehicle weight (GVW) of 26,000 pounds. Operators of such trucks are required by federal law (or regulation) to have a CDL.

The Claimant then asked MPO for an opportunity to displace some other junior employee. No such opportunities were then available. He was furloughed on January 29, 1997. While on furlough, he obtained a CDL on February 12. He was recalled to work on February 14 as a Stationary Welder in Nebraska. He remained on that job until February 21 when he was once again furloughed. And, finally, he was recalled to a Welder job on welding crew No. 367 on March 10.

The claim was filed on March 20, 1997, alleging that he had been improperly removed from crew No. 367 on January 29, 1997. His complaint has merit for the following reasons.

First, even though the Carrier may have erred in allowing the Claimant to displace a Grinder on crew No. 367 on January 13, 1997, the fact is that he worked that job without difficulty. He was qualified to perform grinding work; he was qualified to drive three of the five trucks used by the crew. Nowhere does the evidence suggest that supervision had to alter a driving assignment due to the Claimant's lack of a CDL. The MPO disqualification occurred when it discovered the Claimant could not operate the two trucks with a GVW of 26,000 pounds. This was, however, in the nature of a potential problem rather than an immediate one. As of January 28, 1997, he had apparently been able to perform all of the duties he had been assigned.

Second, it is true that the Carrier had a right to insist that Grinders on the crew be qualified to operate all of the trucks. It is also true that because the Claimant did

not have a CDL, he could not operate two of the five trucks. But that did not contractually require his removal from his Grinder job on January 28, 1997. He should have been retained and given an opportunity to obtain a CDL so that he could drive all five trucks and be a fully qualified Grinder. Indeed, that is what Rule 23 seems to contemplate:

> "A. Employees . . . securing positions through exercise of seniority, in a class in which not yet qualified, will not be disqualified for lack of ability to do such work [until] after a period of thirty (30) calendar days thereon. Employees will be given reasonable opportunity . . . to qualify for such work as their seniority may entitle . . . them to. . . .
>
> B. An employee failing to qualify for a position secured . . . in exercise of seniority will be given notice in writing of reason for such disqualification." (Emphasis added)

Third, it should be emphasized that the Claimant secured a CDL on February 12, 1997, less than 30 calendar days after he was advised he was being removed from the Grinder job due to lack of a CDL. The latter removal was his initial notice of a need for a CDL.

For all of these reasons, the Claimant's rights were violated. He should be made whole for whatever earnings he lost due to his disqualification on January 28, 1997, and whatever lodging, meal or travel expenses he incurred on account of this violation. The Carrier's procedural objection to this claim is not at all persuasive.

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 28th day of October 2002.

Carrier Members' Dissent
to Award 36286 (Docket MW-35584)
(Referee *Mittenthal*)

This decision compounds a previous error and decides the matter on the basis of a special benefit accorded to the Claimant not enjoyed by the other members of welding crew 367.

There was no dispute in this record that all members of welding crew 367, as a pre-requisite for assignment, were required to be qualified to operate all of the vehicles available to the crew. Because the crew often worked in multiple groups at several locations each member needed to be able to use whatever equipment was available. Such was the reason for the requirement. Carrier's right to make such legitimate qualification requirements has been upheld as a proper exercise fo Carrier's responsibility; see Third Division Awards 35152, 32185, 33913, 34012, 34013, 35561 involving these parties.

There is also no dispute that Claimant did not meet the qualification requirement for this crew on January 13, 1997. That Claimant "worked the job without difficulty" for ten (10) days and the perception that the Carrier's qualification requirement was "in the nature of a potential problem" simply ignores the plain fact that the Organization sought to have Claimant treated differently than everybody else. The Majority does note "that the Carrier had a right to insist that Grinders on the crew be qualified to operate all of the trucks" (emphasis added) but then rationalizes that the Claimant's failure to be qualified did not require Claimant's removal on January 28th. The Majority has made an exception to the general rule in upholding this claim. Claimant was well aware of the qualification requirement for this crew. He benefitted from the Carrier's initial error and such benefit has been compounded by this decision.

The Majority's conclusion that this Claimant is contractually entitled to "lodging, meal or travel expense" because he was entitled to such by his assignment on crew 367 again ignores the fact that Claimant was not qualified to be assigned to welding crew 367 in the first place. Claimant's benefit due to the Carrier's initial error has been compounded and compounded again to provide unwarranted benefits for a unqualified individual.

We Dissent.

P V Varga

Paul V. Varga

M W Fingerhut

Martin W. Fingerhut

Michael C. Lesnik

Michael C. Lesnik