

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40287
Docket No. MW-40710
10-3-NRAB-00003-80533**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 improperly and unjustly disqualified and removed Machine Operator D. Johnson from his ballast regulator position on Gang 9181 on April 13, 2007 (System File MW-07-84/1477297 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid disqualification should be dropped and Claimant D. Johnson shall now have his ballast regulator operator foreman qualifications reinstated and he shall be compensated for the difference in pay between the machine operator restricted rate of pay and the spiker operator rate of pay for all straight time and overtime hours worked by Gang 9181 beginning April 13, 2007 and continuing.”**

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 April 13, 2007, the Claimant received a disqualification letter from Supervisor S. Mills disqualifying him from a ballast regulator position on Gang 9181. The reasons stated were:

“Reason(s) not qualified:

[O]perator [J]ohnson can not properly final dress track and can not meet the production needs of this gang.

Comments:

Operator Johnson does not possess the skills to properly final dress the ballast section and does not meet the production standards of UPRR production surfacing gangs.”

Supervisor Mills also rated the Claimant as “unsatisfactory” in the following categories:

“Demonstrates confidence while operating (controls)

Ensures standard ballast section (shoulder, slope)

Toe line at end of ballast slope.”

Whether an employee can be disqualified from a position he or she holds is the Carrier’s determination, subject only to limited review by the Board under a

standard which requires the Organization to demonstrate that the Carrier's decision was arbitrary. See Third Division Award 36957:

“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’).”

See also, Third Division Award 36086 (“It is well established that in cases of fitness and ability, the Carrier has the management prerogative to judge fitness and ability and the burden shifts to the Organization to demonstrate that the Carrier's decision was arbitrary, capricious, or unreasonable.”)

Under the limited review standard discussed in those Awards, we are unable to find that the Organization has shown that the Carrier was arbitrary when it determined that the Claimant was not qualified to continue to hold the ballast regulator position on Gang 9181.

The Organization's arguments do not change the result.

First, disqualification from a position is not discipline. See Third Division Award 36957 supra:

“The Claimant's disqualification from the Track Foreman's position was not discipline. . . . See Third Division Award 29307 between the parties (where the employee was in the position for six months and was then disqualified):

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. . . [W]e 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.”

Second, the fact that the Claimant held seniority as a Ballast Regulator Operator since 2006 and worked on the position also does not change the result. See Third Division Award 36957, supra citing Third Division Award 29307 supra:

“ . . . [T]he 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 . . . :

. . . 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.”

At best, this case comes down to the Organization contending that the Claimant was qualified and the Carrier contending that he was not. But the burden is on the Organization to demonstrate that the Carrier’s determination was arbitrary. That burden has not been carried.

This claim shall therefore be denied.

AWARD

Claim denied.

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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 1st day of March 2010.