

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37419
Docket No. MW-36955
05-3-01-3-586**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The disqualification of Foreman D. Susdorf on March 19, 1999 was arbitrary, capricious and in violation of the Agreement (System File UJH-01-99/8-00388 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. D. Susdorf shall now have the disqualification expunged from his record and he shall be compensated ' . . . for all lost wages, including but not limited to all straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, and any and all other benefits to which entitled, but lost now or during the pendency of this dispute, as a result of Carrier's deliberate, arbitrary, capricious, excessive and discriminate disqualification in reducing claimant from section foreman to laborer under date of March 19, 1999 and the reaffirmation by way of hearing decision dated April 26, 1999.**

*****"**

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.

On August 13, 1998, the Claimant was informed by letter that he had 90 days to secure a CDL due to the fact that the gang truck was to be replaced by a vehicle that required its operator to possess a CDL. After 35 days, the Claimant was hospitalized on September 17, 1998. The count resumed on January 18, 1999 when the Claimant returned to work. The 90-day period concluded on March 13, 1999, by which time the Claimant had not secured a CDL. The Claimant failed his road test on March 18, 1999. The next date available to retake the CDL exam was April 1, 1999. However, the Claimant contacted the local driver's examination facility and was able to reschedule another driving exam for March 24, 1999. On that date, he successfully completed his driving exam and obtained his CDL.

Pursuant to his inability to obtain his CDL within the 90 days required, the Claimant was disqualified from his Section Foreman position. He exercised his seniority. As a result of his disqualification, the Organization requested an Unjust Treatment Hearing that took place on April 15, 1999. Following this Hearing, by letter dated April 26, 1999, the Carrier reaffirmed its decision to disqualify the Claimant from his Section Foreman position.

The Organization asserts that the decision to disqualify the Claimant was arbitrary and capricious. It asserts that the time period allotted for the Claimant to obtain his CDL was inadequate. Further, the Claimant was not provided appropriate assistance to obtain driving experience on CDL type vehicles. Finally,

the Organization claims that the Claimant was a victim of disparate treatment. It contends that the Carrier should now be required to expunge the disqualification from the Claimant's record and compensate him for all lost wages, including but not limited to all straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, and any and all other benefits to which entitled, but lost.

The Carrier takes the position that the burden is on the Organization to prove that the Carrier acted arbitrarily and capriciously. It contends that the Organization has been unable to meet that burden. The Organization contends that it treated the Claimant fairly and equitably and that the claim has no merit.

The Organization's burden in this case is difficult to meet. As articulated by the Board in 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. Based on the developed record, we cannot find that the Carrier was arbitrary in its determination to disqualify the Claimant. Given the problems exhibited by the Claimant in the performance of his job, a rational basis existed for the Carrier's determination to disqualify the Claimant.

The Organization's arguments that the Claimant was improperly disqualified go to whether the decision made by the Carrier was a correct one. At best, the Organization's arguments make the Carrier's decision a debatable one. But, showing that a determination was debatable, even wrong, does not equate with a demonstration that the decision was arbitrary. A rational basis exists for the Carrier's determination. That determination was therefore not arbitrary. In light of the limited review standard, that is as far as this inquiry can go."

After a review of the record evidence, the Board cannot find that the decision to disqualify the Claimant was arbitrary. Based on the above, the claim is denied.

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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 22nd day of March, 2005.