

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36957
Docket No. MW-36014
04-3-00-3-109

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when Track Foreman J. M. Jones was disqualified and removed from the position of track foreman on Gang 8991 effective September 9, 1998 (Carrier's File 1162229 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. M. Jones shall now be “. . . reinstated to the track foreman position, with seniority and all other rights unimpaired, his record be cleared of any reference to the improper disqualification and he be compensated for all wage loss suffered as a result of the Carrier's improper 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.

The Claimant held a Track Foreman's position on Gang 8991 since June 26, 1998. By letter dated September 9, 1998, the Carrier disqualified the Claimant from his Track Foreman's position "account your failure to properly perform the duties assigned to this position."

The Carrier relied upon the following reasons from Manager Track Maintenance J. E. Taylor for disqualifying the Claimant:

"... Mr. J. M. Jones was assigned the foreman position of gang 8991 through the standard bid process. On September 4, 1998 Foreman Jones was lined up to surface two locations with his gang, one being the tie-up switch at the south end of Wrenn Siding, two the north cross-over at CTP250 Hattie Street on the #1 Main track both locations had deviation in track surface. The work was completed at approximately 9:00 PM that evening. At approximately 10:30 AM the morning of September 5, 1998 Track Inspector G. L. Michel upon inspection of the #1 track at CPT250 Hattie cross-over took the Main track out of service, he found three locations with three to four inch high spikes one twenty eight ties in a row, another location with seventeen ties in a row and another with twelve ties in a row all within the area of Mr. Jones surfacing gang work. Mr. Michel then called me and I met him at the location where I found the same condition in the track that was described to me, we then called gang 8814 off of their scheduled work to come and make emergency repairs so that the main track could be restored to service. I find Mr. Jones' actions to be totally lacking in concern for the safety of his fellow employees and the public in general."

The Carrier determines whether its Foremen have the fitness and ability to perform their duties, subject to review by the Board only as to whether the Carrier's decision was arbitrary. Third Division Award 35808 ("Qualification,

fitness and ability to perform a job are determinations to be made by the Carrier, subject only to limited review by the Board as to whether the Carrier was arbitrary in its determination”).

In this case, we cannot find that the Carrier was arbitrary when it determined that the Claimant was not qualified to continue to hold the Track Foreman's position. The record shows that on the morning following the night the work was performed under the Claimant's supervision, there were high spikes found on a substantial number of ties which necessitated the removal of the main track from service and the reassignment of a gang to make emergency repairs. Under those circumstances, it was not arbitrary for the Carrier to conclude that the Claimant was not qualified to continue to hold the Track Foreman's position.

The Claimant's disqualification from the Track Foreman's position was not discipline as argued by the Organization and the fact that he was in the position for more than the 30-day qualifying period specified in Rule 10 does not prevent the Carrier from disqualifying him from that position. See Third Division Award 29307 between the parties (where the employee was in the position for six months and was then disqualified):

“ . . . The fact that Claimant may have previously been deemed qualified is not controlling. Any employee, despite having previously been qualified on a certain piece of equipment, may, for whatever reason, fail to maintain the necessary degree of fitness to continue in that capacity. We do not read Rule 10 as a limitation on Carrier's right to disqualify an individual at any time where there is evidence of incapacity or inability to competently perform the duties of his or her assignment.

Moreover, we reject the Organization's contention that the action taken against the Claimant was tantamount to discipline thereby warranting the invocation of the investigation and hearing procedures of the Agreement. The vast majority of Awards considering this issue have differentiated facts such as those herein from facts constituting discipline. Third Division Awards 11975, 14596, 20045; Second Division Award 11064.”

The fact that, as pointed out by the Organization, the employee in Third Division Award 29307 signed a statement that he acknowledged that he could be disqualified does not change the general propositions stated in that Award. See Third Division Award 20045, *supra* where the employee was disqualified after being in the position for more than four months, (“... the instant facts did not require a disciplinary hearing...”). See also, Third Division Award 34201 (“Disqualification is not discipline”). To the extent that Public Law Board No. 526 stands for propositions to the contrary, given the above cited weight of authority, we do not find that Award controlling.

Other authority cited by the Organization does not change the result. Third Division Award 28781 was a failure to call dispute with the Carrier maintaining that the Roadmaster made the call but did not get an answer. The Board sustained the claim on the basis that the Carrier’s facts were taken from an unsigned letter from the Roadmaster and the Organization produced signed letters that no calls were received by the employee. Third Division Award 30284 similarly sustained the claim protesting a disqualification because all the employee received was a letter stating that he was disqualified and “[t]he Board has searched the record in vain to determine the basis of the Carrier’s decision to disqualify the Claimant.” The record developed on the property in this matter shows detailed reasons taken from Manager Track Maintenance Taylor’s statement demonstrating why the Claimant was disqualified and does not show the Organization refuting the factual assertions. Rather, the Organization’s position on the property in this case was that the action by the Carrier was discipline and should have been handled through the discipline procedures. See the Organization’s letter dated January 6, 1999 (“... a review of the afore referenced letters clearly establishes that Mr. Jones was not disqualified for a lack of ability or qualifications to perform the duties assigned to a foreman but because of his alleged failure to properly perform the assigned duties of his position ... [and] there can be no question but that the disqualification was disciplinary in nature and as such the Carrier was contractually obligated to comply with the provisions of the discipline rule, i.e., timely and properly charge the Claimant and to timely schedule and hold a hearing in connection therewith”). As earlier discussed, disqualification is not discipline. Third Division Award 33224 sustained a claim that awarded the difference in pay and seniority date when the Carrier found the employee qualified for a position in October 1993, but not in April 1993, when there was no appreciable change in the employee’s qualifications. That is not this case.

Finally, the Rule in Third Division Award 17535 contained a specific provision that prohibited disqualification of an employee for fitness and ability reasons after the employee was awarded the position and worked 30 days ("Employees awarded bulletined positions, or employees securing positions through exercise of seniority will not be disqualified for lack of fitness and ability to do such work after a period of thirty (30) working days thereon. . . ." [Emphasis added]. No similar Rule exists in this case.

Based on the above, the claim shall 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 April 2004.