

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Seaboard System Railroad

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

(1) The Carrier violated the Agreement when it improperly disqualified Mr. J. Haynes as a Class II (Ballast Regulator) Machine Operator on August 24, 1983 [System File 37-SCL-83-20/12-8 (84-101) R].

(2) Because of the aforesaid violation, the letter of disqualification dated August 24, 1983 shall be rescinded, the claimant shall be compensated for all wage loss suffered beginning August 25, 1983 and he shall be accorded seniority in Rank 4, Machine Operator's Classes I, II and III on the Atlanta-Waycross Seniority District as of July 25, 1983."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimant commenced employment with the Carrier as a Trackman in 1970. Claimant applied for and was assigned to the position of Machine Operator, Class II (Ballast Regulator), on Surfacing Force 5370. On July 25, 1983, Claimant commenced his qualifying period as a ballast regulator operator under the supervision of Roadmaster M. W. Guthrie.

By letter dated August 24, 1983, Roadmaster Guthrie advised Claimant that he was disqualified as a Machine Operator. Guthrie stated, in pertinent part:

"Effective at the close of days work, Wednesday, August 24, 1983, you are being disqualified as Machine Operator, Class II, on Surfacing Force #5387. After your first ten (10) days in this position I checked behind you and found your work to be unsatisfactory. I have given you an additional twenty-one (21) in which to qualify on this machine."

Rule 8 provides:

"BULLETINING VACANCIES AND NEW POSITIONS

* * *

Section 8

(a) Except as provided for in Note below, positions of Track Machine Operators on the machines assigned to employees in Group A, Track Subdepartment, will be bulletined to employees holding seniority therein, and the bidder with the most seniority in Rank 4 will be assigned.

* * *

(b) Successful bidders on the positions referred to in Paragraph (a) above, shall be allowed ten (10) working days in which to qualify at the prevailing rate of the position. Failing to qualify by the expiration of ten (10) working days, such employee shall return to his former position within five (5) working days, provided it is not then occupied by a senior employee account of force reduction, or the position has been abolished, in which event he will exercise his established seniority as provided in Rule 13, Section 3."

Based upon this record, it does not appear that the ten day qualifying time period set forth in Rule 8(b) was extended by agreement. Therefore, there is no basis for the Carrier to assert that it could unilaterally extend that ten day period by an additional twenty-one days. In Third Division Award 24267 we faced a similar issue wherein the Carrier failed to disqualify an employee within the prescribed time period. We stated:

"It is true, as Carrier argues, that it must be given wide latitude in determining whether its employees perform their jobs satisfactorily. It is equally true that Carrier's determination ... that Claimant was unfit for the position ... was neither arbitrary nor capricious. However, the central issue before us is whether Carrier had the right, under the Agreement, to disqualify Claimant from that position at that time, without the benefit of a formal notice of discipline. We believe that it did not."

We find Award 24267 controlling in this matter. Claimant was in the position in excess of the ten days specified in Rule 8 without being disqualified. As in Award 24267, the disqualification after that time without a notice of discipline was improper.

With respect to the Carrier's argument that Claimant did not file a timely Claim under the provisions of Rule 39, Section 5 which requires the filing of written request within ten days of the cause for complaint for employees who consider themselves to be unjustly treated, Award 24267 is again dispositive. As stated therein:

"Finally, we note that Claimant did not invalidate his claim by failing to ask for a hearing within ten days from the time it disqualified him. Carrier improperly disqualified Claimant. It did not discipline him. Had it done so, he would have had to timely request a hearing. However, Carrier's actions violated Rules 6 and 12 of the Agreement, not Rule 39 - Discipline. Claimant timely filed a claim as to those violations. Accordingly, Claimant did not forfeit his right to relief by not requesting a hearing."

Finally, with respect to the Carrier's argument in this case that Rule 12 governs the dispute, we are unable to consider that argument since it was not raised on the property. We note that in denying the Claim in the letter of March 20, 1984, the Carrier's Chief Engineer justified the action under the ten day period found in Rule 8. The Carrier cannot now argue that it had a longer period under a different rule in which to act.

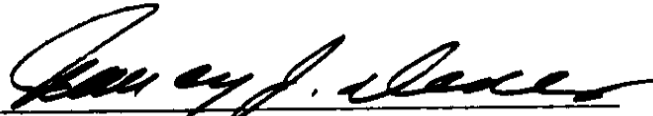
We must therefore sustain the Claim and require that Claimant be compensated for the difference in wages for the time period that he has been disqualified.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of April 1988.