

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37958
Docket No. MW-37112
06-3-01-3-655**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 the Carrier disqualified Mr. M. A. Sotomayor as a track welder on August 9, 2000 and assigned his welder work to junior employee C. Hernandez beginning on August 9, 2000 and continuing through September 1, 2000 (System Files MW-01-2/1248586 and MW-01-8/1249476 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. A. Sotomayor shall now have his track welder seniority status reinstated and he shall be compensated for the difference in pay between a track welder and a welder helper for all straight time and overtime hours worked by Mr. C. Hernandez beginning August 9, 2000 and continuing through September 1, 2000.”

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 Organization alleges that the Carrier improperly disqualified the Claimant from his Welder position and assigned the work to his junior Helper, C. Hernandez. The facts are that the Claimant obtained a Welder Helper position on April 30, 1999. He worked as a Welder Helper until promoted to Welder on February 18, 2000. The Claimant worked as a Welder until he was disqualified effective August 9, 2000.

The Organization contends that the Carrier violated Rule 19 - Promotion (former Rule 10) which states, in pertinent part:

"Promotions will be based on ability, merit and seniority. Ability and merit being sufficient, seniority will prevail, the management to be the judge subject to appeal."

The Organization raised a large number of points associated with its position that the Carrier failed to properly direct, assign, train or assist the Claimant in receiving proper practice and knowledge with respect to welding procedures and techniques to qualify. After redirecting the Claimant to track work and his experience as a Welder Helper to other activities, the Carrier found that the Claimant lacked experience. The Organization argues that an employee cannot obtain experience if denied the opportunity. In that regard, the Claimant was suspended from service at the very time Basic Welder Training was taught. At no time did the Carrier ever provide the Claimant an opportunity to make up this training.

The Claimant made his position clear on the property. He felt that he was not properly trained, evaluated or disqualified. Without getting into the details of several issues, the Claimant argues that the action taken against him was a

deliberate attempt to assure that he was not properly trained. The Claimant feels that the actions of the Carrier were such as to leave him vulnerable due to unfair treatment, hostility, retaliation, and intimidation. The Organization strongly supports the Claimant's position in this regard.

The Carrier denies any improper training or evaluation of the Claimant's abilities. It denies that the Claimant lacked the time to learn the job or the help to assist in such learning. In fact, the Carrier argues that the Claimant "... was given ample time to learn this craft." The Carrier asserts that the time for the Claimant to learn the job was when he was a Welder Helper, not when he was promoted to Welder. As the Carrier states, the Claimant "... bid the job, knowing that he didn't know how to perform his duties." The Carrier argues that the Claimant's abilities were assessed and he was not qualified. For that reason, he was properly disqualified. He did not possess sufficient ability to safely and efficiently do the work.

The Board reviewed the assessment by Manager Track Welding Finlay. Although there are differences with respect to what happened on February 28, 2000, the Claimant was not seen as qualified by either Finlay or Robertson, as indicated by Manager of Track Maintenance Caston. Further, Finlay stated that in August 2000, he observed the Claimant in the performance of his job. He indicated that the Claimant was not qualified in welding. He stated in part:

"I asked you a few questions about procedures you must follow when making a field weld, but you did not know correct procedures. When I asked you to cut a rail you were not sure on how to adjust the torch properly for a cutting flame. I then asked you to demonstrate the proper procedure for building up railends, which again you were not sure. When we got to the actual arc welding part, your weld deposits were not satisfactory."

The Rule provides the Carrier with the latitude to determine ability. The Carrier maintained that the Claimant did not possess sufficient ability. The Carrier has that right by Agreement to make the determination unless the Organization can demonstrate that the Carrier's judgment is erroneous for some reason. Here, the Board is not persuaded. The fact that the Claimant did not make a welding class is

not on point. The Claimant had 18 months in which he was a Welder Helper to learn the basic skills. We do not find fault with the Carrier's actions. The Claimant reacted to the disqualification indicating and confirming the Carrier's position when he stated: "I admit that I needed more practice since I have not been doing any arc welding just thermit welding in few occasions."

In the whole of this case, the Board finds that the Carrier did not act in an improper manner. The Carrier has the right to assess fitness and ability and in this instance we will not set aside its judgment. No probative evidence exists that the determination was improper, arbitrary or capricious. Based on the evidence, the Board concludes that 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 19th day of September 2006.