

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36540
Docket No. MW-34595
03-3-98-3-241**

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri-
(Kansas-Texas Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly disqualified Mr. M. E. Brooks as a foreman and removed his name from the 7222 Track Foreman Roster on January 16, 1997 (System File Y97321/1055120 MKT).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. M. E. Brooks' name shall be reinstated to the 7222 Track Foreman Roster with a date of December 12, 1996 and his disqualification shall be rescinded.”**

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 entered the Carrier's service on March 19, 1979, and on that date established seniority as a Track Laborer. During his railroad career, he also obtained seniority as a System Machine Operator Helper, System Machine Operator and System Truck Driver. On December 5, 1996, a position of Foreman on Gang 8739 at Saginaw, Texas, was advertised. The Carrier received an application from the Claimant and one other employee (M. Bell). The Claimant and Bell did not have Foreman seniority, but as the senior bidder, the Claimant was awarded the position on December 12, 1996.

It is not contested that the Claimant reported for the position on December 27 and that he worked the position on December 27 and 30, 1996, and on January 2, 3 and 6, 1997. On January 9, 1997, the Carrier bulletined a Machine Operator position on Gang 8750, the work location from which the Claimant bid the Foreman's job. The parties do not dispute that the Claimant worked the Foreman position on January 10, 13, 15, 16 and 17, 1997. On January 20, 1997, the Claimant reported to his awarded Machine Operator position on Gang 8750 and performed no further service as a Foreman.

On January 16, 1997, the Claimant received the following letter from the Manager Track Maintenance:

"DEAR MR. BROOKS

AS A RESULT OF YOUR BIDDING OFF THE POSITION OF FOREMAN ON GANG 8739 PRIOR TO ACQUIRING THE NECESSARY PROFICIENCY TO PREFORM (sic) ALL THE DUTIES REQUIRED OF THIS POSITION AND IN ACCORDANCE WITH ARTICLE 5 RULE 10 OF AGREEMENT DP-357 DATED SEPTEMBER 15, 1961 YOU ARE HEREBY NOTIFIED YOU HAVE FAILED TO QUALIFY ON THE POSITION OF FOREMAN AND YOUR NAME HAS BEEN REMOVED FROM ROSTER 7222 OF THE POSITION OF FOREMAN.

**RESPECTFULLY,
JOHN E. TAYLOR
MANAGER TRACK MAINTENANCE"**

Article 5, Rule 10 provides:

“Rule 10. Employees awarded bulletined positions and failing to qualify within thirty (30) days will return to their former positions without loss of seniority. If, in the meantime their former positions are abolished they will exercise their seniority.”

The Organization asserts that based on the above Article 5, Rule 10, and identically worded Article 4, Rule 6, the Claimant had 30 days from the date he was awarded the Foreman position to qualify as a Foreman. The Organization points to the December 12, 1996 award date and to the January 16, 1997 date on which the Claimant was notified that he was not qualified and emphasizes that this time span exceeded 30 days. The Organization maintains that the cited Rules do not specify that the 30-day period is the equivalent of “actual working” days. Therefore, the Organization avers that the Carrier’s decision to disqualify the Claimant after he occupied the position for more than 30 days was untimely.

The Organization also contends that a past practice existed which allowed employees to bid onto new positions, hold them just long enough to qualify, and then return to their former positions by bid. The Organization maintains that because the Claimant held the Foreman position for more than 30 days, he was qualified on that position pursuant to the above Article provisions. The Organization charges that the Claimant was unfairly penalized for returning to his former Machine Operator position after holding the Foreman job for more than 30 days, and that the Claimant’s actions in this regard did not justify the Carrier’s decision to not qualify the Claimant as a Foreman.

In its defense, the Carrier stresses that the Claimant actually worked ten days as a Foreman, an insufficient amount of time to gain the necessary proficiencies and be deemed qualified. The Carrier points out that the Claimant chose to return to his former Machine Operator position before he had obtained the degree of experience and skills required of a qualified Foreman. The Carrier expresses its disagreement with the position taken by the Organization, during the on-property handling of the claim, that the Carrier was required to conduct a disciplinary Investigation before taking any action tantamount to disqualifying the Claimant. The Carrier emphasizes that although the total number of days the Claimant occupied the Foreman position exceeded 30, the fact remains that the Claimant only performed service as a Foreman on ten of those 39

days. According to the Carrier, ten days is an insufficient amount of time to determine whether an employee is a qualified Foreman given the many responsibilities required of Foremen. Such duties include, supervising gangs, ensuring safe track conditions, monitoring overtime, conveying instructions, and overseeing track maintenance in accordance with Carrier and FRA standards. Finally, the Carrier asserts that prior Awards have upheld the Carrier's right to determine employee qualifications and that Carrier determinations of employee fitness and ability should not be overturned unless evidence exists that the Carrier's actions were arbitrary or unreasonable.

After thorough review of the record and all arguments advanced by the parties, the Board finds that the Organization has not established a Carrier violation of Article 5, Rule 10 or its identical counterpart, Article 4, Rule 6. In pertinent part, both Rules state "Employees awarded bulletined positions and failing to qualify within thirty (30) days will return to their former positions without loss of seniority. . . ." The Board rejects the Organization's contention that the absence of the words "actual working" with respect to the 30-day evaluation period, dictates that an employee will be considered qualified simply because he has occupied a position for 30 or more days. As the Carrier pointed out, the Claimant actually worked only ten days as a Foreman, and those ten days were not enough time for the Carrier to qualify the Claimant as a Foreman.

The Board does not agree that the Carrier's January 16, 1997 letter to the Claimant was issued to him in an untimely manner. As the facts indicate, the Claimant's assignment to the Machine Operator position was effective on January 16, 1997, and the Claimant's last day of work as a Foreman was on January 17, 1997. Clearly, this is not a situation where the Carrier exhibited undue delay in notifying an employee of a failure to qualify, and the Board notes that the Awards cited by the Organization have limited application here. Nothing in the above-cited Articles precluded the Carrier from deeming the Claimant not qualified after the Claimant worked only ten days as a Foreman before choosing to bid out. Furthermore, the Organization has not provided any evidence that the Claimant had gained proficiency in the duties required of a Foreman and should, therefore, have been qualified after completing only ten days of actual Foreman work.

The Board finds no evidence that the Carrier's decision to not qualify the Claimant stemmed from any ill will toward the Claimant as a result of the Claimant's decision to return to the Machine Operator position. Given the circumstances present

in this case, the Board does not find that the Carrier's decision to not qualify the Claimant was tantamount to discipline. The Carrier's decision to not qualify the Claimant after observing his work on ten days was not the equivalent of a disqualification, and such decision to not qualify was not disciplinary in nature.

It is well settled that the determination of an employee's qualifications is a prerogative of management, and such determination will not be overturned without proof that the Carrier acted in an arbitrary, capricious or unreasonable manner. See Third Division Award 30203. Here, the Organization failed to establish that, in view of the circumstances of this case, the Carrier's decision to not qualify the Claimant as a Foreman was in any way improper. Accordingly, 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 8th day of May 2003.