

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40290
Docket No. MW-39620
10-3-NRAB-00003-060165
(06-3-165)**

The Third Division consisted of the regular members and in addition Referee Brian Clauss 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 disqualified and removed Foreman N. Noska from his foreman position on Southern District Tie Gang 9169 on January 25, 2005 (System File MW-05-63/1421128 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant N. Noska shall now have his Southern District Tie Gang foreman qualifications and seniority status reinstated and he shall be compensated at the applicable time and one-half rate of pay for any and all overtime acquired by Tie Gang 9169 beginning January 25, 2005 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.

The Claimant was assigned as a Foreman to Southern District Tie Gang 9169 on July 23, 2004. He was disqualified from his position on January 25, 2005 in a memo from Engineering Supervisor McCartney that stated:

“This letter is to inform you that you have been disqualified from the position of Tie Gang Foreman, on Gang 9169, account failure to show the necessary fitness and ability required to be a tie gang foreman in a safe and efficient manner.

In accordance with the Agreement between the Brotherhood of Maintenance of Way employees and the Union Pacific Railroad (former Missouri Pacific Railroad) you should arrange to exercise your seniority in accordance with your agreement.”

The Organization sent a letter to the Carrier dated January 26, 2005 in which it was alleged that the disqualification letter was “vague and generic.” Because the Organization considered the disqualification as discipline, a fair and impartial Investigation was demanded, including the production of every member of the Tie Gang to be called as witnesses.

The Organization presented a claim on March 7, 2005, and maintained that the disqualification was discipline. During the handling of the claim, the Carrier provided the email statements of two Carrier Officers. Supervisor Alex Fisher stated in an email dated April 12, 2005:

“Noska was given several chances to improve on his leadership abilities as tie gang foreman by Supervisor McCartney. When Noska was unable to show the expected improvement after several occurrences, McCartney disqualified him as a tie gang foreman. Noska is still an acting foreman on the switch gang and to my knowledge has not received any less pay than a tie gang foreman. As information, I travelled to Houston a few weeks ago and had the opportunity to meet with Noska at a switch he was supposed to be installing ties in. He was unfamiliar with rules governing on track protection with Form B. I am told that Supervisors McCartney and Earley have previously tried to explain the rules to Noska but he still did not understand them. I explained to Noska that he very much needed to understand these rules and time management if he wanted to remain a foreman in any capacity on Tie South programs. Again, Noska has not lost any wages in connection with this claim. He simply, at this time, does not have all resources needed to be a foreman in charge of a large tie gang. I therefore recommend full denial of this claim.”

Supervisor Ron McCartney stated in an email dated April 20, 2005:

“Noska was disqualified as a tie gang foreman on the Southern District Tie Program Gang 9169. He could exercise his rights as a foreman, but not on a Tie Gang. Therefore he lost no wages as a foreman other than him taking his time to place himself w/his seniority. Noska’s job responsibility as a tie foreman were incapable of a large gang on a daily basis. His leadership skills and communication need attention where there will be classes in the future to help train and motivate our supervision in the fields. There is lots of stress and emotions when your foreman can’t lead and direct the gang on a daily basis. Decisions are crucial throughout each and every day but we tend to fall short and it gets to be a matter of not understanding what our goals are. Noska is foreman on the 9198 Switch Gang under my jurisdiction and I have

been at edge trying to get him to understand his job responsibility as a foreman. He does not take charge and control.”

The Organization maintains that the claim must be granted because the Carrier disciplined the Claimant by removing him from the position of Foreman on the tie gang. The Claimant held seniority and there is no evidence in the record that supports the decision to disqualify the Claimant. Even if the Board were to find that the disqualification was not discipline, the claim must nonetheless be granted because of the lack of evidence to support the Carrier decision. In the absence of evidence warranting disqualification, the decision can be nothing but arbitrary.

The Carrier counters that disqualification is not discipline. The Carrier cites Third Division Award 36957 for the proposition that it has the right to determine qualifications and the only review by the Board is whether the decision to disqualify was arbitrary. The Carrier supplied statements from two managers that indicate that the disqualification was not arbitrary.

The Board agrees with the analysis in Third Division Award 36920 rejecting the Organization’s argument that disqualification was discipline and further stating that “[t]he 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.” (Also see Third Division Award 35808.)

In this case, we cannot find that the Carrier acted arbitrarily when it determined that the Claimant was not qualified for the position in question. The record shows that two Carrier Officers cited the Claimant’s lack of skills to perform the Foreman job. They cited his communication skills, his understanding of job responsibility, his understanding of Rules and time management. Further, the Claimant’s inability to take charge and control were cited as further reasons for the disqualification.

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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 1st day of March 2010.