

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41398
Docket No. MW-41275
12-3-NRAB-00003-100115**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement when it failed to properly schedule and hold an unjust treatment hearing concerning the Carrier's September 16, 2008 action of disqualifying Mr. R. Michalski as a traveling mechanic, as requested by letter dated September 30, 2008 (System File B-M-1897-W/11-09-0050 BNR).**
- 2. The Carrier also violated the Agreement in its actions in connection with disqualifying Mr. R. Michalski as a traveling mechanic on September 16, 2008 and continuing (System File B-M-1937-H/11-09-0146).**
- 3. As a consequence of the violation referred to in Part (1) above, Claimant R. Michalski shall now ‘. . .be immediately restored to his assigned Rank B Mechanic position at Havre, MT, we further request his original seniority date as a Rank B Mechanic be restored. We further request that the claimant receive pay at the Rank B Mechanic straight time rate of pay, for each claimed day beginning on September 17, 2008 and continuing until he is placed on his Rank B Mechanic’s position and his seniority is restored. We further request that the claimant receive pay at the Rank B Mechanic overtime rate of pay, for any and all overtime,**

worked on the Rank B position he was assigned to, for each claimed day beginning on September 17, 2008 and continuing until he is placed on his Rank B Mechanic's position, with straight time and overtime pay to be paid above and beyond any pay received by the claimant on any other position, for all days, and full pay for any days missed due to claimant being furloughed, beginning on September 17, 2008 and continuing until claim is settled.'

4. As a consequence of the violation referred to in Part (2) above, Claimant R. Michalski shall now have any and all reference of this improper disqualification removed from his record. Furthermore, '*** This claim demands restoration of Claimant's July 31, 2008 Roadway Equipment Repair Shop, Roster 1, Rank, B, C and D, seniority dates. This claim seeks remuneration for eight hours pay for each and every work day (Monday through Friday) beginning September 17, 2008, and continuing until he is placed upon the traveling equipment maintainer's position. We seek compensation for any and all overtime paid to any junior traveling equipment maintainer working on Seniority District 200, beginning September 17, 2008, and continuing until Claimant is placed upon the traveling equipment maintainer's position. All pay is to be at the Rank B traveling equipment maintainer's rate of pay.'

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 to Position 21871 as a Rank B Traveling Equipment Maintainer (Traveling Mechanic). By letter of September 16, 2008, the Claimant was disqualified from his Traveling Mechanic position for alleged “. . . failure to meet the qualifications and demonstrate your ability to read and understand Electric, Hydraulic and Pneumatic Diagrams and Schematics with sufficient skills to repair roadway equipment as required.”

On September 30, 2008, the Organization requested an Unjust Treatment Hearing pursuant to the provisions of Rules 62 and 40. On October 13, 2008, Manager Roadway Equipment M. Sprattler advised the Claimant and the Organization that he had scheduled an Unjust Treatment Hearing for October 23, 2008, to determine the facts surrounding the disqualification. On October 14, 2008, the Organization informed the Carrier that the Unjust Treatment Hearing had been scheduled in violation of the time limits established by Rule 40. On the same day, it filed a claim on behalf of the Claimant.

On October 15, 2008 Sprattler acknowledged that he scheduled the Unjust Treatment Hearing six days beyond the prescribed time limit. He stated that it was not intentional and, because of that, as a remedy the Claimant was awarded eight hours at the straight time rate of pay for six workdays between October 18 and 23, 2008. At the Organization's request the Unjust Treatment Hearing was postponed until November 13, 2008.

On December 8, 2008, after the Unjust Treatment Hearing was held, but before a decision was rendered, the Carrier declined the claim. On December 10 the Carrier informed the Claimant and Organization that following a thorough review of the transcript, the Claimant remained disqualified.

On January 7, 2009, the Organization rejected the Carrier's findings regarding the Unjust Treatment Hearing based on a variety of reasons.

The claim was duly handled on-property and is now properly before the Board for adjudication.

