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D.M.P.  
McC.  
NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24516  
Docket Number MW-24543

George V. Boyle, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(Chicago South Shore and South Bend Railroad

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The disqualification of Mr. D. E. Poland as a machine operator on April 25, 1980 was improper, without just, sufficient or reasonable cause.

(2) The Carrier shall return the claimant to the position of machine operator and shall reimburse him for the net wage loss\* suffered from the date of disqualification until the date he is restored to the position of machine operator.

\*Net wage loss is the difference between what he would have been paid at the machine operator's rate of pay and what he was paid at the laborer's rate of pay for the period he has been withheld from the position of machine operator."

OPINION OF BOARD: The Claimant Poland was the successful bidder for a position vacancy in accordance with the bidding procedure contained in the collective bargaining agreement, about which there is no dispute.

He was awarded the position effective April 9, 1980. However, by letter of May 2, 1980, the General Chairman was advised that Claimant had failed to qualify for the position in that:

"He demonstrated insufficient ability by examination and performance. Mr. Poland has failed the Small Machine Operator test three (3) times, with scores of 54, 65 and 61½ out of a possible 100. All other candidates for this position passed this basic examination.

Also, Mr. Poland has been observed operating various equipment and appears to be unaware of what is expected of him in the performance of his duties. He has attended several instructional classes for this purpose."

The relevant portions of the contract are as follows:

"Rule 28. Basis for Promotion

- a. Promotion shall be based on ability, merit and seniority; ability and merit being sufficient, seniority shall govern; the Management to be the judge, subject to appeal.
- b. Employees accepting promotion and failing to qualify within thirty (30) days may return to their former position without loss of seniority."

"Rule 44. Machine Operators

. . . .

Machines to be operated by Machine Operators are as follows:

Concrete Cutter	Power Spike Puller
Power Track Wrench	Joint Oiler
Tie Adzer	Tie Sprayer
Tie Boring Machine	Tie Remover
Tie Inserter	Power Jack

and such machines in this general classification as may be added to the list from time to time.

In order to qualify, Machine Operators must have a general working knowledge of the machines in this classification; must have ability to operate these machines and to perform such other duties as are normally assigned Machine Operator; must have ability to make minor repairs and adjustments to machines; and must be in possession of a valid chauffeur's license ..."

The Employes, on behalf of the Claimant contend that:

1) "the claimant was never afforded a reasonable opportunity to demonstrate his ability ..."; (he) "only operated the Tie Boring Machine for one hour during the time he was assigned to this position".

2) "the Claimant was promoted ... and subsequently disqualified ... thirteen (13) days later ...", contrary to Rule 28 which requires a thirty (30) day qualifying period.

3) "the claimant was not afforded any assistance or guidance from the Carrier or a reasonable opportunity to gain practical experience once he had been assigned ..."

4) the use of a written examination by the Carrier was improper and arbitrary and is an attempt to unilaterally amend Rule 44.

5) since the Carrier promoted the Claimant for temporary periods as well as to fill the job vacancy it is indicative of proven job performance and therefore the retroactive assessment of poor performance is specious and is evidence of prejudgment on the part of the Carrier to the detriment of the Claimant.

The Board, however, finds to the contrary on all contentions.

Treating these positions seriatim:

1) Whether or not the Claimant operated the Tie Boring Machine only one (1) hour is irrelevant. (And there was no agreement or probative evidence adduced to substantiate either party's position in this regard.) The Carrier determined that the Claimant was not qualified based upon prior observation of poor performance and upon his repeated failures to pass an examination which all other bidders had successfully mastered. The examination was designed to test acquisition of knowledge taught in specific instructional classes and consisted, each time, of the identical twenty (20) questions dealing with small machines. His third attempt ended in failure on April 30, 1980 just prior to issuance of the disqualification letter noted above.

Moreover, the Carrier introduced unrefuted evidence that the Claimant had worked sixty-seven (67) prior days on temporary assignment as a Machine Operator during 1979 and 1980. This certainly indicates that the Carrier had ample opportunity to observe his work and the Claimant similarly had adequate chance to demonstrate his capabilities.

2) The letter of assignment dated April 7, 1980 awards the Machine Operator position to the Claimant, effective April 9. The letter of disqualification is dated May 2, 1980. The Grievance letter from Everett Lawson, General Chairman states that he was disqualified on April 25, which is thirteen (13) working days later. Obviously this action was not related to the second test failure, on March 20, 1980, since the promotion occurred in the interim and the third examination on April 30 had not been taken.

The basis for disqualification must then be ascribed to the deficiencies of work performance as well as to the failure of written tests. It is thus within the Carrier's authority to remove the Claimant from this position, subject to the appeal procedure. It would be an absurd construction of the labor agreement to require the Carrier to retain the Claimant in his new position for thirty (30) days despite the Carrier's conclusion that he was unqualified to be in that position. The Claimant has thirty (30) days within which to prove his competence. If within that period he demonstrates his incompetence the Carrier cannot be obligated to continue his employ in such a position where he may jeopardize himself, other employees, the Carrier's productivity or, to whatever degree, the general public.

3) The Claimant was not only afforded reasonable opportunities to qualify for the position, he was extended very generous forms of accommodation by way of classes, instructor's tutoring, home study assistance and quite liberal scoring exams.

4) With respect to the written examination, although this is a recent practice on the part of the employer, there is no language in the agreement which prohibits the Carrier from instituting such a practice for purposes of training and evaluation, and this is consistent with the present provisions of Rule 44.

5) Simply because the Claimant has been used in the past on temporary assignment to perform certain duties of Machine Operator is no reason to conclude that he is capable of performing all the duties on a permanent basis. Moreover, the Carrier's willingness to assign the Claimant to Machine Operator's duties for temporary periods and to award the promotion to him so that he might have the opportunity of demonstrating his competence and abilities' indicates that he was not prejudged unfit for the job without trial.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September, 1985

