

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37819
Docket No. MW-38464
06-3-04-3-419**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier disqualified and suspended Metropolitan Division Electric Traction Lineman B. Rhodes from his position beginning on April 4, 2003 and continuing through April 10, 2003 (System File NEC-BMWE-SD-4335 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Rhodes shall now be compensated for all straight time and overtime hours that were lost to him during the period beginning April 4, 2003 and continuing through April 10, 2003.”**

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.

This claim protests the Carrier's disqualification of the Claimant from his position as ET Lineman/HRO position upon the expiration of his medical certification card required by federal regulations for his CDL to be valid and holding him out of service for five work days until he obtained such re-certification, as a violation of Rule 68 which requires a fair and impartial Hearing prior to a suspension.

The record reflects that the Claimant was notified by the Carrier on March 24 that his medical certification card would expire on April 4, 2003 and that he would not be permitted to perform his regular duties if he did not update this qualification for his CDL. There is no dispute that the Claimant's position requires a CDL which is necessary for the operation of the high-rail truck used by his gang on a daily basis. On the property the Claimant asserted that the Carrier made no attempt to schedule a medical appointment for him or assign him other work on his gang that he was qualified to perform not requiring a CDL, as it had done for other named employees who were permitted to work pending qualification. The Claimant also stated that the gang did not require a commercial vehicle during his disqualification period. The Carrier's correspondence avers that the Claimant did not call its office to arrange a physical examination until after his medical certification had lapsed, it acted promptly in attempting to schedule one the following day, but the Claimant was unable to attend a physical exam until April 10, 2003, for which he was compensated. It appears that the Claimant's failure to re-certify until April 10, 2003 was the result of his night shift work hours and child care duties. The Carrier took issue with the examples put forward by the Claimant, asserting that there was no proof that it knowingly permitted any employee to work without qualifications.

The Organization argues that the Carrier's decision to disqualify the Claimant and remove him from service was a suspension from work without the required fair and impartial Hearing which violates Rule 68, citing Third Division Awards 30240, 31368, 32410 and 32719. It contends that the Carrier could have

scheduled the Claimant for a physical exam prior to the expiration of his medical certification which would have avoided the loss of pay sought by the claim herein, and that his disqualification was an unreasonable application of the DOT updating requirement, relying on Third Division Awards 24359, 28780, 29925, 30802 and 32228. The Organization asserts that the Carrier could have assigned the Claimant duties unrelated to operating a high-rail vehicle until he re-certified or cooperated in the effort to update his medical certification, thereby avoiding the hardship caused by the loss of earnings to a single parent.

The Carrier contends that it was the Claimant who was responsible for keeping his qualifications current, and that he failed to do so despite being given ample notice of the expiration date of his medical certification card as well as the consequence of removal from his position if he allowed his certification to lapse. The Carrier argues that it acted in the same manner here as it did in any of the other cited examples where it removed employees from their positions immediately upon learning of the lapse in qualifications. The Carrier notes that it acted immediately in scheduling an appointment for the Claimant to take his physical exam, upon his request, but it was the Claimant's personal situation that prevented him from attending until he had been out of work for a week, a delay that is not attributable to any action of the Carrier. The Carrier contends that it is not obligated by the Agreement to give the Claimant work outside of his position due to his lapse in qualifications, and that it complied with Rule 2 in disqualifying him in this case, citing Third Division Awards 20203 and 29480.

A careful review of the record convinces the Board that the Carrier complied with the provisions of Rule 2(c) when it disqualified the Claimant from his position as ET Lineman/HRO when he permitted his medical certification card required to maintain the validity of his CDL to lapse. The Organization has not shown that it is the Carrier's responsibility in the first instance to assure that the Claimant has a timely physical exam, or that the Carrier's actions were in any way an unreasonable application of DOT regulations. The Carrier gave the Claimant adequate notice of the expiration date of his medical certification card as well as what the consequences would be if he permitted his qualification to lapse. For whatever personal reasons, the Claimant did not follow through and take any initiative in assuring that he timely updated his certification. Unlike the situation in Third Division Awards 24359, 28780 and 30802, the record does not support the contention that it is the

Carrier who is responsible for the delay in this case, or that the Carrier knowingly permitted others to work in positions without proper qualifications. A showing that this may have occurred because the Carrier's records did not timely track all qualifications does not validate a claim to have an employee continue to perform in a position for which he is not currently qualified. This was a disqualification under Rule 2, not a disciplinary suspension to which the right to a fair and impartial Hearing applies; see e.g. Third Division Award 29925, so no Rule 68 violation has been proven. Accordingly, the Organization has not sustained its burden of proving a violation of the Agreement herein.

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 June 2006.