

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31267
Docket No. MW-30942
95-3-92-3-836

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Soo Line Railroad Company (former
(Chicago, Milwaukee, St. Paul and
(Pacific Railroad Company)

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

- (1) The disqualification of Special Machine Operator R. H. Smithson on May 13, 1991, by Roadmaster J. M. Manning, was arbitrary, capricious and in violation of the Agreement (System File C-20-91-C090-01/8-00035-002 CMP).
- (2) The Claimant shall be reinstated to the special machine operator's position, retroactive to the date he was disqualified, he shall be made whole for all lost earnings incurred, including all overtime, and he shall be allowed 5.5% interest compounded until the date of the final resolution of this claim."

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 waived right of appearance at hearing thereon.

This is a fitness and ability dispute in which the Organization alleges violation of Rule 6 and Rule 7, in the failure of the Carrier to award the position of Special Machine Operator to

the Claimant. The substance of the Organization's arguments are based on the fairness of the Extra Gang Foreman's training and evaluation. The Organization argues that there was prejudice, lack of training and an inappropriate disqualification.

The Carrier argues that the Claimant did not possess the ability necessary to qualify for the position. It basis its argument on the clear details of the Claimant's failures as testified by the Extra Gang Foreman at the Unjust Treatment Hearing. The Carrier denies any Agreement violation.

The Board has studied the Rule language and probative evidence. In this instance, the Rules governing this dispute are as follows:

"Rule 6 - PROMOTION

- (a) Promotion shall be based on ability and seniority; ability being sufficient, seniority shall prevail, the Management to be the judge, subject to appeal.

Rule 7 - FAILING TO QUALIFY

An employee accepting promotion will be given a fair chance to demonstrate his ability to meet the practical requirements of the position, and failing to qualify within thirty (30) calendar days may return to his former position."

The Organization argues herein that the Claimant had the sufficient ability, but was denied the "fair chance to demonstrate his ability to meet the practical requirements of the position." Carrier on the other hand, argues that the Claimant was given a fair opportunity and could not demonstrate sufficient ability under the Agreement, "Management to be the judge."

It is not only a well established principle of numerous Board Awards, but also within the language of Rule 6 that the Carrier has the prerogative to assess ability. This Board has studied the Extra Gang Foreman's testimony, both in terms of what was necessary to qualify as a Special Machine Operator and the Claimant's alleged deficiencies. The Board has also remained cognizant that it is the Organization that must prove with sufficient evidence that the Carrier's judgement was arbitrary, capricious or in some manner defective.

An examination of this record discloses that the Claimant, along with fellow employee Reed, both began training under the Extra Gang Foreman on April 15, 1991, on the Jackson 6000. The Extra Gang Foreman testified that the Claimant made numerous mistakes while he trained him. The Claimant failed to unclamp the

machine on April 17; to watch his meters without clamping on April 18; failed to unclamp again on April 23; failed to properly line a curve on the 24th and again on the 25th. Additionally, the Claimant was "tamping with only seven out of eight motors on," on April 29, 1991. The Extra Gang Foreman also reported complaints from other foreman while the Claimant worked alone and that on May 8 and 9, it became apparent that the Claimant lacked the knowledge of adjusting the liner. On May 13, 1991, the Extra Gang Foreman disqualified the Claimant because "he really didn't understand the liner or anything on the machine after 30 days."

On the question of Rule 7, this Board does not agree with the Carrier's determination, given the full weight of the evidence. The complete testimony does not support the Carrier's conclusion that the Claimant was justly treated to a fair demonstration of his abilities. Based on the following testimony, the Board is constrained to find that the disqualification was improper.

The full testimony from the Extra Gang Foreman demonstrates that, at best, the Claimant had eleven days of actual experience with the Jackson 6000. The record does not disclose the amount of actual training on the machine due to two undisputed facts: the machine was repeatedly broken down by mechanical failures and the Claimant rotated with employee Reed. The record indicates that the Extra Gang Foreman was often occupied with non-training tasks and had left for some days with Mr. Reed to obtain the Jackson 6500. The Claimant also spent some of his time as a Laborer. While there is considerable dispute in this record on actual times and dates, there is no discrepancy large enough to suggest that the Claimant had extensive operational time on the Jackson 6000.

Additionally, even ignoring evidence that Mr. Reed received far more training than the Claimant, and other alleged conflicts between the Claimant and the Extra Gang Foreman, the testimony of Foreman-Supervisor Ean is probative. Mr. Ean testified that he was qualified to rate the Claimant. He testified that he observed, monitored and evaluated the quality of the work the Claimant performed. Mr. Ean testified that in the absence of the Extra Gang Foreman, both employees worked under his supervision. He stated that he "could have lived with [Claimant] for the summer." The Foreman-Supervisor also testified that the Claimant was a great mechanic on the machine, operated it the same as employee Reed, was improving, and when asked for a comparison rated the Claimant above Mr. Reed.

The Board has again reviewed the Extra Gang Foreman's testimony. That testimony indicates that the Claimant spent much of his time reading manuals and observing. Rule 7 refers to meeting the "practical requirements" of the position, which is the operational use and repair of the machine. The testimony does not establish with a specific detailed and comparable basis the amount of time that the Claimant was operating the machine, only that it

was much less than employee Reed. The machine Claimant used was broken down about one third of this time frame. Additionally, there is no evidence that the Claimant was given the opportunity to qualify under Rule 6. The Claimant had extensive background as an equipment operator and mechanic on his farm, the trucking firm he owned and with the military.

This Board has labored with his record in no small part due to its reluctance to interfere with the Carrier's judgement in questions of ability, as per the language of Rule 6. However, in these circumstances, the Board fails to find the supportive evidence to uphold the Carrier's disqualification. The Board concludes that the Claimant was treated unjustly. The probative evidence of record fails to support either that the Claimant lacked the ability, or that the was given "a fair chance to demonstrate his ability to meet the practical requirements of the position."

Accordingly, part one of the Claim is sustained. As for part two of the Claim, the Board has studied the parties dispute raised on the property and concurs only with the following remedy. The Claimant is to be afforded another opportunity to qualify for the position of Special Machine Operator under Rules 6 and 7 of the Agreement. The Claimant is to be compensated and made whole for lost wages that he would have earned if he had been given "fair" opportunity as per comparable employees (Third Division Award 30586). The request for interest is denied.

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 1st day of November 1995.