

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29307
Docket No. MW-28217
92-3-87-3-776

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

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(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 Machine Operator M. E. Lain, Jr. was disqualified as the operator of Plaser PUM Tamper ATS-23 on November 22, 1985 (Carrier's File 247-7250).

(2) As a consequence of the aforesaid violation, Mr. M. E. Lain, Jr. shall:

'... returned as the operator of the ATS-23, and that he be paid all expenses incurred by him for being disqualified, and having to exercise his seniority. Also, that he be paid all wage loss suffered, including any holiday pay, from November 22, 1985, until he was able to place himself on a new position.'

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 employees 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.

The instant dispute centers on the disqualification of the Claimant from operating a Plaser PUM Tamping Machine. The Claimant retains a seniority date of June 22, 1973 as a Machine Operator on the Louisiana Division.

According to the information exchanged by the parties during the handling of this dispute on the property, Claimant was qualified on the Plasser PUM Tamper on May 30, 1985. Prior to issuing a certification of Claimant's qualification, the Supervisor required the Claimant to execute the following statement:

"May 30, 1985

In reference to my qualification on the ATS 23, a Plasser PUM Tamper. Considering that the PUM tamper is a high production and maintenance machine I understand that if I cannot do or do not keep the machine in proper working condition and maintain production that I may be disqualified from operating a Plasser PUM Tamper.

I agree to all of the above and acknowledge understanding. In addition if I cannot meet the above mentioned stipulations I will take no formal recourse of any kind." (Emphasis added)

On November 5, 1985, Claimant complained to the Supervisor that the machine would not cross level properly. The same problems were experienced by the Claimant for the next two days. Each day, the Supervisor checked the calibration on the cross level of the machine and found nothing wrong. Each day, the record shows, he demonstrated to Claimant the proper way to operate the machine. On November 21, 1985, Claimant reported that he was having problems with the cross level again. This time, a Mechanic and a Roadmaster examined the machine and found that it was in proper working order. Claimant was disqualified on the machine the following day.

The Organization contends, first, that in accordance with Rule 10 of the current Agreement, "employees accepting promotion and failing to qualify within thirty (30) days, may return to their former position without loss of seniority." According to the Organization, the Rule clearly provides an employee a thirty day period in which to receive training and to demonstrate his fitness, ability and capacity to learn the job. If Claimant were not qualified to operate the Plasser PUM Tamper, Carrier would have disqualified him within the 30-day period under Rule 10. As the record stands, the Organization argues that Claimant filled the position for six months. This suggests to the Organization that the disqualification was arbitrary and capricious and without evidentiary support.

Second, the Organization contends that Claimant was entitled to a Hearing under Rule 12. It notes that Claimant requested a Hearing and that Carrier's failure to so provide denied Claimant his Agreement rights of due process. In the Organization's view, Claimant's right to the Hearing was triggered by the disqualification, an action which the Organization deems to be disciplinary in nature.

Carrier's position is that it disqualified Claimant for justifiable reasons and that its actions did not constitute discipline within the purview of Rule 12. Carrier further notes that Claimant understood the fact that his qualification was conditioned upon his continued good work performance, as demonstrated by his signed May 30, 1985 statement. He should not now be heard to complain, the Carrier argues, given his continued inability to operate the machine properly.

After careful review of the record in its entirety, we are convinced that the instant claim is without merit and must be denied. Although the Organization asserts that Claimant was disqualified "for no apparent reason" and in apparent contradiction to the opinion of several employees who submitted letters on the Claimant's behalf, the record showed that there were repeated occasions where Claimant demonstrated that he lacked the necessary degree of fitness and ability to safely and competently operate this piece of equipment. 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.

Moreover, we 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.


In sum, the record establishes a reasonable basis for Claimant's disqualification and, accordingly, the claim must be denied.

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 24th day of July 1992.