It is the position of the Organization that the Board does not have to look at the merits and should sustain the claim because the Unjust Treatment Hearing was scheduled in an untimely manner. It further argued that a review of the Unjust Treatment Hearing reveals that the Hearing Officer conducted it in an unfair

manner and had improper contact with a sequestered witness. Additionally, it asserted that the Hearing Officer should have rendered the decision because he could judge witness credibility better than an Officer who did not attend the Unjust Treatment Hearing. Lastly, it suggested that the Claimant was subjected to disparate treatment. Turning to the merits, it argued that the record shows that the Claimant was qualified for the position in dispute and the Carrier did not prove that he should have been disqualified. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the record demonstrates that the Claimant received a "fair and impartial" Unjust Treatment Hearing and there were no procedural violations that would require setting aside its decision to disqualify the Claimant. Regarding the time limit for the scheduling of the Unjust Treatment Hearing, it argued that violation was remedied by the fact that it made the Claimant whole for six days' pay. It further argued that the record shows that the Organization failed to provide any evidence to prove that the Claimant was qualified as a Rank B Traveling Equipment Maintainer, or that it was mistaken in its disqualification of him. It closed by asking that the claim remain denied.

The Board thoroughly reviewed the record as well as the transcript. We are not persuaded that any alleged procedural violations rise to the level to sustain the claim without reviewing the merits.

There are two separate and distinct issues in this dispute. The first is the remedy for the Carrier's time limit violation in responding to the Organization's request for an Unjust Treatment Hearing in accordance with Rule 62. The second issue concerns whether the Carrier was justified in its disqualification of the Claimant and did the Organization prove that the Claimant was qualified.

There is no dispute between the parties that the requested Unjust Hearing was scheduled 23 days after the Organization's request, rather than within the required 15 days. The Carrier argued that it remedied its error by compensating the Claimant six days' pay. According to the Carrier, such payment was in accordance with the principle of interim payment as set forth by National Disputes Committee Decision No. 16. The Organization disagreed and asserted that the time limit violation required the disqualification to be set aside and the claim sustained as presented; but, assuming, *arguendo*, that NDC-16 applied in this instance, the Carrier should be required to pay damages beginning on the date of the Claimant's

unjust disqualification, i.e., September 16, 2008. There are many Awards that address “when liability begins and ends” with varying conclusions. In this instance, and on a non-precedential basis, the Board concludes that NDC-16 is applicable and the Carrier’s liability began on the date of the disqualification. As a result, the Claimant is entitled to Rank B Mechanic straight time pay for each claimed day during the period of September 17 until the date of the Unjust Treatment Hearing that was held on October 23, 2008. As the record reveals, the Claimant has already been compensated for six of those days.

There is broad arbitral consensus that the Carrier has the managerial right to make determinations of qualifications that will not be disturbed unless it is clear, by convincing evidence, that the Carrier's decision was arbitrary or capricious. The Organization vigorously argued that the Claimant was treated unfairly because the Carrier treated him differently than similarly situated employees. It asserted that the record indicates that on September 15, 2008, Supervisor Iverson administered the Simmons-Boardman exam to the Claimant (a standardized test given to applicants for a Rank B Traveling Equipment Maintainer) which he passed and, on the following day, September 16, Supervisor Iverson presented the Claimant with a surprise memory test that was not given to any other employees attempting to qualify for the same position. The Organization's argument was supported by the testimony of a Traveling Equipment Maintainer and statements from five other employees. Testimony was also provided by Traveling Equipment Maintainer Iverson. He stated that he was given the same memory quiz that the Claimant took. Although he believed that he did not pass the test, despite that failure he was not disqualified.

The Carrier countered the Organization's argument of disparate treatment regarding the test given to the Claimant not being given to all other employees attempting to qualify for the same position. It argued that the test pertained to hydraulic and pneumatic symbols. It suggested that the Organization referred to the quiz as a “memory test,” but in reality, most any test, absent an open book test, can be referred to as a memory test. Moreover, in this instance, the Claimant should have been able to remember hydraulic and pneumatic symbols because that knowledge was pertinent to his position.

The record substantiates that the various witnesses called by the Organization were hired at different times, some in different locations, and with different backgrounds. One of those witnesses testified that he was qualified for his

position of Traveling Equipment Maintainer without having taken any test while another employee was administered both tests taken by the Claimant. It is a close call, but the Board is not persuaded that the additional testing required of the Claimant was unfair, arbitrary or that the Claimant was qualified as a Rank B Traveling Equipment Operator.

Although the Board finds and holds that the disqualification will not be rescinded, we also note that the Claimant's disqualification is not permanent. A disqualification is a change in status that can be subsequently regained provided the employee can demonstrate sufficient "fitness and ability" to perform a position.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 25th day of July 2012.