

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 31809
Docket No. MW-30415
96-3-92-3-157

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The disqualification of Mr. J.A. Weyland as a work equipment operator on May 4, 1990 was improper, as a result of unjust treatment and in violation of the Agreement (System File D-90-06/MW-10-90).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. A. Weyland shall "*** be returned to service as a Work Equipment Operator with all seniority and other rights unimpaired and compensated for all wage loss suffered, including overtime, commencing May 4, and continuing until such time as violation ceases in accordance with Agreement Rules 29 and 30."

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 made a bid application for the position of Operator in the Road Equipment Subdepartment. He was assigned to this position on April 10, 1990 and was given the opportunity to train on two different machines. There is no dispute that the period involved in such training was considerably less than 30 days.

Rule 9, Promotion, reads in pertinent part as follows:

"After an applicant has successfully completed the requirements prescribed in subsection (d) hereof it will be the responsibility of the supervisor in charge of the work on the seniority district to determine the ability of the applicant to perform the work to which promotion is sought.

Such determination shall be made by providing the applicant a thirty (30) day trial period in which to demonstrate his ability, unless during such thirty (30) day trial period the supervisor in charge can show by reasonable evidence that the applicant does not possess sufficient ability to qualify for the new position."

On May 4, 1990, the Supervisor of Work Equipment wrote the Claimant as follows:

"After observing your operation of Work Equipment Machinery during the past 30 day trial period, it is my opinion that you do not possess the abilities that are needed to qualify as a Work Equipment Operator. I have based my decision on my observations of your hand/eye coordination, attention span, and your general handling of the machine you have been assigned to. As a result of these observations you do not qualify."

This notification came less than 30 days after the Claimant commenced his qualification period. If this letter were shown to be factual, it might well be the basis of "reasonable evidence" that the Claimant did not possess "sufficient ability to qualify." A major difficulty is that such is not the case. First, there was no 30-day trial period, whether considered in calendar days or work days. Second, the letter refers to a "machine" rather than two "machines" to which the Claimant was assigned. Third and most significantly, the Supervisor made no personal "observations" of the Claimant's work. This was admitted in testimony before an Unfair Treatment Hearing requested by the Claimant.

Beyond this, the testimony of those Operators and supervisory personnel involved in the Claimant's training, while not enthusiastic about the Claimant's performance, provided no indication of "reasonable evidence" that a full 30-day trial period should have been curtailed.

In support of this is Third Division Award 31267 which concluded, under similar circumstances and comparable Agreement language, as follows:

"This Board has labored with [the] record in no small part due to its reluctance to interfere with the Carrier's judgment in questions of ability . . . 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 he was given 'a fair chance to demonstrate his ability to meet the practical requirements of the position.'"

Put another way, the question of qualification (absent specific language to the contrary) rests with the Carrier, short of arbitrary, capricious or discriminatory judgment. However, when the Carrier curtails an employee's 30-day entitlement to "demonstrate his ability," such becomes an affirmative defense, placing on the Carrier a heavier burden of proof. Here, there is no evidence which would support such proof.

As to remedy, the Board finds appropriate the solution provided in Third Division Award 30586, with minor modifications, as follows:

"Claimant shall be made whole for the [difference] in wages earned by the . . . employee who received the job and those wages earned by Claimant for the time that the job existed. In the event the disputed job still exists, the Carrier's liability shall run until such time as Claimant is given [a further opportunity under Rule 9] to qualify, [ceasing only if] it is fairly determined that Claimant is not qualified for the 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 26th day of December 1996.