

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36304
Docket No. MW-36414
02-3-00-3-656**

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier's decision on February 19, 1998 to disqualify Mr. S.L. Siegel from his Group 3 (GP-3) Machine Operator position (BNX 060228 Ballast Regulator) on System Region Gang SC-30 was without just and sufficient cause, unfair and in violation of Rule 23 (System File S-P-638-O/MWB 98-07-06AC BNR).**
- (2) As a consequence of the aforesaid violation, Claimant S.L. Siegel shall now "*** be made whole for all losses, this including but not limited to the difference in pay between GP-3 and the Labor position he had to bump, any and all overtime in which his position on SC-30 receives until this violation is corrected."**

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 has established and holds seniority in various classes within the Track and Roadway Machine Operator Subdepartments, including Laborer and Group 3 Machine Operator. Although the Claimant was experienced as Group 3 Machine Operator, he had not previously been qualified as a Ballast Regulator Operator.

Prior to February 2, 1998 the Claimant submitted a bid for one of the Group 3 Ballast Regulator positions available on System Gang SC30, a track surfacing gang. Subsequently the Claimant was notified of his assignment to one of the Ballast Regulator Operator positions.

On February 2, 1998, Gang SC30 began a week long series of safety and start-up meetings, which ended on February 6, 1998, with no ballast regulation work being performed that week. The following week, the gang moved equipment from Wenatchee, Washington, to their starting work location at Kelso, Washington. Thereafter, the Claimant observed vacation during the week of February 9 through 13, 1998, but returned to duty on February 17, 1998. On February 17, 18 and 19, 1998, the Claimant began work on the ballast regulator, under the tutelage of Assistant Foreman C. Pitcher, who was assigned to assist the Claimant during his training.

By letter dated February 19, 1998, the Carrier apprised the Claimant that:

"Effective February 20, 1998, you are disqualified from the position of Machine Operator on BNX 060228 account you have not shown the fitness and ability to perform this job. Please arrange to place yourself by exercising your seniority according to your schedule rules."

By letter dated February 23, 1998, the Claimant requested an Unjust Treatment Hearing, per Rule 62 of the Agreement. The Hearing was held on March 13, 1998, after which the Carrier upheld its decision to disqualify the Claimant as a Ballast Regulator Operator.

In the meantime, however, the Organization filed a "continuing" claim on behalf of the Claimant, alleging that the Carrier had violated Rules 1, 2, 4, 8, 23, and 40 of the Agreement when it did not allow a "reasonable" amount of time for the Claimant to qualify for the Ballast Regulator Operator position. The Vice General Chairman further alleged that the Carrier was not living up to the "spirit or intent" of Rule 23 when "no specific reason" was given for the Claimant's disqualification. In that connection, the Organization noted that for the three days the Assistant Foreman was assigned to work with the Claimant, he observed that: "... I felt he was a little slow but he was ... improving daily."

As remedy for the Carrier's alleged Rule violations, the Vice General Chairman requested that:

"Claimant be made whole for all losses, including but not limited to the difference in pay between GP-3 and the Labor position he had to bump, any and all overtime in which his position on SC-30 receives until this violation is corrected."

The Carrier denied the claim, contending that the Claimant was disqualified for "several reasons." Specifically, the Carrier premised its decision upon the following:

"First, the Claimant ran his ballast regulator into another machine during a training exercise. . . . Testimony proves that this accident could have resulted in an injury and brought serious attention to whether Claimant could safely operate a ballast regulator.

Claimant also fell asleep during other relevant training during the first week on the ballast regulator position. . . . An employee who does not feel it is necessary to stay awake for safety training cannot safely be allowed to remain on the job.

Further, Carrier Officials made the determination that Claimant did not have the ability to maintain the necessary rate of production required of production gangs such as SC-30. . . . It became clear that Claimant was struggling to maintain the performance of the gang in its early weeks before it was up to full production, so it is highly unlikely that he would be able to maintain the necessary performance once the gang was in full production. . . .

The Organization has provided no evidence that Claimant was indeed qualified for the position in question, in fact, they have tacitly admitted that he was not qualified by arguing that if he were provided more time, he could become qualified."

The Organization alleges that the Carrier violated Section A of Rule 23 when it disqualified the Claimant from his position as a Group 3 Machine Operator after operating his machine for only three working days. In Rule 23-FAILURE TO QUALIFY states:

- "A. Employees awarded bulletined positions, or 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 after a period of thirty (30) calendar days thereon. Employees will be given a reasonable opportunity in their seniority order to qualify for such work as their seniority may entitle them to, without additional expense to the Company.**

NOTE: 'Without additional expense to the Company' is understood to mean that an employee qualifying on a position will be entitled to the rate of pay he was receiving on his immediately previous assignment.

- B. An employee failing to qualify for a position secured by bulletin, or in exercise of seniority will be given notice in writing of reason for such disqualification.
- C. An employee who considers himself unfairly disqualified may request, and shall thereupon be given, an investigation as to such qualifications pursuant to the provisions of Rule 62."

The Claimant was assigned to the position in question commencing February 2, 1998. Slightly over two weeks on the job, the Carrier disqualified the Claimant, contending that the Claimant did not possess the fitness and ability to operate the machine to meet the requirements of the position.

In these circumstances, the Organization does not argue with the Carrier's assessment of the Claimant's fitness and ability for the position in dispute, but rather asserts that the Claimant was "improving" and should have been given "more time" to attempt to become qualified. Specifically, the Organization asserts that the Carrier violated Rule 23 noted supra, by not providing the Claimant with 30 days to attempt to qualify for the Group 3 Ballast Regulator Operator position. However, Rule 23 does not require that the Carrier allow successful bidders to work any specified period of time before disqualifying them. The Rule only requires that the Carrier give the employee a "reasonable opportunity" to qualify. In these circumstances, the record demonstrates that the Carrier adhered to that requirement.

In that connection, the Organization asserts that the Claimant was only "on the position" for three days. However, the record demonstrates that the Claimant was actually "on the position" for 18 days. Of those 18 days, the Claimant was physically operating the machine at least five days: two days of non-production, training operation of the machine in the week of February 2, 1998, and three days of production work in the week of February 17, 1998.

On February 4, 1998, during the first two weeks of operating the Ballast Regulator, the Claimant ran his machine into another machine. Regarding that incident, Roadmaster Searer stated that the Claimant didn't seem to be "very familiarized" with the equipment.

During that same period of time, the record demonstrates that the Claimant fell asleep during training class in his first week of training. The instructor, who observed the Claimant nodding off and then sleeping, directed the Claimant to wake up and pay attention.

Finally, with respect to the Claimant's overall progress, the Assistant Foreman assigned to train the Claimant reported that:

"I said that he was improving, however, I didn't know that he would be able to keep up with the production crew when we got into full production"

The Carrier's right to determine whether their employees are qualified to perform desired jobs is supported by numerous Awards. (See for example the on-property Award Appendix K Board, Award 24, Third Division Awards 35408 and 35917.) The record demonstrates that the Carrier afforded the Claimant ample opportunity to qualify for the Group 3 (GP-3) Machine Operator position, and in these circumstances, the Carrier's decision to disqualify the Claimant from same cannot be considered arbitrary or capricious.

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 13th day of November 2002.